Public Version

IN THE ARBITRATION UNDER THE UNITED STATES-MEXICO-CANADA AGREEMENT AND THE UNCITRAL ARBITRATION RULES (1976) BETWEEN

ALBERTA PETROLEUM MARKETING COMMISSION

Claimant

-and-

UNITED STATES OF AMERICA

Respondent.

ICSID CASE NO. UNCT/23/4

THE UNITED STATES OF AMERICA'S MEMORIAL ON ITS PRELIMINARY OBJECTIONS

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1. In accordance with the Tribunal's Procedural Order No. 4 of August 7, 2024, the United States hereby submits its Memorial on its Preliminary Objections to the Tribunal's jurisdiction under Annex 14-C to the United States-Mexico-Canada Agreement ("USMCA"), as well as the expert reports of Professor Richard Gardiner, Professor Hervé Ascensio, and Professor Michael Klausner.[1]

I. Introduction

2. The United States objects to the Tribunal's jurisdiction *ratione temporis* (**Part II**) and *ratione materiae* (**Part III**).

3. The Tribunal lacks jurisdiction *ratione temporis* because Claimant's claims are outside the scope of the USMCA Parties' consent to arbitration. The USMCA Parties consented in Annex 14-C to arbitrate only claims for the breach of certain NAFTA obligations. Those obligations, along with the rest of the NAFTA, terminated on July 1, 2020. Claimant's claims are based on conduct (the revocation of the Keystone XL pipeline permit) that occurred six months after the NAFTA's termination, when the United States was not bound by the NAFTA's obligations and incapable of breaching them.

4. Claimant attempts to argue that the USMCA Parties agreed, without expressly saying so, that the NAFTA's substantive investment obligations would survive for three years after the NAFTA's termination. This argument, however, is contrary to the text of Annex 14-C and the rest of the USMCA. It has been expressly refuted by each of the three USMCA Parties. It is denied by Professors Gardiner and Ascensio, two experts on treaty law who have submitted reports for this Tribunal's consideration. And it was rejected by the *TC Energy* tribunal in a

[1] In this Memorial, the United States cites Professor Gardiner's Report as "Gardiner Report ¶ X," Professor Ascensio's Report as "Ascensio Report ¶ X," and Professor Klausner's Report as "Klausner Report ¶ X."

thorough and well-reasoned award.[2] In short, Claimant's claims are outside the scope of Annex 14-C and the Tribunal's jurisdiction *ratione temporis*. They must be dismissed.

5. The Tribunal also lacks jurisdiction *ratione materiae*. Claimant has not been able to show, in any of its pleadings, that any aspect of its complex series of transactions with TC Energy qualified as an "investment" within the meaning of NAFTA Chapter 11, or that it had an investment in the United States on the date of the permit revocation.

6. When it initially entered into arrangements with TC Energy to support the construction of the Keystone XL pipeline, Claimant commenced a series of transactions that can be generally separated into three streams: the funding of a Canadian special purpose vehicle ("Canadian SPV"), the temporary funding of a U.S. special purpose vehicle ("U.S. SPV"), and a loan guarantee provided to TC Energy. Claimant clarified during briefing on bifurcation that the loan guarantee was not an "investment" for purposes of establishing this Tribunal's jurisdiction, which leaves only the Canadian SPV and the U.S. SPV transactions as potential "investments" supporting this Tribunal's jurisdiction. But to the extent they constituted "investments," the transactions related to the Canadian SPV constituted an investment in Canada, not the United States, and thus do not support jurisdiction in this case.

7. Claimant's equity stake in the U.S. SPV was temporary and only ever intended as bridge financing; Claimant sold its equity stake in and withdrew its funding from the U.S. SPV weeks before the permit revocation, after TC Energy obtained funding from a third source. The money obtained in the sale was promptly repatriated to Claimant in Canada. Claimant's only remaining connection to the United States was its ownership of certain companies that had been used to

[2] *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB/21/63, Award (July 12, 2024) (RL-0060) ("*TC Energy* Award").

facilitate its terminated equity in the U.S. SPV. Claimant had no independent financial interest in the ownership of these companies.

8. In short, whether or not Claimant at some point had an investment in the United States, on the date of the revocation, there was no qualifying investment. Claimant cannot rely on the complexity of its various transactions to avoid the consequence of its withdrawal from the U.S. SPV prior to the events in question. Thus, even if the Tribunal were to find that there is jurisdiction *ratione temporis*, there is in any event no jurisdiction *ratione materiae*, and this case must be dismissed.

II. Claimant Has Failed to Establish the Tribunal's Jurisdiction *Ratione Temporis*

9. Paragraph 1 of Annex 14-C limits the USMCA Parties' consent to arbitration to claims "alleging breach of an obligation" under, as relevant for this case, Section A of NAFTA Chapter 11.[3] As reflected in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[4] Accordingly, in order to establish that its claims based on the January 2021 revocation of the permit for the Keystone XL project can be submitted to arbitration under Paragraph 1 of Annex 14-C, Claimant must show that the obligations set forth in Section A of NAFTA Chapter 11 remained binding on the United States – and could, therefore, be breached – when that act occurred. If not, Claimant's claims are outside the scope of the consent provided in Annex 14-C.

[3] Paragraph 1 places other conditions on the Parties' consent, which will be discussed in more detail below. *See infra* ¶¶ 21-31.

[4] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001) ("ILC, Articles on Responsibility of States for Internationally Wrongful Acts") (RL-0019). *See also* Ascensio Report ¶ 30 ("A breach must relate to a legal rule in force; if not, there would be no obligation and, consequently, no breach.").

A State's consent to arbitration is paramount for the jurisdiction of an arbitral tribunal hearing a dispute against that State,[5] and such consent must be both "certain" and "unequivocal."[6]

10. The NAFTA terminated as of the USMCA's entry into force on July 1, 2020.[7] Pursuant to customary international law principles reflected in VCLT Article 70, the NAFTA's termination

[5] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 ¶ 125 (1st ed. 2009) ("DOUGLAS") (RL-0038 *bis*) ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); *AsiaPhos Ltd. & Norwest Chemicals Pte Ltd. v. People's Republic of China*, ICSID Case No. ADM/21/1, Award ¶ 59 (Feb. 16, 2023) (RL-0061) ("[T]he jurisdiction of any arbitral tribunal should be based on the clear and unambiguous consent of both parties to have their dispute resolved by arbitration. This applies, in particular, in investment disputes where one of the parties is a sovereign State, which generally enjoys jurisdictional immunity from being sued in any kind of proceedings outside of its own State courts. Only where a State has waived its jurisdictional immunity by expressing its consent to have a dispute resolved by international arbitration in a clear and unambiguous manner does an arbitral tribunal have jurisdiction to decide on that dispute.") (internal citations omitted); *Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) (RL-0062) ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru."). *See also* Christoph Schreuer, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 (Peter Muchlinski et al., eds., 2008) ("Schreuer, *Consent to Arbitration*") (RL-0063) (explaining that "[l]ike any form of arbitration, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); BORZU SABAHI ET AL., INVESTOR-STATE ARBITRATION 309 ¶ 9.01 (2d ed. 2019) (RL-0042) (explaining that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

[6] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 I.C.J. 177 ¶ 62 (Jun. 4, 2008) (RL-0065) ("The consent allowing for the Court to assume jurisdiction must be certain . . . . [W]hatever the basis of consent, the attitude of the respondent State must be capable of being regarded as an unequivocal indication of the desire of that State to accept the Court's jurisdiction in a voluntary and indisputable manner.") (quotation and citations omitted). *See also ICS Inspection & Control Services Ltd. (United Kingdom) v. Republic of Argentina*, PCA Case No. 2010-09, Award on Jurisdiction ¶ 280 (Feb. 10, 2012) (RL-0066) ("[A] State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. *The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent.* Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.") (emphasis added); *Mobil Corp. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction ¶¶ 139-40 (June 10, 2010) (RL-0067) ("If it had been the intention of Venezuela to give its advance consent to ICSID arbitration in general, it would have been easy for the drafters of Article 22 to express that intention clearly by using any of those well known formulas [stating either that it gave 'its unconditional consent to the submission of disputes' to ICSID arbitration or that its disputes with foreign investors 'shall at the request of the nationals concerned be submitted to ICSID']. The Tribunal thus arrives to the conclusion that such intention is not established. As a consequence, it cannot conclude from the ambiguous text of Article 22 that Venezuela, in adopting the 1999 Investment Law, consented in advance to ICSID arbitration for all disputes covered by the ICSID Convention.").

[7] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada; and Preamble ¶ 1 (R-0001 *bis*) ("Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, *shall supersede the NAFTA*, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.") (emphasis added). *See also* Annex 14-C ¶ 3 (R-0002 *bis*) ("A Party's consent under paragraph 1 shall expire three years after *the termination of NAFTA*

"release[d] the parties from any obligation further to perform the treaty," unless the Parties, in the NAFTA or the USMCA, agreed to extend the application of those obligations.[8] The NAFTA, however, does not contain a clause providing for the survival of its obligations after the treaty's termination (*i.e.*, a survival or sunset clause). As for the USMCA, it imposes new substantive investment obligations in Chapter 14, but it does not include any provision requiring that the USMCA Parties continue, at the same time, to abide by the legacy NAFTA regime covering the same subject matter.

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

12. In the sections that follow, the United States shows that **(A)** Annex 14-C, interpreted in accordance with the customary international principles of treaty interpretation reflected in VCLT Article 31, does not permit Claimant's claims and **(B)** while it is unnecessary for the Tribunal to have recourse to supplementary means of interpretation under VCLT Article 32 in this case, they confirm this interpretation of Annex 14-C.

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

13. VCLT Article 31(1) reflects the customary international law rule that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

1994.") (emphasis added); *id.* ¶ 5 ("For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by *the termination of NAFTA 1994*, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.") (emphasis added); *id.* ¶ 6(a) ("'legacy investment' means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of *termination of NAFTA 1994*, and in existence on the date of entry into force of this Agreement") (emphasis added).

[8] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 70(1)(a) ("VCLT") (RL-0017).

treaty in their context and in the light of its object and purpose."[9] As the International Law Commission explained in its commentary on the draft text of the Vienna Convention, Article 31 "is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[10]

14. As established in the three sections that follow, a good faith interpretation of Annex 14-C's terms **(1)** in accordance with their ordinary meaning, **(2)** in context, and **(3)** in light of the USMCA's object and purpose confirms that Annex 14-C provides only the USMCA Parties' consent to the continued submission of claims based on events occurring while relevant NAFTA obligations were in force and could be breached. Annex 14-C does not, however, extend *the obligations themselves* past the NAFTA's termination.[11]

15. All three USMCA Parties agree on this point, as discussed below,[12] as do the two international law scholars who have submitted reports on the Tribunal's jurisdiction *ratione temporis*. Professor Gardiner confirms in his report that "the consent in Annex 14-C is consent

[9] *Id.*, art. 31(1) (RL-0017).
[10] International Law Commission, Draft Articles on the Law of Treaties With Commentaries, [1966] 2 Y.B. INT'L L. COMM. 187, 220 (commentary ¶ 11), U.N. Doc. A/CN.4/SER.A/1966/Add.l (RL-0068); *id.* 223 (commentary ¶ 18) (RL-0068). *See also* Gardiner Report ¶ A.8 ("The rules of the Vienna Convention on the Law of Treaties 1969 . . . apply to the interpretation of the USMCA. These rules have been accepted internationally as stating the customary international law rules for interpretation of treaties. Under these rules the starting point is the text.") (citations omitted); *TC Energy* Award ¶ 143 (RL-0060) ("The starting point of the analysis should therefore, in accordance with Article 31(1), be to determine the ordinary meaning of the terms in their context.").
[11] *TC Energy* Award ¶ 146 (RL-0060) ("[T]he USMCA parties could have agreed to make an exception to [the] general rule [under VCLT Article 70(1)] by extending the offer to arbitrate, by extending the substantive provisions of NAFTA, or both. The ordinary terms of Annex 14-C indicate that they agreed to extend the offer to arbitrate. They did however not agree to also extend Section A."); ¶ 151 ("Annex 14-C therefore establishes an exception to the expiry of Chapter 11. Because the scope of Annex 14-C is procedural (the offer to arbitrate), that exception has to be understood as an exception to the expiry of the offer to arbitrate. On the face of the text of Annex 14-C, it cannot be also understood as an exception to the termination of Section A (hence a provision operating as a sunset clause based on which Section A would have been extended for three years)."); ¶ 152 ("Annex 14-C is therefore only an exception to the expiration of NAFTA in respect to the offer to arbitrate. It is not an exception to the termination of Section A.").
[12] *See infra* Section II.A(2)(e).

only to submission to arbitration of claims alleging breach of obligations relating to acts and events taking place before the NAFTA, as the source of those obligations, was superseded on 1 July 2020."[13] Professor Ascensio is in accord: "Annex 14-C does not apply to claims alleging breaches of NAFTA occurring after its termination[.]"[14]

16. Finally, the *TC Energy* tribunal likewise concluded:

> [T]he ordinary meaning of Annex 14-C is that consent to arbitrate was established until 30 June 2023 for facts capable of constituting a breach of NAFTA while NAFTA was in force. This interpretation does not amount to adding language to Annex 14-C; it is rather the result of an interpretive exercise of the Annex.[15]

1) The Ordinary Meaning of Annex 14-C Is Clear and Consistent With the U.S. Position

17. As discussed in detail below, the ordinary meaning of Annex 14-C's terms establishes that Paragraph 1 is exclusively concerned with the USMCA Parties' consent to arbitration, not binding the USMCA Parties to the continued performance of the NAFTA Chapter 11 obligations.

a. Paragraph 1 of Annex 14-C Provides Consent to Arbitrate Breach of the NAFTA's Obligations But Does Not Extend Those Obligations

18. Paragraph 1 of Annex 14-C provides:

> **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:
>
> **(a)** Section A of Chapter 11 (Investment) of NAFTA 1994;

[13] Gardiner Report ¶ G.2.
[14] Ascensio Report ¶ 8. *See also id.* ¶ 35 ("Annex 14-C of USMCA, which contains the State's consent to arbitration, relates to violations of NAFTA that occurred when this treaty was in force. It does not cover an alleged breach of the NAFTA due to events that took place after it terminated, *i.e.*, after 1st July 2020, as in the present case.").
[15] *TC Energy* Award ¶ 177 (RL-0060).

> **(b)** Article 1503(2) (State Enterprises) of NAFTA 1994; and
>
> **(c)** Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.[16]

19. The operative core of the provision is the phrase "[e]ach Party consents . . . to the submission of a claim to arbitration."[17] The remainder of the paragraph imposes three conditions on the USMCA Parties' consent to arbitration: (i) the claim must allege a breach of one of the specified NAFTA obligations; (ii) the claim must be submitted to arbitration in accordance with Section B of NAFTA Chapter 11; and (iii) the claim must relate to a "legacy investment".

20. The United States discusses the conditions on the USMCA Parties' consent in more detail below, but the critical point for the Tribunal's analysis is already made: the sole subject of Paragraph 1 is the USMCA Parties' consent to arbitration and the scope of that consent. Nothing in Paragraph 1 purports to reverse the effects of the NAFTA's termination by keeping the Chapter 11 obligations in force. Had the USMCA Parties wanted to accomplish this, all three had model language that they could have adapted for use in Annex 14-C, specifying, for example, that the obligations shall "continue to apply" or "remain in force" with respect to covered investments.[18] The absence of any such language is dispositive.

i. The Claim Must Allege a Breach of One of the Specified NAFTA Obligations

21. As already discussed, Paragraph 1 limits the scope of the USMCA Parties' consent to claims for breach of the obligations included in NAFTA Chapter 11, Section A, and two articles of NAFTA Chapter 15. An obligation can only be breached if it is binding at the time of the act

[16] Annex 14-C ¶ 1 (footnotes omitted) (R-0002 *bis*).
[17] *Id*.
[18] *See infra* Section II.B(2).

constituting the alleged breach.[19] An act occurring before the obligation became binding or after it ceased to be binding cannot constitute a breach of the obligation. Thus, this limitation necessarily excludes claims based on acts occurring when the USMCA Parties were not bound by the specified NAFTA obligations, whether before the NAFTA entered into force or after the NAFTA's termination.

22. The temporal effect of limiting the scope of consent to breaches of specific treaty obligations was well understood by the United States, Canada, and Mexico long before they began negotiating the USMCA. They had imposed the same limit in the USMCA's predecessor agreement, the NAFTA, and had, in interpreting that limit on their consent in the NAFTA context, all agreed that it functioned to bar claims based on events occurring while the NAFTA was not in force.[20] The tribunal in *Feldman v. United Mexican States* reached the same conclusion more than 20 years ago, explaining: "Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope

[19] *See, e.g.*, ILC, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13 (RL-0019).

[20] For Canada: *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Submission of the Government of Canada ¶ 18 (Oct. 6, 2000) (RL-0046) ("[I]nvestors are limited as to the claims they may bring. They may bring only claims arising from a breach of NAFTA. . . . A measure may only potentially violate NAFTA if the measure is effective or continues to be effective on or after the NAFTA entered into force, January 1, 1994."). For Mexico: *Bayview Irrigation District v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Mexico's Memorial on Jurisdiction ¶ 120 n.90 (Apr. 19, 2006) (RL-0047) ("[A]lleged acts or omissions of Mexico that occurred before the entry into force of the NAFTA on 1 January 1994 are beyond the Tribunal's jurisdiction *ratione temporis*."); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Mexico's Counter-Memorial on Preliminary Questions ¶ 232 (Sept. 8, 2000) (RL-0048) ("It is open to an investor of another Party to claim compensation (subject to compliance with Section B, including the applicable limitation period) for breaches of Section A occurring after NAFTA's entry into force, whether they are entirely 'new' measures or continuing measures that became breaches of Section A when NAFTA entered into force. However, Chapter Eleven does not entitle an investor of another Party to claim compensation 'for loss or damage by reason of, or arising out of' an obligation under Section A before such obligations came into existence.") (emphasis in original). For the United States: *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, U.S. Rejoinder on Competence and Liability at 5 (Oct. 1, 2001) (RL-0049) ("[I]t is now undisputed that this Tribunal is competent to hear only claims for alleged breaches of Chapter Eleven based on acts or omissions of the United States that occurred after NAFTA's entry into force."); *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, U.S. Counter-Memorial on Competence and Liability at 21 (June 1, 2001) (RL-0050) ("[A]s the *Feldman* tribunal correctly found, because no Party was bound by an obligation under the NAFTA prior to January 1, 1994, acts or omissions that took place prior to that date cannot constitute breaches of the NAFTA.").

of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis*."[21] Scholars have also long been in accord on this point.[22]

23. In its bifurcation briefing, Claimant urged the Tribunal to ignore this longstanding consensus because it was developed in the context of claims "alleging breach of obligation for conduct before [the NAFTA] came into force"[23] rather than after the NAFTA terminated. Claimant's argument misses the point. Whether claims are based on events occurring before the NAFTA entered into force or after it terminated, the jurisdictional flaw is the same: the NAFTA's obligations were not binding on the Parties at the relevant time and, accordingly, a claimant cannot allege a breach of those obligations. The *TC Energy* tribunal concurred: "the situation in this case is not conceptually different than that which led the *Feldman* tribunal to decline jurisdiction: for the same reasons why a treaty-based tribunal has no jurisdiction on breaches pre-dating the treaty, it equally lacks jurisdiction on breaches post-dating its termination."[24]

[21] *Marvin Roy Feldman Karpa v. United Mexican States,* NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000) (RL-0020).
[22] *See, e.g.*, Meg Kinnear et al., *Article 1116 – Claim by an Investor of a Party on its Own Behalf*, *in* INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 1116-28 (2006) (RL-0021) ("In *Feldman v. Mexico*, the tribunal made clear that the 'scope of application of NAFTA in terms of time' defined the jurisdiction of the tribunal *ratione temporis*. It held that no obligations adopted under NAFTA existed before January 1, 1994, and thus its jurisdiction did not extend before that date.") (internal citations omitted); BORZU SABAHI ET AL., INVESTOR-STATE ARBITRATION 423 ¶ 12.28 (2d ed. 2019) (RL-0064) ("Where the BIT dispute resolution provision limits the scope of admissible claims to violations of the treaty's substantive provisions, there is no practical difference between temporal jurisdiction and the temporal application of substantive treaty provisions."); CHRISTOPH H. SCHREUER, ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 - Jurisdiction* ¶ 510 (2d ed. 2009) (RL-0069) ("A clause in a treaty or in legislation providing for consent may be broad and refer to investment disputes in general terms. Or it may be restricted to disputes concerning alleged violations of the document containing the consent. If consent to arbitration contained in a treaty is limited to violations of that treaty, the date of the treaty's entry into force is also necessarily the date from which acts and events are covered by consent to jurisdiction. For instance, under the NAFTA and under the ECT the scope of the consent to arbitration is limited to claims arising from alleged breaches of the respective treaties. In that case the entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law.") (internal citations omitted).
[23] Claimant's Observations on the Request for Bifurcation ¶ 27.
[24] *TC Energy* Award ¶ 207 (RL-0060).

ii. The Claim Must Be Submitted to Arbitration in Accordance with Section B of NAFTA Chapter 11 and Annex 14-C

24. Paragraph 1 also requires that claims be submitted to arbitration "in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex." NAFTA Chapter 11 was divided into two sections: Section A imposed obligations on each Party with respect to their treatment of covered investors and investments, while Section B established an investor-State dispute resolution mechanism for claims alleging a breach of the Section A obligations.[25] Section B imposed limits on the scope of claims that could be submitted for resolution as well as pre-requisites to be satisfied by investors seeking to assert claims. For example, NAFTA Articles 1116(1) and 1117(1) permitted claims only for breach of the obligations under Section A of NAFTA Chapter 11 and two provisions of NAFTA Chapter 15 (the same set of NAFTA obligations specified in Paragraph 1(a)-(c) of Annex 14-C), while NAFTA Articles 1116(2) and 1117(2) imposed a three-year limitations period.[26] The pre-requisites imposed by Section B included (1) that an investor deliver to the respondent "written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted"[27] and (2) that an investor "consent[] to arbitration in accordance with the procedures set out in this Agreement" and provide certain waivers.[28]

25. A claim submitted "in accordance with" Section B of NAFTA Chapter 11 is one that complies with its limits and satisfies its pre-requisites. Claims that fail on either count have not

[25] The first article of NAFTA Chapter 11, Section B, provided in relevant part: "this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal." NAFTA, art. 1115 (R-0004 *bis*).
[26] NAFTA, art. 1116(1), (2) (R-0004 *bis*). NAFTA Article 1117 imposes equivalent requirements in the context of claims asserted by "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly . . . ." NAFTA, art. 1117(1), (2) (R-0004 *bis*).
[27] NAFTA, art. 1119 (R-0004 *bis*).
[28] NAFTA, art. 1121 (R-0004 *bis*).

been submitted "in accordance with" Section B of NAFTA Chapter 11 and, accordingly, are outside the scope of the consent provided in Paragraph 1 of Annex 14-C.

26. Here, Claimant's claims are incompatible with NAFTA Articles 1116(1) and 1117(1) for the same reason that they are outside the scope of Paragraph 1: they do not and cannot allege a breach of the NAFTA Chapter 11 obligations because these obligations were not in force when the sole event giving rise to Claimant's claims occurred. Claimant's inability to satisfy the requirements of NAFTA Articles 1116(1) and 1117(1) is a further reason that Claimant's claims must be dismissed for lack of jurisdiction.

iii. The Claim Must Be with Respect to a "Legacy Investment"

27. Finally, the USMCA Parties' consent to arbitrate under Paragraph 1 is limited to claims with respect to a "legacy investment." The term "legacy investment" is defined in Paragraph 6 of Annex 14-C as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement."[29] This definition limits the USMCA Parties' consent to arbitration in two ways: (1) the investment underlying an Annex 14-C claim must have been established or acquired during the period when the NAFTA was in force and, (2) the investment must still have been in existence on the date the USMCA entered into force. It therefore excludes from the USMCA Parties' consent both investments that pre-date the NAFTA and investments that, despite having been established or acquired while the NAFTA was in force, were no longer in existence on the date the USMCA replaced the NAFTA.

[29] Annex 14-C ¶ 6(a) (R-0002 *bis*).

28. The "legacy investment" definition has limited relevance to the interpretive dispute before the Tribunal.[30] The definition references the "termination of NAFTA 1994" but does not address the status of the NAFTA Chapter 11 obligations thereafter. Despite the little it has to say about the temporal scope of the NAFTA's obligations, Claimant contended in its bifurcation briefs that the definition nevertheless supports its interpretation of Annex 14-C. Claimant's convoluted argument focuses on the definition's requirement that a "legacy investment" be "in existence on the date of entry into force of this Agreement."[31] According to Claimant, this requirement would effectively bar any claim based on the expropriation of an investment occurring before the USMCA's entry into force because such an investment would, in Claimant's view, no longer be "in existence" following the expropriation.[32] If Annex 14-C allowed only claims based on conduct predating the USMCA, Claimant continues, it would cover "a likely almost non-existent set" because "investment treaty claims overwhelmingly allege expropriation."[33] Thus, Claimant concludes, the "legacy investment" definition "militates in favour of an understanding that Annex 14-C was intended to protect and indeed continue to encourage investment during a transitionary period by maintaining NAFTA's Chapter 11 protections."[34]

29. Claimant's argument is a flawed distraction. *First*, there is nothing inherently implausible about concluding that Annex 14-C encompasses only a limited set of claims. In the absence of a survival clause in the NAFTA, the default outcome for investors was that they would lose the ability to bring *any* claims under the NAFTA following its termination, even if they were based

[30] *See infra* ¶ 40 (discussing the relevance of the definition's reference to the "termination of NAFTA 1994").
[31] Annex 14-C ¶ 6(a) (R-0002 *bis*).
[32] Claimant's Rejoinder on the Request for Bifurcation ¶ 18; Claimant's Observations on the Request for Bifurcation ¶¶ 34-35.
[33] Claimant's Observations on the Request for Bifurcation ¶ 35.
[34] *Id.* ¶ 34.

on pre-termination conduct.[35] The USMCA Parties decided to permit the holders of "legacy investments" three additional years to bring certain claims that they would otherwise have lost upon the NAFTA's termination, and in doing so the USMCA Parties were free to limit their consent however they chose. The fact that these limits exclude certain investors from asserting claims is a product of choices that the USMCA Parties made in drafting Annex 14-C. Claimant's apparent belief that the Annex's scope should have been broader cannot support any departure from the ordinary meaning of its terms.

30. *Second*, Claimant's alternative suggestion that Annex 14-C must have been intended to "protect" and "encourage" investment after the NAFTA's termination by "maintaining NAFTA's Chapter 11 protections"[36] cannot be reconciled with the fact that the NAFTA/USMCA Parties negotiated the USMCA to *replace* the NAFTA.[37] As discussed more fully below, the USMCA provided a new investment regime in Chapter 14.[38] Protecting and encouraging investment after the NAFTA terminated and the USMCA entered into force was the role of the new USMCA Chapter 14, not the terminated NAFTA Chapter 11.

31. *Third*, Claimant is wrong about the impact of the "legacy investment" definition as it relates to expropriation claims. Far from rendering the claims covered by Annex 14-C an "almost non-existent set," in fact many otherwise qualifying claims would meet the definition of "legacy investment" despite its requirement that the investment be in existence at the time of USMCA's

[35] *TC Energy* Award ¶ 146 (RL-0060) ("[A]bsent any transitory provision, the termination of NAFTA would have had the consequence not only that its substantive provisions would no longer be applicable past 30 June 2020, but also that investors would no longer be able to accept the offer to arbitrate contained in Section B, irrespective of the date of the alleged breach.").
[36] Claimant's Observations on the Request for Bifurcation ¶ 34.
[37] *See, e.g.*, USMCA, Preamble (R-0001 *bis*) (stating that the USMCA Parties had resolved to "REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region").
[38] *See infra* Section II.A(2)(a), (3).

entry into force. This is because, contrary to Claimant's argument, the vast majority of expropriation claims asserted are for *indirect* expropriation (over 75% of expropriation claims across all ISDS proceedings and nearly 95% of such claims in NAFTA proceedings).[39] Claimant's argument relies on equating the expropriation of an investment with its complete destruction, such that the investment is no longer "in existence," but Claimant has failed to provide any more than rhetorical support for this assumption in the context of *indirect* expropriation claims. The definition of "legacy investment" therefore does not help Claimant.

iv. The Footnotes to Paragraph 1 Clarify Its Scope and Application

32. The footnotes to Paragraph 1, footnotes 20 and 21, provide further confirmation of the U.S. interpretation.

33. Footnote 20 clarifies, "[f]or greater certainty," that the "relevant provisions" of various NAFTA chapters "apply with respect to . . . a claim" asserted under Paragraph 1. This clarification is entirely consistent with the U.S. interpretation of Paragraph 1 because it confirms that the sole class of claims that may be asserted under Paragraph 1 – *i.e.*, claims based on events occurring while the NAFTA was in force – will be governed by, and decided in accordance with, the relevant NAFTA provisions. Thus, footnote 20 is merely a restatement of the general principle of intertemporal law, which provides that "[a] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[40]

[39] U.S. Reply to Claimant's Observations on the Request for Bifurcation ¶ 26.
[40] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries, art. 13, [2001] 2 Y.B. INT'L L. COMM. 31, 57 (commentary ¶ 1), U.N. Doc. A/56/10 (2001) (RL-0057) (internal citations omitted).

34. As Claimants would have it, footnote 20 does not confirm this important principle but instead subverts it by making the NAFTA applicable to events that – due to its termination – it would not otherwise have governed (and that would instead be governed solely by the USMCA's new investment regime).[41] However, this reading of footnote 20 is incompatible with the ordinary meaning of its terms. *First*, the footnote is introduced by the words "for greater certainty," indicating that it is merely confirmatory[42] and does not signal either (i) a departure from an otherwise applicable principle of international law[43] or (ii) the creation of a new rule or obligation not otherwise provided in Paragraph 1.[44] *Second*, the footnote states that the relevant NAFTA provisions apply "with respect to . . . a *claim*" asserted under Paragraph 1, not with respect to legacy investments. In other words, footnote 20's "for greater certainty" clarification is only

[41] In addition to making two overlapping investment regimes (NAFTA Chapter 11, Section A, and USMCA Chapter 14) applicable to legacy investments, footnote 20 – if interpreted as Claimant proposes – would cause overlap in a variety of other substantive areas. For example, footnote 20 also references NAFTA Chapters 14 (Financial Services), 15 (Competition Policy, Monopolies and State Enterprises), and 17 (Intellectual Property), which deal with subjects addressed in USMCA Chapters 17 (Financial Services), 20 (Intellectual Property), 21 (Competition Policy), and 22 (State-Owned Enterprises). Subjecting themselves to overlapping obligations across such a wide range of subject matters would be a recipe for confusion and conflict, which would be entirely at odds with the USMCA Parties' stated object and purpose in entering the USMCA. *See infra* Section II.A(3). *See also TC Energy* Award ¶ 165 (RL-0060) (observing, in discussing the claimants' interpretation of footnote 20, "the resulting situation would be that the USMCA parties would be bound until 30 June 2023 by different – and potentially conflicting – sets of substantive norms on matters as sensitive as competition, intellectual property or financial services. There is no indication that such was the parties' intention.").

[42] *See, e.g.*, *Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, Enrique Carrizosa Gelzis v. Republic of Colombia*, PCA Case No. 2018-56, Hearing Transcript 217-18 (Dec. 15, 2020) (RL-0070) ("In U.S. practice, the phrase 'for greater certainty' signals that the sentence it introduces reflects the understanding of the United States and the other agreement party or parties of what the provisions of the Agreement would mean even if that sentence were absent."); *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Hearing Transcript 431-32 (Nov. 13, 2020) (RL-0071) (same); *Omega Engineering LLC & Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States of America 9 n.24 (Feb. 3, 2020) (RL-0072) (same).

[43] *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, 1989 I.C.J. 15, 42 ¶ 50 (July 20) (RL-0073) ("Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so."); *Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 160 (June 26, 2003) (RL-0074); *see also id.* ¶ 162 (RL-0074) ("It would be strange indeed if sub silentio the international rule were to be swept away.").

[44] *TC Energy* Award ¶ 162 (RL-0060) ("The Respondent has submitted in this respect that in the U.S. treaty practice, the terms '*for greater certainty*' have a confirmatory value and are used to confirm the state of the law. The Arbitral Tribunal agrees. The ordinary meaning of these terms is to confirm the existence of a given rule. These terms therefore indicate that the provision in which they are included does not introduce new obligations; therefore, footnote 20 cannot be construed as an agreement to extend Section A.").

relevant where an investor has asserted a qualifying claim under Paragraph 1; it does not apply to any investors or investments outside a qualifying claim and does not provide a separate basis for a claim. This further supports the conclusion that the USMCA Parties were not intending to change the law applicable in their treatment of investors and investments after the NAFTA terminated and the USMCA entered into force.

35. Turning to footnote 21, this provision creates an exception to the consent to arbitrate in Paragraph 1 of Annex 14-C for a certain class of investors. Specifically, footnote 21 funnels investors who are eligible to use Annex 14-E into the USMCA's new dispute settlement regime, consistent with the USMCA's object and purpose:[45]

> 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).[46]

36. While this footnote has no direct application to this case because Claimant, as a Canadian company, is not "eligible to submit claims to arbitration under paragraph 2 of Annex 14-E,"[47] its text confirms that Paragraph 1 deals with the consent of the USMCA Parties to arbitration, nothing more. If Paragraph 1 extended the substantive investment obligations in NAFTA Chapter 11 past termination, a carveout from that paragraph would be expected to exclude the subject investors and their investments not just from the "consent under paragraph 1" but also from the continued protection of NAFTA Chapter 11. Yet footnote 21's exclusive focus is on the "consent" provided

[45] *See infra* Section II.A(3).
[46] Annex 14-C ¶ 1 n.21 (R-0002 *bis*).
[47] Annex 14-E, which is titled "Mexico-United States Investment Disputes Related to Covered Government Contracts," is not available to Canadian investors. The same is true for Annex 14-D, titled Mexico-United States Investment Disputes. *See, e.g.*, Article 14.D.1 (R-0002 *bis*) (in definitions applicable to both Annexes 14-D and 14-E, defining "Annex Party" to mean "Mexico or the United States" and "claimant" to mean "an investor of an Annex Party that is a party to a qualifying investment dispute . . .").

by the USMCA Parties under Paragraph 1. There is no reference to an agreement by these Parties to extend the application of the NAFTA's substantive investment obligations, nor any attempt to carve investors out from that purported commitment.

37. Claimant's Memorial nevertheless argues that because Annex 14-E is "forward-looking" (in that it permits only claims for breach of the USMCA Chapter 14 obligations), footnote 21 would "make no sense unless it was referencing the forward-looking nature of Annex 14-C."[48] There is nothing about footnote 21, however, that mandates a "forward-looking" reading of Annex 14-C. Consider, for example, an investor claiming that one of the USMCA Parties engaged in wrongful conduct beginning prior to the NAFTA's termination and continuing after the USMCA entered into force. Pursuant to footnote 21, such an investor would not be permitted to submit a claim for breach of the NAFTA under Annex 14-C if that investor would also be eligible to submit a claim for breach of the USMCA under Annex 14-E. Again, footnote 21 ensures that investors who have access to the new Annex 14-E dispute settlement mechanism cannot rely on the legacy mechanism in Annex 14-C. In addition, as the *TC Energy* tribunal reasoned, footnote 21 avoids "the risk of parallel arbitrations" that might otherwise arise "in case of continuous or composite breaches."[49] Accordingly, Claimant's attempt to turn footnote 21 in its favor fails.

b. The Remainder of Annex 14-C Confirms That Paragraph 1 Is Exclusively Concerned with Consent

38. The remainder of Annex 14-C (which is reproduced below) confirms the interpretation that derives from the plain text of Paragraph 1, namely that it deals solely with the USMCA Parties' consent to arbitration:

[48] Claimant's Memorial ¶ 232.
[49] *TC Energy* Award ¶ 167 (RL-0060).

2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

(b) Article II of the New York Convention for an "agreement in writing"; and

(c) Article I of the Inter-American Convention for an "agreement".

3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.

4. For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 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 expiration of consent referenced in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

5. For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

6. For the purposes of this Annex:

(a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;

(b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994; and

> **(c)** "ICSID Convention", "ICSID Additional Facility Rules", "New York Convention", and "Inter-American Convention" have the meanings accorded in Article 14.D.1 (Definitions).

39. *First*, several Annex 14-C provisions expressly refer to the "consent" to arbitration under Paragraph 1, confirming that this (and only this) is what Paragraph 1 provides:

- **Paragraph 2** states that "*[t]he consent under paragraph 1* and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy"[50] certain pre-requisites of the ICSID Convention, the New York Convention and the Inter-American Convention, where applicable. For example, in cases under the ICSID Convention, this combination of consents satisfies the requirement in Article 25(1) that the parties to the dispute "consent in writing" to its submission to arbitration.[51]

- **Paragraph 3** provides that "[a] Party's *consent under paragraph 1* shall expire three years after the termination of NAFTA 1994."[52] The language of Paragraph 3 is telling. Had Paragraph 1 memorialized an agreement between the USMCA Parties to extend the application of the NAFTA's substantive investment obligations, not only would that have been evident from the text of Paragraph 1 but one would also expect Paragraph 3 expressly to relieve the Parties from any commitment to continue performing the NAFTA's obligations after three years. Otherwise, the NAFTA Chapter 11 obligations would remain binding on the USMCA Parties indefinitely, despite the entry into force of the USMCA's investment chapter. Yet, Paragraph 3

[50] Annex 14-C ¶ 2 (R-0002 *bis*) (emphasis added).
[51] ICSID Convention, art. 25 (R-0012).
[52] Annex 14-C ¶ 3 (R-0002 *bis*) (emphasis added).

says nothing about the NAFTA Chapter 11 obligations. Instead, Paragraph 3 ends only the USMCA Parties' *consent* to arbitrate legacy investment claims. This is further confirmation that such consent is Paragraph 1's sole object.

- **Paragraph 4** is also consistent with this conclusion. Paragraph 4 provides that, "[f]or greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion," and that "the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of *consent* referenced in paragraph 3."[53] Again, the focus is on the USMCA Parties' consent: such consent is given in Paragraph 1 and expires pursuant to Paragraph 3. The NAFTA's substantive investment obligations are not mentioned.

40. *Second*, several provisions of Annex 14-C acknowledge the NAFTA's termination, making even more striking the absence of any agreement to keep the NAFTA Chapter 11 obligations in force despite the agreement's termination:

- As noted above, **Paragraph 3** specifies the expiration date of the consent under Paragraph 1 as "three years after *the termination of NAFTA 1994*."[54]

- **Paragraph 5** refers to the NAFTA's termination in two separate ways: (1) the provision defines its scope of application as "arbitration[s] initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 *while NAFTA 1994 is in force*" and (2) specifies that such arbitrations may proceed to their conclusion, unaffected by "*the termination of NAFTA 1994*."[55] These two

[53] *Id.* ¶ 4 (emphasis added).
[54] *Id.* ¶ 3 (emphasis added).
[55] *Id.* ¶ 5 (emphasis added).

references assume a clear distinction between the period during which the NAFTA is in force and the period after the NAFTA's termination. There is no acknowledgement of the purported transitional period on which Claimant's jurisdictional case hangs, during which the NAFTA Chapter 11 obligations would survive, despite the NAFTA's termination.

- Finally, as already discussed, **Paragraph 6** states that a "legacy investment" must have been "established or acquired between January 1, 1994, and the date of *termination of NAFTA 1994*."[56]

The provisions referencing termination in Annex 14-C underscore that the USMCA Parties were aware of the NAFTA's termination and its relation to the consent to arbitration provided in Annex 14-C. Accordingly, if it was indeed their intention that the substantive obligations in NAFTA Chapter 11, Section A, would survive past the NAFTA's termination, they would have drafted clearly to achieve this goal. Again, they did not do so: there is no language in Annex 14-C or elsewhere providing for the post-termination survival of the NAFTA Chapter 11 obligations.

41. The provisions of Annex 14-C are therefore aligned to establish that the USMCA Parties did not agree to continue performing the NAFTA Chapter 11 obligations for any period after the NAFTA's termination. Instead, they agreed only that investors could submit claims for breach of these obligations, which necessarily limited claims to those based on conduct occurring while the NAFTA was in force.

[56] *Id.* ¶ 6 (emphasis added).

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

42. Annex 14-C must be interpreted in its "context" in accordance with VCLT Article 31(1). The context of Annex 14-C further confirms that it cannot be read as an agreement to extend the application of the NAFTA's substantive investment obligations. The following contextual elements of Annex 14-C support this interpretation of Paragraph 1: **(a)** the Preamble to the USMCA ("Preamble") and the USMCA Protocol; **(b)** the placement of Annex 14-C within the USMCA; **(c)** USMCA Article 14.2(3); and **(d)** USMCA Article 34.1.

43. VCLT Article 31(3) further provides that "[t]here shall be taken into account, together with the context":

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.[57]

44. As discussed in sections **(e)** and **(f)**, respectively, both the USMCA Parties' common understanding regarding the meaning of Annex 14-C and relevant rules of international law provide further support for the U.S. position.

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

45. The Preamble and the USMCA Protocol provide two points of supportive context for the interpretation of Annex 14-C. Both the Preamble and the USMCA Protocol make clear, *first*, that

[57] VCLT, art. 31(3) (RL-0017).

the USMCA Parties were bringing the NAFTA to an end and, *second*, that they were replacing it with a new and different trade and investment regime set out in the USMCA.

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

> REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region;[58]

47. The USMCA Protocol, which is titled in full the "Protocol *Replacing* the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada,"[59] has similar language. The USMCA Protocol states in Paragraph 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."[60]

48. The Preamble and the USMCA Protocol, together with the references to the NAFTA's termination in Annex 14-C,[61] show that the USMCA Parties intended to leave the NAFTA behind and replace it with the USMCA. The Preamble and the USMCA Protocol are wholly consistent with the U.S. interpretation of Annex 14-C, under which the USMCA Parties' conduct with respect to investors and their investments after the agreement's entry into force is assessed exclusively under Chapter 14 of the USMCA. Chapter 14, as compared to Chapter 11 of the NAFTA, includes entirely new provisions (*e.g.*, USMCA Articles 14.15 (Subrogation) and 14.17 (Corporate Social

[58] Preamble to the USMCA ¶ 3 (R-0001 *bis*).
[59] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada (R-0001 *bis*) (emphasis added).
[60] *Id.* ¶ 1 (R-0001 *bis*) (emphasis added).
[61] *See supra* ¶ 40.

Responsibility)) and numerous revisions and clarifications to the text regarding substantive investment obligations. Claims alleging breach of the Chapter 14 obligations are subject to the USMCA's more restrictive investor-State dispute settlement regime, as embodied in Annexes 14-D and 14-E.

49. Claimant's interpretation of Annex 14-C would result in a period after the USMCA's entry into force during which the USMCA Parties' conduct regarding legacy investments would be subject to two distinct sets of substantive investment obligations and could be the subject of arbitration under two different international agreements.[62] Such an overlap is nowhere contemplated by the USMCA Parties and is incompatible with the Preamble and USMCA Protocol.[63]

50. In its Memorial and bifurcation briefs, Claimant largely ignored the stated purpose of the USMCA Protocol – namely, the replacement of the NAFTA with the USMCA – and instead focused on the "without prejudice" phrase at the end of Paragraph 1.[64] According to Claimant, this phrase means that "if a provision of [USMCA] states that a provision of NAFTA will have some continued effect, then it will despite NAFTA's termination."[65]

51. There are two significant problems with Claimant's argument. *First*, the USMCA Protocol does not say anything about NAFTA's provisions having "continued effect" following the

[62] *See supra* ¶¶ 33-34, n.41.
[63] As discussed below, the United States has, in certain instances, permitted the temporary coexistence of an older bilateral investment treaty and a new free trade agreement with the same counterparty. *See infra* ¶¶ 86-87. However, where it has done so, the United States and its counterparties have been clear about this intention by leaving the bilateral investment treaty in force. Here, by contrast, the United States and its counterparties terminated the NAFTA. The termination of the NAFTA, among other things, makes it clear that the USMCA Parties did not intend for the NAFTA's substantive investment obligations to be in force at the same time as the USMCA's substantive investment obligations.
[64] Claimant's Memorial ¶¶ 222-23; Claimant's Observations on the Request for Bifurcation ¶ 24; Claimant's Rejoinder on the Request for Bifurcation ¶ 16.
[65] Claimant's Rejoinder on the Request for Bifurcation ¶ 14.

NAFTA's termination. Paragraph 1 of the USMCA Protocol simply says that USMCA provisions that "refer" to NAFTA provisions will not be prejudiced by the NAFTA's termination. In other words, USMCA provisions that reference the NAFTA will function as written despite the termination of the NAFTA provisions to which they refer. The effect (if any) of the referenced NAFTA provisions depends entirely on the meaning of each of the USMCA provisions at issue.[66]

52. *Second*, contrary to Claimant's assertion, Annex 14-C does *not* include provisions "which give NAFTA Chapter 11 continued effect, including the substantive obligations of Section A."[67] Neither Paragraph 1 of Annex 14-C nor any other provision of the USMCA provides that NAFTA's substantive investment obligations (Section A) have "continued effect" after the NAFTA's termination.

53. Paragraph 1 of Annex 14-C memorializes the USMCA Parties' consent to arbitrate claims alleging certain breaches of the NAFTA – which could only arise while the NAFTA was still in force – under the dispute resolution framework in NAFTA Chapter 11, Section B. The "without prejudice" language in the USMCA Protocol ensures that this consent is given force. It eliminates the possibility of any dispute over whether the limited consent in Paragraph 1 of Annex 14-C is valid, in view of the termination of the NAFTA and the consequent withdrawal of the Parties'

[66] For example, in USMCA Article 5.19, the Parties agreed to establish a Sub-Committee on Origin Verification. Among this Sub-Committee's functions is, according to Article 5.19(3)(b), "developing and improving the NAFTA 1994 Audit Manual and recommending verification procedures." USMCA, art. 5.19(3)(b) (R-0002 *bis*). Nothing in this Article suggests that the relevant NAFTA obligations on origin verification still applied, but the USMCA Protocol's "without prejudice" clause avoids any confusion about whether the Sub-Committee could undertake this task despite the NAFTA's termination. Similarly, Article 10.12(15) requires the USMCA Parties to maintain or amend certain statutes related to antidumping and countervailing duties in their domestic legislation. USMCA, art. 10.12(15) (R-0002 *bis*). Among the statutes to be maintained are those each Party listed in its Annex to NAFTA Article 1904.15 (R-0004 *bis*). The "without prejudice" clause simply ensures that the termination of the NAFTA does not render that reference a dead letter. Again, nothing in this reference to NAFTA in USMCA Article 10.12(15) suggests that the "without prejudice" clause in the USMCA Protocol meant that NAFTA Article 1904.15 itself remained applicable.

[67] Claimant's Rejoinder on the Request for Bifurcation ¶ 14 ("All Claimant has ever said is that Annex 14-C includes provisions which give NAFTA Chapter 11 continued effect, including the substantive obligations of Section A.").

consent to arbitration of NAFTA claims reflected in NAFTA Article 1122. The "without prejudice" language in the USMCA Protocol cannot, however, be read to change the meaning of Paragraph 1 of Annex 14-C by adding a commitment to extend the NAFTA's substantive investment obligations, which is entirely absent from its text and would lead to an unclear and confusing result where two sets of obligations governed investments.

54. The Preamble and the USMCA Protocol clearly indicate the USMCA Parties' desire to terminate the NAFTA and have the USMCA govern trade and investment going forward. This supports the ordinary meaning of Paragraph 1 of Annex 14-C. After the NAFTA's termination, Claimant's alleged investments were governed by the USMCA, not the NAFTA. Accordingly, breaches occurring after the USMCA entered into force would be subject to the USMCA's substantive investment obligations and (more limited) investor-State dispute settlement regime.[68]

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

55. The structure of the USMCA provides further contextual support for the ordinary meaning of Annex 14-C. The USMCA separates the articles relating to the Parties' substantive investment obligations from those relating to investor-State dispute settlement, including provisions reflecting the Parties' consent to arbitration. The USMCA's substantive investment obligations are set out in the main body of Chapter 14, whereas the jurisdictional and procedural rules for investor-State dispute settlement are in Annexes 14-C, 14-D, and 14-E. This separation mirrors the structure of NAFTA Chapter 11, which provided substantive investment obligations in Section A and an investor-State dispute settlement mechanism in Section B.[69]

[68] The USMCA also offers State-to-State dispute settlement under Chapter 31.
[69] Meg Kinnear et al., *Introduction*, *in* INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 37 (2006) (RL-0075) ("Section A of Chapter 11 sets forth the primary obligations of the Parties,

56. As the *TC Energy* tribunal correctly determined, USMCA Article 14.2(4) confirms the procedural nature of Annex 14-C.[70] Article 14.2(4) states, "[f]or greater certainty," that "an investor may only submit a claim to arbitration under this Chapter [14] as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)."[71] As stated in this provision, the function of Annex 14-C – like Annexes 14-D and 14-E – is to provide investor-State dispute settlement procedures, which include the USMCA Parties' consent to arbitration.

57. The separation of the USMCA Parties' substantive investment obligations from the provisions governing investor-State dispute resolution reflects, among other things, the distinct nature of the consent to arbitration.[72] Consent to arbitration is an offer that the parties to an investment treaty extend, subject to certain conditions, to individual investors, and "[t]he perfected consent is not a treaty but an agreement between the host State and the investor."[73] The agreement to be bound by specific substantive investment obligations is, by contrast, more typical of commitments that treaty parties make to each other.[74]

while Part B sets forth the investor-State dispute resolution mechanism."); *see also id.* 38 ("Section B . . . sets forth the dispute resolution procedures for arbitration that an investor of one NAFTA Party may institute against one of the other NAFTA Parties in which it is making, seeks to make, or has made an investment. Section B contains no substantive rights or obligations, but is devoted to the mechanism by which an investor may seek redress.").

[70] *TC Energy* Award ¶ 150 (RL-0060) ("Article 14.2-4 of USMCA confirms the procedural nature of Annex 14-C by providing that Annexes 14-C, 14-D and 14-E contain the offer to arbitrate claims under USMCA.").

[71] USMCA, art. 14.2(4) (R-0002 *bis*).

[72] Gardiner Report ¶ A.6 ("Consent underlies obligations relating to the arbitral process. In treaties, these obligations are typically in a set of provisions essentially distinct from the substantive provisions on treatment of investments."); ¶ A.7 ("Thus, the treaty structure of both the NAFTA and USMCA includes a body of substantive rules for treatment of investments on the one hand, and a body of jurisdictional and procedural rules for arbitration of disputes over the substantive rules on the other.").

[73] SCHREUER, *Consent to Arbitration*, 864 (RL-0063).

[74] Indeed, underlining the distinction between substantive investment obligations and consent to arbitration, there are numerous treaties that include substantive investment protections, but that do not include a State's consent to arbitrate disputes related to those protections directly with investors. (Such protections may, depending on the treaty,

c. USMCA Article 14.2(3) Confirms that the USMCA Parties Intended Annex 14-C to Apply to Claims Based on Events Predating the USMCA's Entry into Force

58. USMCA Article 14.2(3) provides additional context that confirms the temporal scope of the consent in Paragraph 1 of Annex 14-C. Article 14.2(3) states that:

> For greater certainty, this Chapter, *except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims)* does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.[75]

59. This provision confirms the ordinary meaning of Annex 14-C. It sets up the general rule that, consistent with the presumption against retroactivity in VCLT Article 28, the USMCA does not bind the USMCA Parties with respect to any acts occurring before its entry into force. It then makes clear that Annex 14-C is an exception to this general rule because it *does* apply to acts or facts that took place before the entry into force of the USMCA. Indeed, that is precisely what the consent provided in Annex 14-C addresses: breaches of obligations that existed under the NAFTA that arose before the USMCA entered into force.[76]

60. In its Memorial, Claimant nevertheless contends – in direct opposition to the ordinary meaning of its terms – that Article 14.2(3) supports a "forward-looking" interpretation of Annex 14-C.[77] But Article 14.2(3) does not say that Annex 14-C is "forward-looking"; to the contrary, it

be subject to interstate dispute resolution provisions.) For example, the U.S.-Australia Free Trade Agreement (2004) includes a full chapter on investment but does not include a consent to arbitrate directly with investors. United States-Australia Free Trade Agreement, Chapter 11, May 18, 2004 (RL-0076). The United States also maintains numerous Friendship, Commerce, and Navigation Treaties or Treaties of Amity that include protections for foreign investors but do not include consent to arbitrate directly with those investors. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, U.S.-Den., Oct. 1, 1951, 421 U.N.T.S. 105 (RL-0077).

[75] USMCA, art. 14.2(3) (R-0002 *bis*) (emphasis added).

[76] Ascensio Report ¶ 21 ("The language of Article 14.2, paragraph 3, supports the conclusion that the temporal scope of Annex 14-C is thus events that occurred *before* the entry into force of USMCA."); Gardiner Report ¶ C.3 ("Annex 14-C is identified [in Article 14.2(3)] as being an exception in relation to matters pre-dating the USMCA. This sets a basis for understanding Annex 14-C to relate to acts, facts or situations within the investment treatment regime in force under NAFTA, not that under USMCA.").

[77] Claimant's Memorial ¶ 229.

confirms that Annex 14-C provides consent to arbitrate claims that arose *before* the USMCA's entry into force by excepting it from the presumption against retroactivity that would otherwise apply. Claimant's argument depends on construing Article 14.2(3) as referring solely to "paragraphs 4 and 5 of . . . Annex [14-C]," which, according to Claimant, "confirm that existing NAFTA arbitral procedures could continue with the Parties honouring any resulting awards (the 'Pending Claims' it refers to)."[78] Claimant is wrong. *First*, nothing in the text of Article 14.2(3) suggests that its reference to Annex 14-C should be limited only to certain paragraphs of the Annex. *Second*, Paragraph 4 concerns "an arbitration initiated pursuant to the submission of a claim under paragraph 1 [of Annex 14-C]," and is thus inextricably bound with the consent provided in Paragraph 1. Accordingly, the reference in Article 14.2(3) to Annex 14-C logically applies to both Paragraphs 1 and 4 (and the rest of the Annex's provisions), all of which refer to claims that arose before the USMCA entered into force.

61. In sum, Article 14.2(3) makes clear that Annex 14-C applies to conduct that took place before the entry into force of the USMCA and says nothing about its application to acts or facts that occurred afterwards. This provision is aligned with the U.S. interpretation of Annex 14-C and offers no support to Claimant's interpretation.

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

62. The USMCA Parties provided in USMCA Article 34.1 what they termed a "transitional provision from NAFTA 1994."[79] These provisions include, for example, an agreement that certain parts of the NAFTA, namely Chapter 19, "shall continue to apply" in certain circumstances despite

[78] Claimant's Memorial ¶ 230.
[79] USMCA, art. 34.1 (R-0002 *bis*).

the NAFTA's termination.[80] USMCA Article 34.1, however, makes no mention of NAFTA Chapter 11, let alone any provision for its survival after the NAFTA's termination. The absence of NAFTA Chapter 11 from USMCA Article 34.1 is further evidence that the USMCA Parties did not extend its obligations. As the *TC Energy* tribunal observed, "[t]he USMCA parties did in fact agree on transitional provisions extending the life of other substantive provisions of NAFTA in Article 34.1 of USMCA," but "[c]ritically, there is no language in Chapter 34, or anywhere else in [USMCA], indicating that the parties intended to maintain the substantive provisions of Section A of Chapter 11 in respect of legacy investments."[81]

63. The reasoning of the State-to-State dispute resolution panel in the *Crystalline Silicon* case (constituted pursuant to USMCA Chapter 31) is in accord:

> In the view of the Panel, the NAFTA and the USMCA are separate treaties. Indeed, upon the entry into force of the USMCA, the NAFTA came to an end, "but without prejudice to those provisions set forth in USMCA that refer to the provisions of NAFTA." It would have been possible for the Parties to have inserted a provision in the USMCA providing for the continuation of all obligations under the NAFTA as obligations under the USMCA. But they did not do so. The Parties created self-standing USMCA obligations even though such obligations were stated in "identical or nearly identical form" to obligations under NAFTA. Where the Parties wanted to carry over specific NAFTA obligations, such as NAFTA Chapter Nineteen, they did so explicitly in Article 34.[82]

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

[81] *TC Energy* Award ¶ 153 (RL-0060).

[82] *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report ¶ 41 (Feb. 1, 2022) (RL-0078) (internal citations omitted). The Panel also noted that the reference to a "smooth transition" in USMCA Article 34.1(1) cannot be treated as an implicit carryover of the NAFTA obligations into the USMCA when there are no other words in the USMCA doing that. *Id.* ¶ 42.

64. Claimant argues that USMCA Article 34.1 supports its interpretation of Annex 14-C, because it limits the continued applicability of NAFTA Chapter 19 to "final determinations published by a Party before the entry into force of [the USMCA]."[83] Claimant contends that "[i]n other contexts in [USMCA], such express backward-looking language was indeed used."[84] But Claimant misses the broader point about Article 34.1, which is that such a temporal limit with respect to Chapter 19 was necessary because, as noted, the article also contains express language stating that "Chapter Nineteen of NAFTA 1994 *shall continue to apply*" after the USMCA's entry into force. Again, there is no reference in Article 34.1 to the continuing applicability of NAFTA Chapter 11, Section A, nor is there any comparable language in Annex 14-C. Accordingly, no temporal limitation was necessary with respect to claims asserted under Annex 14-C for alleged breaches of obligations under NAFTA Chapter 11.

e. The USMCA Parties Have Agreed that Annex 14-C Does Not Permit Claims Based on Conduct Post-Dating the NAFTA's Termination

65. VCLT Article 31(3) recognizes the important role that the States Parties play in the interpretation of their treaties by requiring interpreters to take into account "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;" and "(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[85]

66. The three USMCA Parties all agree that Annex 14-C permits only claims based on conduct occurring while the NAFTA was in force. The United States has taken this position in publicly

[83] USMCA, 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.") (R-0002 *bis*).
[84] Claimant's Observations on the Request for Bifurcation ¶ 30.
[85] VCLT, art. 31(3) (RL-0017).

available submissions in the *TC Energy* and *Legacy Vulcan v. United Mexican States* cases, as has Mexico.[86] Canada recently confirmed its agreement with this interpretation of Annex 14-C in a submission in *Ruby River v. Canada*, where it observed that there is "consensus among the USMCA Parties" on this issue.[87]

67. The USMCA Parties' common understanding of Annex 14-C confirms the U.S. position, and it must, in accordance with Article 31(3), be taken into account by the Tribunal.[88]

[86] *See, e.g.*, *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA ¶ 5 (Sep. 11, 2023) (R-0013) ("This consent [in Annex 14-C] is limited to the submission of a 'claim' alleging a 'breach of an obligation under … Section A of Chapter 11 (Investment) of NAFTA 1994.' A breach of a Treaty can only occur if that Treaty is in force. The NAFTA ceased to be in force as of July 1, 2020, and therefore a violation of Section A of Chapter 11 (Investment) of NAFTA was no longer possible as of that date."); *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Second Submission of the United States of America ¶¶ 8-12 (July 21, 2023) (R-0014); *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Mexico's Counter-Memorial on the Ancillary Claim ¶¶ 407-14 (Dec. 19, 2022) (R-0015); *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Mexico's Rejoinder on the Ancillary Claim ¶¶ 258-87 (Apr. 21, 2023) (R-0016).

[87] *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5, Contre-Mémoire Sur Le Fond Et Mémoire Sur La Compétence Du Canada ¶ 262 (July 15, 2024) (R-0017) (English translation) (French original: "un consensus parmi les Parties à l'ACEUM"). *See also id.* ¶ 182 ("Annex 14-C of the USMCA . . . does not allow [Claimant] to submit to arbitration a claim relating to events giving rise to liability after June 30, 2020.") (English translation) (French original: "l'annexe 14-C de l'ACEUM . . . ne lui permet pas de soumettre à l'arbitrage une plainte portant sur des faits générateurs de responsabilité postérieurs au 30 juin 2020.").

[88] *See, e.g.*, *Alicia Grace et al. v. United Mexican States*, ICSID Case No. UNCT/18/4, Final Award ¶¶ 473-74 (Aug. 19, 2024) (RL-0079) ("[T]he concurring statements submitted by the Non-Disputing Parties in the course of this arbitration alongside the positions of Mexico regarding dual nationals are to be understood as subsequent practice for the purposes of Article 31(3)(b) of the VCLT. . . . [I]n light of the common understanding of the NAFTA Parties regarding the application of the dominant and effective nationality test, the Tribunal finds compelling to proceed with its jurisdictional analysis within this framework."); *William Richard Clayton et al. v. Government of Canada,* NAFTA/UNCITRAL, PCA Case No. 2009-04, Award on Damages ¶ 379 (Jan. 10, 2019) ("*Clayton & Bilcon* Award") (RL-0080) ("[T]he consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals . . . can be taken into account in interpreting the provisions of NAFTA. Thus, the NAFTA Parties' subsequent practice militates in favour of adopting the Respondent's position on this issue[.]"); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶¶ 103, 104, 158, 160 (July 13, 2018) (RL-0081) (explaining that the approach advocated by claimant had "clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA," as evidenced by "their submissions to other NAFTA tribunals," and that "[i]n accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight."); *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188-89 (Jan. 28, 2008) ("*Canadian Cattlemen* Award") (RL-0033) (explaining that "the available evidence cited by the Respondent," including submissions by the NAFTA Parties in arbitration proceedings, "demonstrates to us that there is nevertheless a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications[.]'").

f. Relevant Rules of International Law Support the U.S. Position

68. Finally, the U.S. interpretation finds further support in relevant rules of international law. VCLT Article 31(3)(c) mandates that "[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties."[89] VCLT Article 70 and Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC State Responsibility Articles") reflect relevant customary international law rules applicable to the consequences of treaty termination.

69. Pursuant to VCLT Article 70(1), "the termination of a treaty . . . releases the parties from any obligation further to perform the treaty" unless "the treaty otherwise provides or the parties otherwise agree."[90] As detailed in Section II.A, the NAFTA adheres to this default rule under Article 70.[91] NAFTA lacks a survival clause that would extend its obligations beyond its termination. Furthermore, the Parties did not agree in the USMCA that NAFTA's substantive investment obligations would continue to bind them after the NAFTA's termination.

70. Turning to Article 13 of the ILC State Responsibility Articles, it reflects the customary international law rule that an act of a State does not constitute a breach of an obligation unless the State is bound by such obligation at the time the act occurs.[92] Because the revocation of the Keystone XL permit occurred in January 2021, when the United States was no longer bound by

[89] VCLT, art. 31(3)(c) (RL-0017).
[90] *Id.*, art. 70(1) (RL-0017).
[91] *See supra* ¶ 10.
[92] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13 (RL-0019).

NAFTA's Chapter 11 obligations, it cannot – pursuant to the rule reflected in Article 13 – constitute a breach under Annex 14-C.[93]

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

71. Annex 14-C must be interpreted in light of the USMCA's object and purpose in accordance with VCLT Article 31(1). As noted above, the USMCA Parties expressly resolved in the Preamble to "REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement" to support trade and economic growth in the region.[94] The USMCA Protocol similarly states that the USMCA "shall supersede the NAFTA," and Annex 14-C itself repeatedly references the NAFTA's termination.[95] Not only did the USMCA expressly supersede and replace the NAFTA overall, but the USMCA specifically replaced the old investor-State dispute settlement regime of the NAFTA with a new regime in Annexes 14-D and 14-E that Canada chose not to join. The new USMCA regime is narrower than the one in Chapter 11 of the NAFTA, with express limitations not included in the NAFTA.[96]

72. As recognized by the tribunal in *TC Energy*, the U.S. interpretation of Annex 14-C is consistent with the object and purpose of the USMCA to replace the NAFTA with a new agreement.[97] Under the U.S. interpretation, investor claims based on conduct occurring after the

[93] *See TC Energy* Award ¶ 175 (RL-0060) (taking into account VCLT Article 70 and Article 13 of the ILC State Responsibility Articles and concluding that the revocation of the permit was not capable of constituting a breach for purposes of the tribunal's jurisdiction under Annex 14-C).
[94] Preamble to the USMCA ¶ 3 (R-0001 *bis*).
[95] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada ¶ 1 (R-0001 *bis*); Annex 14-C ¶¶ 3, 5, 6(a) (R-0002 *bis*). *See also* RICHARD K. GARDINER, TREATY INTERPRETATION 213, 218 (2d ed. 2015) ("GARDINER") (RL-0058 *bis*) (noting that while the preamble is a source of guidance on the object and purpose of a treaty, both the Vienna Convention and practice make it clear that an interpreter needs to take into account the whole treaty).
[96] *See supra* ¶¶ 45, 48.
[97] *TC Energy* Award ¶ 174 (RL-0060) (stating that there is no indication in the USMCA that interpreting Annex 14-C to extend Section A of the NAFTA beyond its termination would be in harmony with the object and purpose of the USMCA).

USMCA's entry into force are governed solely by the USMCA's new substantive obligations and its circumscribed dispute settlement regime. Legacy investment claims, which are governed by the NAFTA's substantive obligations, are confined to conduct occurring prior to the USMCA's entry into force. Claimant's interpretation of Annex 14-C would, on the other hand, effectively delay the implementation of the USMCA's new regime for three years, maintaining significant parts of the NAFTA in force. This is inconsistent with the USMCA Parties' stated purpose that the USMCA "replace" and "supersede" the NAFTA upon its entry into force.[98]

73. Moreover, an overlap between the NAFTA and USMCA regimes would be inconsistent with the USMCA Parties' desire, expressed in the Preamble, to establish "a clear, transparent, and predictable legal and commercial framework" that supports trade and investment.[99] Such overlap would mean that for the three-year period of Annex 14-C, States would be bound by two different sets of legal obligations with respect to investment, which would not be a "clear, transparent, and predictable legal . . . framework" for either the USMCA Parties or investors. As the tribunal in *TC Energy* indicated, a broad interpretation of Annex 14-C, such as Claimant's interpretation, would lead to an unclear extension of Section A of Chapter 11 of the NAFTA.[100]

74. In sum, the ordinary meaning of Annex 14-C is consistent with the object and purpose of the USMCA and the general principles in the Preamble to replace the NAFTA with the USMCA,

[98] Ascensio Report ¶ 32 ("If the claimant's interpretation were to be followed, it would mean that, during a period of three years after the entry into force of USMCA, the NAFTA chapter relating to investment would not be replaced by the USMCA, but would continue to apply as it stands, in terms of both substance and dispute settlement. This would also result in a three-year overlap with the substantive provisions of USMCA Chapter 14 for investments existing at the time of the entry into force of the Protocol.").
[99] Preamble to the USMCA ¶ 7 (R-0001*bis*).
[100] *TC Energy* Award ¶ 174 (RL-0060).

and to provide clarity, transparency, and predictability to the legal framework. In contrast, Claimant's interpretation of Annex 14-C is not consistent with the USMCA's object and purpose.

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

75. VCLT Article 32 provides that "[r]ecourse may be had" to supplementary means of interpretation "to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[101] Because the application of VCLT Article 31 to Annex 14-C unambiguously establishes that it does not extend the application of the NAFTA's substantive investment obligations beyond the NAFTA's termination, and because there is nothing manifestly absurd or unreasonable about this choice of the USMCA Parties, there is no need for the Tribunal to consider supplementary means of interpretation.[102]

[101] VCLT, art. 32 (RL-0017).

[102] Gardiner Report ¶ G.3 ("[T]here is nothing in the interpretative process to suggest an outcome that leaves the meaning [of Annex 14-C] ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Hence, no requirement arises to seek to determine the meaning from supplementary means of interpretation."). *See also Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award ¶ 79 (Dec. 8, 2008) (RL-0082) ("Judgments of international tribunals (the PCIJ and ICJ) contain pronouncements to the effect that where the ordinary meaning of words (the text) is clear and they make sense in the context, there is no occasion at all to have recourse to other means of interpretation."); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, 2002 I.C.J. 625, 652-53 ¶¶ 52-53 (Dec. 17) (RL-0083) (after expressing the Court's conclusion on the interpretation of the text at issue "when read in context and in the light of the [treaty's] object and purpose," explaining that "the Court does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the [treaty] and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention") (citations omitted); *Conditions of Admission of a State to Membership in the United Nations*, 1948 I.C.J. 57, 63 (May 28) (RL-0084) ("The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.").

76. Nevertheless, the supplementary means of interpretation that might be considered at this phase of the case "confirm the meaning resulting from the application of article 31."[103] *First*, the relevant provisions of Annex 14-C mirror NAFTA articles that dealt exclusively with the NAFTA Parties' consent to arbitration. Had the Parties, when negotiating Annex 14-C, intended it to address a wholly different subject – namely, the post-termination survival of the NAFTA's substantive investment obligations – they would have understood the need to include additional language beyond what is found in the NAFTA. They did not do so, which supports the conclusion that Annex 14-C does not provide for the survival of the NAFTA's obligations. *Second*, there is no mystery about what such a survival clause would look like because the USMCA Parties' past treaty practice shows that each has model language that binds treaty parties to the continued performance of a treaty's obligations for a period after its termination. Again, the absence of this language or anything like it from Annex 14-C confirms the U.S. interpretation.

77. By contrast to these proper supplementary means of interpretation, the documents Claimant sought to submit for the Tribunal's consideration under VCLT Article 32 are irrelevant because they do not shed light on the *common understanding* of the three USMCA Parties as to the meaning of Annex 14-C's terms. Instead, Claimant's documents primarily reflect either (i) the views of a single USMCA Party, or (ii) the personal views of an individual, often expressed long after the conclusion of the USMCA negotiations. As discussed more fully below, these documents are entitled to little or no weight in a Vienna Convention interpretation. Nor, in any event, would they change the analysis because they are vague, fail to address the interpretive question before the Tribunal, or both.

[103] VCLT, art. 32 (RL-0017).

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

78. USMCA Chapter 14 and its Annex 14-C were negotiated against the background of the USMCA's predecessor, the NAFTA. NAFTA Chapter 11's terms were well understood by the USMCA Parties, including because they were the subject of extensive analysis and argument in numerous arbitrations since the NAFTA entered into force in 1994. Particularly where there is overlap between USMCA Annex 14-C and NAFTA Chapter 11, the NAFTA can provide insight into the meaning that the same treaty Parties attached to the terms of Annex 14-C.

79. Paragraphs 1 and 2 of Annex 14-C closely resemble NAFTA Articles 1116(1)/1117(1) and 1122, which concern the NAFTA Parties' consent to arbitration. This is illustrated in the color-coded table below, which shows the extensive similarities between the two sets of provisions. In the table below, the green text in the USMCA Annex 14-C column derives from NAFTA Article 1122(1), the blue text derives from NAFTA Articles 1116/1117, and the orange text derives from NAFTA Article 1122(2).

NAFTA	USMCA Annex 14-C
Article 1122(1) Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.[104] **Article 1116**[105] **1.** An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.	**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: (a) Section A of Chapter 11 (Investment) of NAFTA 1994; (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.
Article 1122(2) The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties; (b) Article II of the New York Convention for an agreement in writing; and (c) Article I of the InterAmerican Convention for an agreement.	**2.** The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; (b) Article II of the New York Convention for an "agreement in writing"; and (c) Article I of the Inter-American Convention for an "agreement".

[104] The "procedures set out in this Agreement" are those contained in Section B of NAFTA Chapter 11. NAFTA, Ch. 11, Section B (R-0004 *bis*).

[105] Article 1117(1) is, in relevant part, nearly identical to Article 1116(1), except that it addresses the submission of a claim by "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." NAFTA, art. 1117(1) (R-0004 *bis*).

80. NAFTA Articles 1116(1)/1117(1) and 1122 are part of the investor-State dispute resolution framework established in Section B of NAFTA Chapter 11 and are not part of the substantive obligations detailed in NAFTA Chapter 11, Section A.[106] Article 1122 provides the NAFTA Parties' consent to arbitration and Articles 1116(1) and 1117(1) specify the types of claims that an investor may submit pursuant to this consent. These articles impose no substantive investment obligations on the NAFTA Parties. And as discussed above, the three NAFTA Parties each expressed their understanding that confining their consent in NAFTA Articles 1116(1) and 1117(1) to claims that a Party "breached an obligation" under the NAFTA limited a NAFTA tribunal's jurisdiction *ratione temporis* to the period when the NAFTA's obligations were in force.[107] That very same text is mirrored in the "breach of an obligation" formulation in USMCA Annex 14-C, Paragraph 1.

81. Accepting Claimant's interpretation of Annex 14-C would require the Tribunal to conclude that the terms of NAFTA Articles 1116(1)/1117(1) and 1122, when transposed with minor modifications into Annex 14-C, took on a new function beyond the one that they performed in the NAFTA. According to Claimant, the terms in Annex 14-C not only set the scope of the USMCA Parties' consent but also embody an agreement to extend the NAFTA's substantive investment obligations for three years beyond termination. Claimant has not, however, identified any text in Annex 14-C that would account for this supplemental functionality, nor can it. To the contrary, as

[106] Meg Kinnear et al., *Introduction*, *in* INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 37 (2006) (RL-0075) ("Section A of Chapter 11 sets forth the primary obligations of the Parties, while Part B sets forth the investor-State dispute resolution mechanism."); *see also id.* 38 ("Section B . . . sets forth the dispute resolution procedures for arbitration that an investor of one NAFTA Party may institute against one of the other NAFTA Parties in which it is making, seeks to make, or has made an investment. Section B contains no substantive rights or obligations, but is devoted to the mechanism by which an investor may seek redress.").
[107] *See supra* n.20.

the above table shows, the changes are minor and none of the new text could be read to embody an agreement to extend the obligations in Section A of NAFTA Chapter 11.

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

82. Beyond the NAFTA, which was the USMCA's direct antecedent, the USMCA Parties' past practice in connection with other treaties also confirms the interpretation of Annex 14-C reached through the application of VCLT Article 31. This practice discloses how the USMCA Parties draft language to memorialize an agreement that a treaty's provisions will apply for some period after the treaty has been terminated. The absence of any language in Annex 14-C similar to what the USMCA Parties have previously drafted for this purpose supports the conclusion that the Parties did not intend for Annex 14-C to have this effect with respect to the NAFTA's substantive investment obligations.

83. Each of the USMCA Parties' model bilateral investment treaties ("BITs") contains language that extends the application of the BIT's obligations for a specified period after its termination. For example, the U.S. Model BIT achieves post-termination survival in a single clear sentence:

> For ten years from the date of termination, all other Articles *shall continue to apply to covered investments* established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.[108]

[108] 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) (RL-0051) (emphasis added); *see also* 2004 U.S. Model Bilateral Investment Treaty, art. 22(3) (RL-0052) ("For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.").

84. This provision extends the substantive obligations in the terminated treaty for a period of ten years past termination. The Canadian and Mexican models use similar language for the same purpose.[109]

85. These model treaties show that the USMCA Parties had a practice of using clear language that could, with minor modifications, have been used to memorialize the survival of the NAFTA Chapter 11 obligations beyond the termination of the agreement. The USMCA Parties could have included, either in Annex 14-C or Article 34.1, a statement such as: "Section A of Chapter 11 (Investment) of NAFTA 1994 *shall continue to apply* to legacy investments . . . ." Fatally for Claimant's claims, however, the Parties did not include this or similar language in the USMCA.[110]

86. Also relevant are examples in which the United States and its counterparty chose *not* to terminate a legacy BIT despite the entry into force of a new free trade agreement between them. For instance, the United States did not terminate BITs with Morocco and Panama after entering into free trade agreements with both States. The United States likewise left its BIT with Honduras in force after both States became parties to the CAFTA-DR. Rather than terminate the legacy BITs in each of these examples, the State Parties suspended their dispute resolution provisions, subject to express exceptions allowing investors to continue submitting claims to arbitration under

[109] 2021 Canada Model Agreement for the Promotion and Protection of Investments, art. 57(4) (RL-0053) ("In respect of investments or commitments to invest made prior to the date of termination of this Agreement, Articles 1 through 56, as well as paragraphs 1 and 2 of this Article, shall remain in force for 15 years."); 2014 Canada Model Agreement for the Promotion and Protection of Investments, art. 42(4) (RL-0054) ("In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, Articles 1 to 41 inclusive, as well as paragraphs 1 and 2 of this Article, shall remain in force for a period of 15 years."); 2004 Canada Model Agreement for the Promotion and Protection of Investments, art. 52(3) (RL-0055) ("In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles 1 to 51 inclusive, as well as paragraphs (1) and (2) of this Article, shall remain in force for a period of fifteen years."); 2008 Mexican Model of Investment Promotion and Protection Agreement, art. 30(4) (RL-0056) ("This Agreement shall continue to be effective for a period of ten years from the date of termination only with respect to investments made prior to such date.").

[110] As noted above, the USMCA Parties included similar language in Article 34.1 with respect to NAFTA Chapter 19, but not with respect to NAFTA Chapter 11. *See supra* ¶¶ 62-64.

the BIT for ten years based on preexisting investments or disputes.[111] The substantive obligations under the BIT, which was not terminated, therefore remained in force despite the later free trade agreement. This arrangement allowed investors with qualifying investments to submit claims to arbitration for alleged breaches of the BIT both pre- *and* post-dating the entry into force of the subsequent free trade agreement.

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

88. For the foregoing reasons, relevant past treaty practice of the USMCA Parties confirms that Annex 14-C does not contain an agreement to extend the application of the NAFTA's substantive investment obligations after its termination.[112]

3) Claimant's Purported Supplementary Means Are Entitled to Little or No Weight

89. In support of its argument under VCLT Article 32, Claimant included with its Memorial two law firm marketing memos, a report by an outside advisory committee, various internal

[111] United States-Morocco Free Trade Agreement, U.S.-Morocco, arts. 1.2(1), 1.2(4), June 15, 2004 (RL-0085); Letter from Shaun Donnelly, U.S. State Department to Norman Garcia, Honduras Ministry of Industry and Commerce Regarding Relationship of CAFTA-DR to U.S.-Honduras BIT, Aug. 5, 2004 (RL-0087); Dominican Republic-Central America-United States Free Trade Agreement, art. 1.3(1), Aug. 5, 2004 (RL-0088); United States-Panama Trade Promotion Agreement, U.S.-Pan., arts. 1.3(1), 1.3(3), June 28, 2007 (RL-0086).
[112] *See also TC Energy* Award ¶ 176 (RL-0060).

documents from the Office of the U.S. Trade Representative ("USTR"), and a Canadian government briefing book.[113] These documents need not detain the Tribunal long.

90. *First*, these documents should be disregarded because they do not reflect the common understanding of the USMCA Parties with respect to the meaning of Annex 14-C's terms. As special rapporteur Humphrey Waldock observed with respect to *travaux préparatoires*, the weight to which such documents are entitled "depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty."[114] Professor Gardiner likewise opines: "A further functional test for admitting material into the interpretative process as supplementary means of interpretation is whether the material provides proof of 'the common understanding of the parties.'"[115] Similarly, the *TC Energy* tribunal observed: "in order to be relevant to an assessment of the ordinary meaning of the treaty, the supplementary means of interpretation need to provide an indication as to what the common intention of the parties may have been."[116]

91. Beginning with the law firm marketing memos, the Tribunal should dismiss them out of hand because they reflect the views of lawyers in private practice who are soliciting business, not the views of a USMCA Party. Moreover, while these memos take a position on what Annex 14-C permits, they do not explain the basis for this position in the text of Annex 14-C. In short, these memos are of no use whatsoever to the Tribunal.

[113] Claimant's Memorial, Section IV.C.
[114] Humphrey Waldock, Special Rapporteur, *Third Report on the Law of Treaties* 58 (¶ 21), [1964] 2 Y.B. INT'L L. COMM'N 5, U.N. Doc. A/CN.4/167 and Add.1-3 (RL-0089) (emphasis in original). *See also* GARDINER at 119 (RL-0058 *bis*) ("The admission of material generated by one party needs to be carefully approached in the light of the principle that preparatory work should illuminate a common understanding of the agreement, not unilateral hopes and inclinations.").
[115] Gardiner Report ¶ E.1 (citation omitted).
[116] *TC Energy* Award ¶ 183 (RL-0060).

92. The report prepared by the Industry Trade Advisory Committee ("ITAC") on Services is irrelevant for similar reasons. The ITAC is comprised of private citizens who provide advice to the U.S. government.[117] Whatever understanding the ITAC may have had of Annex 14-C – and this is hardly clear from the brief mention in the report – there is no basis to conclude that it was shared by the U.S. government. Moreover, there is no evidence that the report was shared with the other USMCA Parties, let alone that they endorsed the ITAC's view. Accordingly, the ITAC report cannot be considered as proper supplementary means under VCLT Article 32.[118]

93. Even the USTR materials and the Canadian briefing book fall short of the required standard because they are unilateral documents, reflecting the views of only one USMCA Party, rather than all. As Professor Waldock notes, "[s]tatements of individual parties during the negotiations are . . . of small value in the absence of evidence that they were assented to by the other parties."[119] The *TC Energy* tribunal agreed: "material that is internal to the U.S. negotiation team and that has not at least been shared with the other parties will have limited value as to what the intention of the other parties may have been."[120]

94. *Second*, even if the Tribunal were to consider these few government documents, they are no help to Claimant because they do not contradict the U.S. position. Claimant attempts to rely on phrases in the USTR talking points like "[u]nder the ISDS grandfather clause, investors can bring ISDS claims under NAFTA 1994 for three additional years" and "investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS

[117] *See* Report of the Industry Trade Advisory Committee on Services at 25-26 (Sep. 27, 2018) (C-253) (identifying committee members).
[118] *TC Energy* Award ¶ 193 (RL-0060) ("[A]part from the fact that the ITAC is a consultative group of experts that was not part of the negotiating team, this document has not been shared with the other State parties and says nothing about their intention.").
[119] Humphrey Waldock, Special Rapporteur, *Third Report on the Law of Treaties* 58 (¶ 21), [1964] 2 Y.B. INT'L L. COMM'N 5, U.N. Doc. A/CN.4/167 and Add.1-3 (RL-0089).
[120] *TC Energy* Award ¶ 183 (RL-0060).

claims under the NAFTA rules and procedures . . . for three years after the termination of the NAFTA."[121] Similarly, Claimant cites the Canadian government briefing book for the statement: "NAFTA's existing ISDS mechanism will continue to apply for three years after termination of the Agreement for investments made prior to the entry into force of [USMCA]."[122] The problem for Claimant is that none of this language supports Claimant's interpretation of Annex 14-C. There is no dispute that Annex 14-C allows investors to submit claims for breach of certain NAFTA obligations, and that these claims would proceed according to the procedure set out in NAFTA Chapter 11, Section B. The question is whether such claims must be based on events that occurred while the NAFTA was still in force, or whether the USMCA Parties agreed to the survival of the NAFTA's substantive investment obligations such that they could continue to be breached despite the NAFTA's termination. The materials Claimant has submitted provide no insight on this question.

95. Another USTR memo extracted in Claimant's Memorial is more relevant, but it supports the *U.S. position*. This memo discusses a change made to USMCA Article 14.2(3) in the legal scrub process that occurred shortly before the USMCA was signed. As reflected below, the memo is entirely consistent with the U.S. position on the temporal scope of Annex 14-C:

> Article 14.2(3) (Scope): The original text stated that the Investment Chapter does not apply to acts/events that occurred prior to entry into force of the USMCA, consistent with the default Vienna Convention rules. In the scrub, we clarified that there is one exception: Annex 14-C (the grandfather provision) allows investors to bring ISDS claims with respect to legacy investments *where the alleged breach took place before entry into force of the USMCA*.[123]

[121] U.S. Trade Representative FOIA Package at 2, 22 (C-250).
[122] Government of Canada, Minister of International Trade – Briefing Book at 67 (C-255).
[123] U.S. Trade Representative FOIA Package 168 (C-250) (emphasis added). *See TC Energy* Award ¶ 197 (RL-0060) ("It is reasonable to infer from that language that the author of the document understood that the offer to

96. Claimant's purported supplementary means of interpretation therefore fail to provide any support for its interpretation of Annex 14-C. To the extent they are relevant at all, they confirm the U.S. position.[124]

C. Conclusion on the *Ratione Temporis* Jurisdictional Objection

97. Annex 14-C does not include an agreement to extend the NAFTA's substantive investment obligations past its termination. This is plain from the ordinary meaning of the text of Annex 14-C, read in context and in light of its object and purpose. On this question, the three USMCA Parties, two experts on treaty interpretation, and the *TC Energy* tribunal all agree.

arbitrate in Annex 14-C applied to breaches having taken place before the entry onto force of USMCA, not after. Had the author of this note understood that Annex14-C allowed arbitration under Section A for facts postdating the expiry of NAFTA, he would presumably have drafted his comment by saying that 'Annex 14-C (the grandfather provision) allows investors to bring ISDS claims with respect to legacy investments during the transition period', or an equivalent formula. Rather, the specific indication in the note that arbitration is allowed '*where the alleged breach took place before entry into force of the USMCA'* indicates that there was no intention to extend the offer to arbitrate where the alleged breach took place after the entry into force of [USMCA].") (emphasis in original).

[124] Claimant's argument also ignores public statements by officials of the USMCA Parties that do not fit its narrative. For example, Canada's Deputy Prime Minister Chrystia Freeland issued a statement on the USMCA's entry into force, and the accompanying "Quick Facts" explain that the new agreement "*removes* the investor-state dispute resolution system, which has allowed large corporations to sue the Canadian government for regulating in the public interest." Statement by the Deputy Prime Minister on the entry-into-force of the new NAFTA, at 2 (June 30, 2020) (R-0018) (emphasis added); *see also Chrystia Freeland says the new trade deal prevented possible widespread economic disruption*, CANADA'S NATIONAL OBSERVER, at 6 (Oct. 19, 2018) (R-0019); Deputy Prime Minister letter to party leaders regarding the new NAFTA, at 3 (Jan. 26, 2020) (R-0020). Minister Freeland made no reference to investors' continued ability to hold Canada to the NAFTA's substantive investment obligations for three years after its termination. The Undersecretary for North America in Mexico's foreign ministry made similar statements in a factsheet: "It was agreed that the **Investor-State Dispute Settlement** mechanism [under the USMCA] will **not apply to Canada**." Secretaría de Relaciones Exteriores, United States – Mexico – Canada Agreement (USMCA): Investment and Investor-State Dispute Settlement Mechanism (emphases in original) (R-0021). Again, there was no qualification suggesting that the NAFTA's substantive investment obligations would continue to bind Canada for an additional three years. The Canadian and Mexican understanding of how the USMCA curtailed ISDS coincides with the skeptical views of ISDS held by the lead U.S. negotiator of the USMCA, the U.S. Trade Representative Robert Lighthizer. For example, during a 2017 hearing, Ambassador Lighthizer stated that ISDS was "troubling to me on a variety of issues and on a variety of levels." President's Trade Policy Agenda and Fiscal Year 2018 Budget, Hearing Before the Senate Committee on Finance, S. Hrg. 115–247, at 21 (June 21, 2017) (R-0022); *see also* U.S. Trade Policy Agenda, Hearing Before the House Committee on Ways & Means, Serial No. 11-FC08, at 19-20 (Mar. 21, 2018) (R-0023); 2019 Trade Policy Agenda: Negotiations with China, Japan, the EU, and UK; new NAFTA/USMCA; U.S. Participation in the WTO; and other matters, Hearing Before the House Committee on Ways & Means, Serial No. 116-27, at 61, 85-86 (June 19, 2019) (R-0024). Ambassador Lighthizer later recalled that, while negotiating NAFTA's replacement, he "was all in on killing ISDS in NAFTA." ROBERT LIGHTHIZER, NO TRADE IS FREE 226-27 (2023) (R-0025).

98. The consequences of that conclusion are clear. The NAFTA's termination released the United States and the other NAFTA Parties from any further obligations under its substantive provisions. The United States was therefore not bound by the NAFTA's substantive investment obligations when the permit for the Keystone XL pipeline was revoked on January 20, 2021. As a result, the permit revocation cannot have breached the NAFTA's substantive investment obligations. Claimant's claims based on the permit revocation accordingly are outside the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C, which is limited to claims for breach of specified NAFTA obligations. Claimant's claims must therefore be dismissed.

III. Claimant Has Failed to Establish the Tribunal's Jurisdiction *Ratione Materiae*

99. Claimant's case should also be dismissed for lack of jurisdiction *ratione materiae* because Claimant cannot demonstrate that it had an investment within the meaning of USMCA Annex 14-C and NAFTA Chapter 11 on January 20, 2021, when the conduct at issue occurred.[125] The simple facts are that Claimant's financial contribution in the United States was always intended to be temporary, and that Claimant withdrew that financial contribution as anticipated on January 8, 2021, weeks before the revocation of the permit for the cross-border portion of the Keystone XL pipeline. The remaining aspects of Claimant's alleged "investment" either do not qualify as

[125] NAFTA tribunals also have always looked to the date of the measure to determine the protected "investor" and "investment." *See, e.g.*, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award Part VII-Annex, 7 (Aug. 25, 2014) (RL-0026) (finding that "*at the relevant time*" "*on the date of the alleged NAFTA breaches*," "*Apotex's ANDAs could not (yet) be characterised as 'property' for the purposes of NAFTA Article 1139(g), and (b) . . .* "); *ADF Group Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 152 (Jan. 9, 2003) (RL-0027) (in determining whether the treatment afforded the claimant constituted a breach of Article 1102 of the NAFTA, the tribunal noted that the "scope of application of Article 1102 is indicated by the breadth of the definitional scope of the critical term 'investment'").

investments under USMCA Annex 14-C and NAFTA Article 1139, or were outside of the United States.

100. **Part A** of this section will provide the legal framework for assessing an "investment" under Chapter 11 of the NAFTA and Annex 14-C of the USMCA. **Part B** details the relevant facts related to Claimant's agreement with TC Energy. **Part C** explains why, based on these facts, Claimant cannot show that it had an "investment" "in the territory of" the United States on the date of the permit revocation, and thus why the Tribunal lacks jurisdiction *ratione materiae* over Claimant's NAFTA Article 1116 claim. **Part D** explains that the Tribunal also lacks jurisdiction *ratione materiae* over Claimant's NAFTA Article 1117 claim.

A. The Legal Requirements for an "Investment" Under Paragraph 6 of USMCA Annex 14-C and Chapter Eleven of NAFTA

101. USMCA Annex 14-C provides the basis for determining whether there is a qualifying investment supporting the Tribunal's jurisdiction.[126] Paragraph 6(a) of Annex 14-C provides that:

> "legacy investment" means an *investment of an investor of another Party in the territory of the Party* established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement[.]"[127]

This provision details several requirements to establish a "legacy investment" subject to Annex 14-C. As relevant here, Claimant must show that it was an "investor of another Party" with an "investment" "in the territory of" the United States.

102. Paragraph 6(b) of Annex 14-C provides further that the term "investment" has the meaning accorded to it in NAFTA Article 1139. NAFTA Article 1139 provides an exhaustive list of assets

[126] VCLT, art. 31(1) (RL-0017) (providing 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.").
[127] Annex 14-C ¶ 6(a) (R-0002 *bis*) (emphasis added).

and interests that may constitute an "investment" for purposes of Chapter 11. To constitute an "investment" for purposes of Annex 14-C, an asset must qualify for one of the following Article 1139 categories:

> **investment** means:
>
> (a) an enterprise;
>
> (b) an equity security of an enterprise;
>
> (c) a debt security of an enterprise
>
> (i) where the enterprise is an affiliate of the investor, or
>
> (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;
>
> (d) a loan to an enterprise
>
> (i) where the enterprise is an affiliate of the investor, or
>
> (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
>
> (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
>
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

> (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
>
> (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
>
> but investment does not mean,
>
> (i) claims to money that arise solely from
>
> (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
>
> (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
>
> (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)[.]

103. By its ordinary meaning, an "investment" also has several hallmark characteristics.[128] These characteristics, which reflect not only legal interest but also economic interest, may include the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and/or duration.[129] NAFTA Chapter 11 protected "investments" as that term is commonly

[128] *See, e.g.*, *Patel Engineering Ltd. v. The Republic of Mozambique*, PCA Case No. 2020-21, Final Award ¶ 293 (Feb. 7, 2024) ("*Patel Engineering* Award") (RL-0093) ("[T]he asset must indeed qualify as an investment, by meeting the objective and inherent features which are shared by all investments."); *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award ¶ 80 (Apr. 30, 2014) ("*Nova Scotia* Award") (RL-0092) ("No matter what the forum, the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment.").

[129] The hallmark characteristics of an investment – described as "well-established features" representing the "minimum requirements for an investment" – have been broadly applied in both ICSID and non-ICSID arbitrations. *See Nova Scotia* Award ¶ 84 (RL-0092). For ICSID cases, *see Nova Scotia* Award ¶¶ 81, 92-97 (RL-0092) ("The term investment carries inherent features as part of its ordinary meaning and these must be taken into account by the Tribunal" and "[a] commitment to simply pay money in the future after delivery of goods is inadequate to be considered as the contribution which forms the basis of an investment."); *Poštova Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award ¶ 360 (Apr. 9, 2015) (RL-0096); *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award ¶ 170 (Oct. 17, 2013) (RL-0095); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on

understood, and did not protect transactions in which the alleged investor lacked an economic interest.

104. Because the Tribunal is "making a final finding" on these issues, the burden of proof lies "fairly and squarely" on Claimant to demonstrate that it had an investment in the United States within the meaning of Chapter 11 of the NAFTA and Annex 14-C.[130]

B. The Nature of Claimant's Activities

105. **Background:** Claimant's alleged investments relate to TC Energy's efforts to construct the Keystone XL pipeline, which would have transported crude oil produced in the Western Canadian Sedimentary Basin from Alberta, Canada into the United States (the "Project"). By early 2020, several potential funders had confirmed that they would not invest in the Project.[131] The

Jurisdiction ¶ 52 (July 23, 2001) (RL-0094). For non-ICSID cases, *see Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Award ¶ 155 (Aug 3, 2022) (RL-0098) ("[I]nherent in the act of 'investing' is an objective element: a requirement of a positive act that involves some sort of contribution to acquire the asset or enhance its value, coupled with an expectation or desire that the asset will produce a return over a period of time, with the possibility or risk that it may not do so (with the result that the contribution might be forfeited in part or in whole)"); *Romak SA v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award ¶ 207 (Nov. 26, 2009) ("*Romak* Award") (RL-0097) ("[T]he term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk") (emphasis in original); *see also* Campbell McLachlan et al., International Investment Arbitration: Substantive Principles 217, 229, 262 (2d ed. 2017) ("McLachlan") (RL-0028) ("In a non-ICSID case, the notion of 'investment' in a BIT still has two aspects: (a) *a legal aspect*—the asset belonging to the claimant, being an asset of the type listed in the BIT; and (b) *an economic aspect*—'a commitment of resources' or 'contributions that have created such . . . assets'.[] Both elements must be present to constitute an investment.") (citations omitted); Douglas, 163-64 ¶ 340 (RL-0038 *bis*) ("[A]n investment, in order to qualify for investment treaty protection, must incorporate certain legal and economic characteristics. . . . It is essential that an investment have *both* the requisite legal and economic characteristics") (emphasis in original).

[130] *Bridgestone Licensing Services, et al. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶ 153 (Dec. 13, 2017) (RL-0090). *See also* G.A. Res. 31/98, UNCITRAL Arbitration Rules, Article 24 (1976) (R-0026) ("Every party shall have the burden of proving the facts relied on to support his claim or defence."); BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS 334 (2006) (RL-0091) ("[T]he general principle [is] that the burden of proof falls upon the claimant[.]"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) (CLA-24) ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence") (quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (May 23, 1997)).

[131] *See, e.g.*, T. Berman, *Kenney's billions for Keystone XL is ballast for a sinking ship*, Canada's National Observer, p. 2, https://www.nationalobserver.com/2020/04/07/opinion/kenneys-billions-keystone-xl-ballast-sinking-ship (Apr. 7, 2020) (R-0027) ("Over the last three years, some of the biggest banks and international financiers in the world –

Government of Alberta (the "GoA") therefore decided to provide financing for the Project itself.[132] The GoA explained that it supported the Project because it would "create over 1,400 direct and 5,400 indirect jobs in Alberta during construction and [] generate an estimated $30 billion in tax and royalty revenues for future generations of Albertans and Canadians."[133]

106. To realize this support, the GoA encouraged Claimant, a state enterprise, to enter into an Investment Agreement with a TC Energy subsidiary, TCPL, on March 31, 2020.[134] That agreement contemplated that Claimant would (1) temporarily fund a U.S. SPV, (2) fund a Canadian SPV, and (3) provide a loan guarantee to facilitate TC Energy's ability to secure private funding.[135] The Parties' experts explain that the Canadian and U.S. SPVs were responsible for administering the costs of construction of the Keystone XL pipeline on each side of the Canada-U.S. border, respectively.[136]

HSBC, BNP Paribas, Natixis, ING, insurance and investment giant Axa, and Sweden's largest national pension fund, AP7 – confirmed they would no longer provide financing for oilsands projects, including the Keystone XL pipeline.").

[132] *See, e.g.*, G. Dembicki, *Jason Kenney's Bad Bet on a Risky Pipeline Project*, The Tyee, https://thetyee.ca/Analysis/2020/04/04/Jason-Kenney-Bad-Bet-Risky-Keystone-XL-Pipeline/ (Apr. 4, 2020) (R-0028) (reporting that "the U.S. ratings agency Moody's responded [to Alberta's financing] by downgrading TC Energy's credit rating from stable to negative."); Moody's, *Rating Action: Moody's changes TransCanada's and most subsidiaries outlooks to negative from stable, affirms ratings* (Mar. 31, 2020) (R-0029).

[133] Government of Alberta, *Provincial investment kick-starts KXL pipeline* (Mar. 31, 2020) (R-0003), https://www.alberta.ca/release.cfm?xID=69965D6D6EE7A-92F8-DD89-BBB9E1FE323BD2DD ("The government is backstopping the project to enable TC Energy to begin immediate construction on the Alberta portion of the pipeline."). *See also* Claimant's Memorial ¶ 66 ("Alberta as a province also stood to benefit during the construction period with jobs and tax revenues coming straight back from an initial investment."); Claimant's Witness Statement of Adrian Begley ¶ 15 ("The Project's construction constituted a significant economic activity in Alberta at the time, and Alberta expected to benefit from the creation of jobs as well as tax revenues generated by the initial investment.").

[134] Claimant's Memorial ¶¶ 66-67.

[135] *See* Investment Agreement between TransCanada Pipelines Ltd. and APMC, [redacted] (C-110); [redacted] (C-284).

[136] [redacted]

107. **Class A Shares in the U.S. SPV:** [redacted]

[redacted]

108. [redacted] Claimant provided USD480,868,163 to the U.S. SPV, funneled through its two subsidiaries, 2254746 Alberta Ltd. ("Canadian Holdco" in the above chart) and 2254746 Alberta Sub Ltd., a Delaware corporation (the "Limited Partner," or "APMC US Partner" [redacted][138] The U.S. SPV, in turn, provided the equivalent value in Class A shares, which were held by the Limited Partner.[139] For its Class A shares, the Limited Partner was entitled to certain "accretion rights" that acted like interest, entitling Claimant to a flat 6% per annum return on its contribution.[140]

137 [redacted]
138 [redacted]
139 [redacted]
140 *See* [redacted]

109. Critically, the Investment Agreement [redacted]

110. On January 8, 2021, after TC Energy was able to secure private financing from the Royal Bank of Canada for the Project, TC Energy exercised its repurchase right.[145] TC Energy used the amount it obtained from Royal Bank of Canada to fund the U.S. SPV, which in turn bought out and cancelled Claimant's Class A shares in the U.S. SPV.[146] Claimant contends that the amount

[141] *See* Investment Agreement, [redacted] (C-110); [redacted]
[142] Investment Agreement, [redacted] (C-110); [redacted]
[143] [redacted]
[144] [redacted]
[145] [redacted] (C-273); [redacted] (C-274). *See also* Notice of Arbitration ¶ 42; Claimant's Memorial ¶¶ 81, 206-207; [redacted] Claimant's Witness Statement of Adrian Begley ¶ 43 ("With APMC's support and with its backstop guarantee as promised under the Investment Agreement, *TCPL had secured a* [redacted]
[146] [redacted]

the U.S. SPV paid to the Limited Partner was USD497,269,685, consisting of the original investment amount (USD480,868,163) plus the Class A accretion accumulated to that date (USD16,401,522).[147] [redacted]

111. In other words, two weeks before the date of the alleged breach in this case (January 20, 2021), Claimant had effectively relinquished its U.S. economic interests in the Project, leaving neither cash nor shares (save for a *de minimis* amount) in the United States.

112. **Class B and C Shares:** The relevant agreements also contemplated the possibility of Claimant acquiring Class B and C shares in the U.S. SPV. Claimant did not have these shares, however, on the alleged breach date of January 20, 2021.

113. At the time of the permit revocation, only TC Energy owned Class B shares in the U.S. SPV. [redacted]

[147] *See* [redacted]
[148] *See* [redacted]
[149] [redacted]
[150] *See* Investment Agreement, [redacted] (C-110).
[151] *See* Investment Agreement, [redacted] (C-110); [redacted]
[152] Investment Agreement, [redacted] (C-110).

[redacted]

114. Claimant also did not hold Class C shares on the date of the permit revocation. Under the Investment Agreement, Claimant was not entitled to Class C shares unless Claimant repaid any debt financing TC Energy obtained for the Project, pursuant to the loan guarantee Claimant had provided for such financing.[154] [redacted]

115. **The Limited Partner and General Partner:** In addition to the U.S. SPV, Claimant addresses two other U.S. entities as part of its alleged "investment." These two entities were established to facilitate Claimant's contribution to the U.S. SPV.

116. First, Claimant fully owned the Limited Partner through which, as discussed above, Claimant provided its capital contribution to the U.S. SPV, and which held the Class A shares in the U.S. SPV.[157] After January 8, 2021, however, when the Class A shares were sold and the money returned to Claimant in Canada, the Limited Partner was an empty shell, holding neither

[153] Investment Agreement, [redacted]

[154] *See* Investment Agreement, [redacted] (C-110) [redacted]

[155] [redacted] of the Investment Agreement (C-110).

[156] [redacted]

[157] Investment Agreement, [redacted] (C-110); *see also id.* [redacted]

money nor shares save for USD1,000 in remaining Class A shares. Claimant has not asserted that the Limited Partner had any function other than to act as a passthrough for funding to the U.S. SPV. There was thus no independent financial interest in Claimant's ownership of the Limited Partner.

117. In addition, Claimant was a partner in the U.S. SPV General Partner (181531115 LLC) (the "General Partner," or "US SPV GP" [redacted], which was registered in the United States and which it co-owned with TC Energy.[158] The General Partner was a legal mechanism whose sole purpose was to manage the U.S. SPV. TC Energy was the manager of the General Partner, which gave it broad power to manage the activities of the U.S. SPV and another entity, U.S. Carrier GP.[159] Claimant, by contrast, had a much more limited role in the General Partner. Claimant's membership in the General Partner only gave it certain approval rights over the U.S. SPV, such as authorizing the U.S. SPV to admit a new limited partner or granting liens over the assets of the U.S. SPV.[160] In any event, as with the Limited Partner, Claimant had no financial interest in the General Partner; it never made a financial contribution to the General Partner and, by the terms of the Investment Agreement, only had a "non-economic" interest in the General Partner.[161]

* * *

118. Put simply, Claimant's agreement with TC Energy was to provide bridge financing for the U.S. portion of the Project, in the hopes that a private lender would step in. Claimant would

[158] Claimant's Observations on the Request for Bifurcation ¶ 45; Claimant's Rejoinder on the Request for Bifurcation ¶ 29.

[159] [redacted]

[160] [redacted]

[161] Investment Agreement, [redacted] (C-110) [redacted]

withdraw its financing and trade in its Class A shares as soon as TC Energy obtained private financing, which it secured by early January 2021. On January 8, 2021, therefore, Claimant sold its Class A shares in the U.S. SPV. Claimant was refunded its original financing amount with interest, and Claimant repatriated these funds to Canada. Claimant had no Class B or Class C shares in the U.S. SPV at that time. Claimant thus had no investment in the U.S. SPV when the permit was revoked, and its ownership interests in the Limited Partner and General Partner were non-economic in nature.

C. The Tribunal Lacks Jurisdiction *Ratione Materiae* Over Claimant's NAFTA Article 1116 Claim

119. Claimant has failed to demonstrate an "investment" "in the territory of" the United States at the time of the alleged breach that meets the requirements of the NAFTA and paragraph 6 of Annex 14-C of the USMCA, sufficient to sustain a claim on its own behalf under NAFTA Article 1116(1).[162]

120. In its Memorial, Claimant failed to set out the specific nature of its investment within the meaning of Chapter Eleven of the NAFTA.[163] In response to the United States' submissions on bifurcation, Claimant set out for the first time the specific provisions of Article 1139 on which it relied in alleging that it had an "investment," focusing on Articles 1139(a), (e), (f), and (h). We will address each of these provisions below while addressing the specific transactions that Claimant asserts are "investments." Claimant also made certain concessions with respect to all three prongs of its participation in the Project. Specifically, Claimant concedes that:

[162] Notice of Arbitration ¶ 1.
[163] *See* Claimant's Memorial ¶¶ 206–209.

- with respect to the U.S. SPV: "it is true that the Investment Agreement structure involved a buyback of APMC's US Class A interests on 8 January 2021,"[164]
- with respect to the Canadian SPV: "the direct ownership of Canadian interests is not sufficient for Claimant to have an appropriate investment in this case,"[165] and
- with respect to the loan guarantee, "[t]he loan guarantee is not an Article 1139 interest or investment."[166]

121. Claimant nonetheless relies on a supposed "network of circumstances"[167] to conjure the aura of an investment in the United States. Specifically, Claimant's theory now appears to be that, at the time of the alleged breach, it had an overall "investment" that included several distinct parts: (1) an "enterprise" in the United States through its interests in the U.S. SPV, Limited Partner, and General Partner;[168] (2) "accretion rights" that were used solely to calculate the value of Claimant's shares in the Canadian SPV;[169] (3) Class B conversion rights in the U.S. SPV that were not effectuated as of January 20, 2021;[170] and (4) rights to Class C shares in the U.S. SPV that were not effectuated as of January 20, 2021.[171] As discussed in more detail below, none of these circumstances qualify as an investment within the territory of the United States as required under

[164] Claimant's Observations on the Request for Bifurcation ¶ 43.
[165] Claimant's Rejoinder on the Request for Bifurcation ¶ 31.
[166] Claimant's Rejoinder on the Request for Bifurcation ¶ 36. Claimant argues that, instead, the guarantee is "connected through a contractual network to elements which were Claimant's investments as defined by Article 1139." *Id.* Claimant also states that the debt guarantee was a "potential . . . contract obligation for Claimant to pay." Claimant's Observations on the Request for Bifurcation ¶ 43. Claimant says it "gave [the] loan guarantee in consideration of a network of circumstances which are covered by NAFTA Article 1139." *Id.*
[167] Claimant's Observations on the Request for Bifurcation ¶ 43.
[168] Claimant's Observations on the Request for Bifurcation ¶ 45; Claimant's Rejoinder on the Request for Bifurcation ¶¶ 27–30.
[169] Claimant's Observations on the Request for Bifurcation ¶ 52; Claimant's Rejoinder on the Request for Bifurcation ¶¶ 32–33.
[170] Claimant's Observations on the Request for Bifurcation ¶ 50 & n.69.
[171] Claimant's Observations on the Request for Bifurcation ¶ 51; Claimant's Rejoinder on the Request for Bifurcation ¶ 31.

Annex 14-C of the USMCA, and the Tribunal therefore lacks jurisdiction over Claimant's claims. The "network of circumstances" of these transactions cannot constitute an investment when none of its constituent parts is an investment.

1. None of the Companies in the United States Constituted an "Investment"

122. Claimant first invokes Article 1139(a) to argue that the three U.S.-registered companies that supported its funding of the Project constituted an "enterprise."[172] Unfortunately for Claimant, on the date of the permit revocation, none of the U.S. SPV, Limited Partner, or General Partner constituted an "investment" within the meaning of NAFTA Chapter 11.

123. **U.S. SPV:** First, as discussed above, Claimant had relinquished its Class A shares in the U.S. SPV two weeks before the alleged breach date. Claimant had no substantial ownership interest in the U.S. SPV after the sale of its Class A shares, and thus the U.S. SPV cannot itself be considered Claimant's "investment." Claimant has argued that "[t]he US Class A interest repurchase of January 2021 did not result in any change with respect to APMC's US-based ownership status regarding the US SPV,"[173] but this obviously cannot be correct; by its own description, Claimant relinquished its ownership interest in the U.S. SPV when it sold "substantially all" of its shares.[174]

124. Claimant further argues that because the loan required for TC Energy's purchase of Claimant's Class A shares was "backstopped by APMC's guarantee," "APMC's investment in equity in the US SPV was still at risk."[175] While it is true that Claimant guaranteed the loan that TC Energy obtained in order to purchase Claimant's shares, it is impossible that "APMC's

[172] Claimant's Observations on the Request for Bifurcation ¶ 45.
[173] *Id.*
[174] Notice of Arbitration ¶ 42; *see also* Claimant's Memorial ¶ 81.
[175] Claimant's Memorial ¶ 81.

investment in equity" was at risk after the purchase date, because it had no such investment in equity. As for the risk that TC Energy would trigger Claimant's obligation to repay its loans, that was a contractual matter between three Canadian entities – Claimant as guarantor, TC Energy as debtor, and Royal Bank of Canada as lender – that had no connection to the United States as an investment or otherwise, as Claimant has conceded.[176]

125. **Limited Partner and General Partner:** Second, while Claimant maintained technical ownership interests in the Limited Partner and General Partner, these were not "investments" under the NAFTA because Claimant lacked an economic interest in those entities. Claimant has not asserted that the Limited Partner was itself financed; it was merely a passthrough for Claimant's funding on the way to and from the U.S. SPV. And while the Limited Partner at one time held the Class A shares of the U.S. SPV, those shares had virtually all been sold. On the alleged date of breach, the Limited Partner was an empty vessel, containing neither money nor shares save for a *de minimis* amount.

126. As for the General Partner, Claimant never made any financial contribution and had no financial interest in this entity at any time. The Investment Agreement [redacted][177]

127. Thus, while Claimant maintained technical ownership interests in the Limited Partner and the General Partner, the lack of any economic interest in either the Limited Partner or the General

[176] Claimant's Rejoinder on the Request for Bifurcation ¶ 36.
[177] Investment Agreement, [redacted] (C-110) [redacted] While Claimant asserts that it had indirect interests in other entities through the General Partner, those interests must also have been "non-economic" by virtue of its non-economic interest in the General Partner. *See* Claimant's Rejoinder on Bifurcation ¶ 29.

Partner renders those entities outside the scope of an "investment" on the alleged date of breach.[178] There is certainly no loss associated with Claimant's ownership interests in those entities caused by the alleged measure, confirming that there was no economic interest in these entities in the first place.

128. [redacted] illustrates the lack of investment in the alleged enterprises on the alleged date of breach:

[redacted]

2. The Class A "Accretion Rights" Related to the Canadian SPV Did Not Qualify as an Investment "in the Territory" of the United States

129. Claimant also cannot rely on the "accretion rights" associated with the Class A shares to establish an "investment." As explained above, pursuant to the Limited Partnership Agreement

[178] *See, e.g., Romak* Award ¶ 207 (RL-0097) (explaining that the ordinary meaning of the term "investment" includes well-established "characteristics" of an investment such as a contribution); *see also supra*, n.129. [redacted]

for the U.S. SPV, Claimant was entitled to certain "accretion rights," or flat-rate interest, on the Class A shares held.[179] Claimant asserts that these "accretion rights" constitute "investments" under Article 1139(h).[180] By January 20, 2021, however, Claimant had divested itself of substantially all Class A interests in the U.S. SPV, thereby eliminating any "accretion rights" in that entity.[181]

130. In its Memorial, Claimant attempts to mask this obvious jurisdictional flaw by alleging that "[a]lthough the equity contribution in the United States was returned to APMC," the value of the alleged equity – *i.e.*, the accrued accretion or interest earned – "would thereafter be factored into the *Canadian* SPV Class A rights buy back price."[182] Claimant further argues that "[h]ow the interests in the accretion rights ultimately reached Claimant are clearly not relevant."[183]

[redacted]

[179] *See* [redacted]
[180] Claimant's Rejoinder on the Request for Bifurcation ¶¶ 32-33.
[181] Notice of Arbitration ¶ 42; Claimant's Memorial ¶ 81.
[182] Claimant's Memorial ¶ 81 (emphasis added); *see also id.* ¶ 207 (Claimant alleges that with the repurchase of the U.S. Class A shares, its accretion rights were "converted to rights through the Canadian SPV.").
[183] Claimant's Rejoinder on the Request for Bifurcation ¶ 32.
[184] *See* [redacted]
[185] [redacted]

[redacted]

[redacted]

[redacted]

131. [redacted]

[redacted]

To be clear, the U.S. Class A shares had been sold and therefore did not themselves accrue value through accretion rights; instead, Claimant's interest in the Canadian SPV was calculated to include, as an accounting fiction, the value of the accretion rights in the U.S. SPV Class A shares as if they had not been terminated.[187] Claimant alleges that it is this "right" to the accretion value of the Class A shares in the U.S. SPV that amounted to an investment in the United States under

[186] [redacted]

[187] *See, e.g.*, [redacted]

Article 1139.[188] However, [redacted]

132. The United States has not consented to arbitrate claims related to supposed investments in Canada – Claimant's interests in the Canadian SPV – regardless of how the value of that Canadian investment may have been calculated. Indeed, NAFTA tribunals have consistently denied jurisdiction over investments where the "activities center[]" in the home state.[190] As the *Bayview* tribunal explained, "NAFTA Chapter Eleven was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investments may be affected by measures taken by another NAFTA

[188] Claimant's Rejoinder on the Request for Bifurcation ¶ 33 ("Claimant actually had (and not conditionally) at the time of the Revocation through the contractual accretion rights, interests which arose from the commitment of capital in the United States based on a preferential right to share in the income of US SPV. That APMC had that interest by contractual payment flows from Canadian entities creates no barrier to consideration of those interests under the Article 1139 definitions.").

[189] *See, e.g.*, [redacted] Claimant also states for example: "[t]hrough its interest in the US SPV, *which was converted to rights through the Canadian SPV*, APMC was entitled to share in the income and profits of US SPV . . . ." Claimant's Memorial ¶ 207 (emphasis added); *see also id.* ¶ 81 ("Although the equity contribution in the United States was returned to APMC with the accretion owed to date, the value of a continuing Class A accretion based on APMC's total equity contribution in the United States which had been bought back *would thereafter be factored into the Canadian SPV Class A rights buy back price*.") (emphasis added).

[190] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* NAFTA/UNCITRAL, Award ¶ 5 (Jan. 12, 2011) ("*Grand River* Award") (RL-0029) (finding that "activities centered on the manufacture of cigarettes at Grand River's manufacturing plant in Canada for export to the United States" was not an investment); *see id.* ¶ 6 (noting that investors must carry on "substantial business" in the host state); *see also, e.g.*, *Archer Daniels Midland* Award ¶ 273 (RL-0036) ("In a case such as the one at bar, this would exclude investments of ADM and TLIA located outside of Mexico, even if such investments are destined to promote fructose sales in Mexico."); *Canadian Cattlemen* Award ¶ 233 (RL-0033) (finding that it lacked jurisdiction over an alleged NAFTA breach "where all of the Claimants' investments at issue are located in the Canadian portion of the North American Free Trade Area"); *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶ 160 (June 14, 2013) ("*Apotex* Award on Jurisdiction") (RL-0037) (denying jurisdiction over claims because "all the activities relied upon in relation to both sertraline and pravastatin products occur in Canada, not in the territory of the United States"); *Bayview Irrigation District et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award (on Jurisdiction) ¶ 104 (June 19, 2007) ("*Bayview* Award") (RL-0034) (concluding that the claimants were not "'foreign investors' in Mexico. Rather, they were domestic investors in Texas. The economic dependence of an enterprise upon supplies of goods – in this case, water – from another State is not sufficient to make the dependent enterprise an 'investor' in that other State.").

State Party."[191] The *Grand River* tribunal similarly concluded that it did not have jurisdiction "over claims that are based upon injury to investments located in one NAFTA Party on account of actions taken by authorities in another."[192] For these reasons, the alleged "accretion rights," which were nothing more than a mechanism for calculating the value of Claimant's Class A shares in the Canadian SPV, were not an investment in the United States.

3. The Class B Conversion Rights Did Not Qualify as an Investment

133. Claimant next alleges that [redacted] That is an interest in line with category (e) of Article 1139."[193] Here, [redacted] This theoretical possibility never came to pass.

134. In order to effectuate these rights, Claimant would have first been required [redacted] At the time of the challenged measure, Claimant had no such shares to convert. It had sold its Class A shares prior to the date of the alleged breach, and did not hold any Class C shares on the date of the permit revocation (and, in any event, after January 4, 2021, [redacted]

[191] *Bayview* Award on Jurisdiction ¶ 103 (RL-0034); *id.* ¶ 98 (concluding that a "salient characteristic" of the definition of investment in NAFTA Chapter 11 is "that the investment is primarily regulated by the law of a State other than the State of the investor's nationality").
[192] *Grand River* Award ¶ 87 (RL-0029).
[193] Claimant's Observations on the Request for Bifurcation ¶ 50, n.69 (citing Investment Agreement, [redacted] (C-110)); *see also* Claimant's Memorial ¶¶ 84, 206-207.
[194] Investment Agreement, [redacted] (C-110).
[195] Investment Agreement, [redacted] (C-110); *see also id.*, [redacted]

[redacted] Thus, on the date of the permit revocation, Claimant did not hold any shares that could be "converted" to Class B shares.

135. [redacted] The possibility that Claimant might choose to make an investment in the future is not itself an investment, and Claimant provides no support for its argument that this contingent possibility was an "interest" under Article 1139(e). In fact, the plain language of Article 1139(e) demonstrates that it is limited to an interest that the investor held at the relevant time; it does not extend to the potential for an investor to acquire an interest in the future by making a new investment. Article 1139(e) defines an investment as "an interest in an enterprise that ***entitles*** the owner to share in income or profits of the enterprise."[198] [redacted] did not presently ***entitle*** Claimant to share in the income or profits of the U.S. SPV on the date of the alleged measure. [redacted]

136. NAFTA tribunals have consistently declined to recognize mere contingent interests as investments under Article 1139.[200] For example, the tribunal in *Lion v. Mexico* found that

[196] [redacted]

[197] Investment Agreement, [redacted] (C-110).

[198] NAFTA Article 1139(e) (R-0004 *bis*) (emphasis added).

[199] *See* [redacted]

[200] *See Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶¶ 142, 257-258 (Mar. 31, 2010) (RL-0059) (finding that "[e]xpropriation cannot affect potential interests[,]" and that the expectation of contracts executed in the future was an "uncertain expectation, like the goodwill considered in *Oscar Chinn*, [that] does not appear to provide a solid enough ground on which to construct a legitimately affected interest"); *Bayview* Award on Jurisdiction ¶ 118 (RL-0034) (finding no property rights where, among other things, exploitation or use of the water requires the grant of a concession under Mexican law, when such concession does not guarantee the existence or permanence of the water); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 208 (Jan. 26, 2006) (RL-0099) ("[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that

mortgages could not be considered property under Article 1139(g), because "[t]heir purpose is to secure the payment of the loan up to the secured amount, and they are activated after the debtor's default only. They are thus contingent rights."[201] In *Apotex Inc. v. United States*, the tribunal similarly considered whether the claimant's tentatively approved drug applications could constitute an "investment" under Article 1139(g).[202] The tribunal rejected the Claimant's argument, finding that "[w]hether or not each of Apotex's ANDAs would have been granted final approval is by no means certain on the evidence. But in any event, the critical enquiry must be as to the nature of the alleged *'property'* as at the date of the alleged breach – not at some future point."[203] In addition to finding that these applications were not "property" under Article 1139(g), the *Apotex* tribunal concluded that they did not constitute "investments" "as contemplated more generally by NAFTA Chapter Eleven."[204]

137. Thus, the possibility that Claimant might have chosen to invest in Class B shares at some point in the future does not constitute an investment on the alleged date of breach.

was subsequently prohibited."); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 118 (Dec. 16, 2002) (CLA-24) (finding no "right" to tax rebates where the right was conditioned upon presentation of certain invoices); *see also Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter D ¶ 17 (Aug. 3, 2005) ("*Methanex* Final Award") (RL-0100) (noting that "items such as goodwill and market share may . . . in a comprehensive taking . . . figure in valuation," "[b]ut it is difficult to see how they might stand alone" as an investment under Article 1139); *see also Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Submission of the United States ¶ 6 (Oct. 28, 2022) (R-0030).

[201] *Lion Mexico Consolidated LP v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction ¶ 122 (July 30, 2018) (RL-0101).

[202] *Apotex* Award on Jurisdiction ¶¶ 177–225 (RL-0037).

[203] *Id.* ¶ 215 (RL-0037).

[204] *Id.* ¶ 224 (RL-0037); *see also Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Award ¶ 291 (Dec. 8, 2022) (RL-0102) (finding that cases assessing the question of whether a proprietary right existed for purposes of an expropriation analysis are "equally applicable to the threshold question of the existence of an 'investment' for the purpose of the jurisdiction of the tribunal"); *see also id.* ¶¶ 309–310 (finding that the claimant's right to acquire shares under a contract could not constitute an investment, and that the claimant had only "personal contractual obligations" that "were not capable of assignment or transfer by the Claimant unless all Parties were to consent").

4. The Class C Shares Did Not Constitute an Investment

138. Finally, Claimant alleges that it had a right to "convert" its Class A interests to Class C interests in order to acquire assets on dissolution of the Project, and that this was an interest in line with Article 1139(f).[205] Article 1139(f) defines an investment as "an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d)."[206]

139. As with the Class B shares, Claimant had no Class C shares on the date of the permit revocation, nor did it have "conversion" rights with respect to the Class C shares.[207] Rather, [redacted]

140. As Claimant did not hold the Class C shares on the date of the permit revocation, and as none of the triggering events specified in the relevant documents had yet come to pass, Claimant was not "entitle[d]" to a share of any "assets of [an] enterprise" on the date of the permit revocation. Claimant's "eligibility" to obtain Class C shares in the future was not an "investment" under

[205] Claimant's Observations on the Request for Bifurcation ¶ 51; Claimant's Rejoinder on the Request for Bifurcation ¶ 31.
[206] NAFTA, Article 1139(f) (R-0004 *bis*).
[207] Even if Claimant had such "conversion rights," Claimant would have no "conversion" rights on the date of the permit revocation because it had relinquished its Class A shares.
[208] *See* Investment Agreement, [redacted] (C-110); [redacted]
[209] [redacted]

Article 1139(f). Indeed, as with the Class B conversion rights, the Class C rights were merely contingent.[210]

D. The Tribunal Lacks Jurisdiction *Ratione Materiae* Over Claimant's NAFTA Article 1117 Claim

141. Claimant asserts its claim not only on its own behalf, but also on behalf of the Limited Partner under NAFTA Article 1117(1).[211] As explained above, on the date of the permit revocation, the Limited Partner was an empty vessel. It did not hold Class A shares in the U.S. SPV save for a *de minimis* amount, it held no Class B or Class C shares in the U.S. SPV, and had transferred the money obtained in the sale of the Class A shares to the Claimant in Canada. Because the Limited Partner did not have an investment in the territory of the United States on the date of the alleged breach, the Tribunal lacks jurisdiction *ratione materiae* over the Limited Partner's claims.

E. Conclusion on the *Ratione Materiae* Jurisdictional Objection

142. In summary, Claimant lacked an investment in the United States on the date of the permit revocation. Prior to the challenged measure, Claimant exited the U.S. SPV and moved the financial interests it might have had in the United States to Canada. Its contractual rights to Class B or Class C shares in the U.S. SPV were merely contingent. On the date of the alleged breach, Claimant, at most, had nominal ownership interests in the Limited Partner and General Partner, but those interests lacked any financial value or risk.[212]

[210] [redacted] Indeed, it appears that the rights Claimant obtained pursuant to the Class C shares that Claimant eventually received – long after the alleged measure – were fully exercised.

[211] Notice of Arbitration ¶ 1.

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

IV. Conclusion

145. For the foregoing reasons, the United States respectfully requests the Tribunal to conclude that it lacks jurisdiction *ratione temporis* and *ratione materiae* over the Claimant's claims and to dismiss them in their entirety.

Respectfully submitted,

[signed]

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objections or defenses, Claimant has not established that the challenged measure "related to" its alleged investment in the United States (*see* NAFTA, art. 1101 (R-0004 *bis*); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL First Partial Award ¶ 147 (Aug. 7, 2002) (RL-0103)), or that it incurred loss or damage by reason of, or arising out of, the alleged breach (*see* NAFTA, arts. 1116 and 1117 (R-0004 *bis*); *S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNICTRAL, First Partial Award ¶ 140 (Nov. 13, 2000) (RL-0104)).