Public Version

IN THE MATTER OF AN ARBITRATION UNDER THE CANADA-UNITED STATES-MEXICO AGREEMENT ("CUSMA"), THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA"), AND THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ("UNCITRAL") ARBITRATION RULES

ALBERTA PETROLEUM MARKETING COMMISSION, Claimant, *v.* **THE GOVERNMENT OF THE UNITED STATES OF AMERICA** Respondent.	**ICSID Case No. UNCT/23/4**

CLAIMANT'S COUNTER-MEMORIAL ON PRELIMINARY OBJECTIONS

16 December 2024

TABLE OF CONTENTS

TABLE OF KEY DEFINED TERMS

APMC	Alberta Petroleum Marketing Commission
APMC US Partner	2254746 Alberta Sub Ltd., the wholly-owned enterprise of APMC and also a limited partner of the US SPV
Canadian SPV	2249158 Investments L.P., the sister entity to the US SPV. Part of the managing partnership for the Canadian investment and assets for the Keystone XL Project
Class A Accretion	Class A Interests that the APMC Canadian Partner and the APMC US Partner were to receive for their capital contributions in the SPVs, which were to accrue with quarterly compounding until the date the Project was completed and in service
CUSMA (or USMCA)	Canada–United States–Mexico Agreement
FOIA	U.S. Freedom of Information Act
Investment Agreement	Investment Agreement between TransCanada Pipelines Ltd. and the Alberta Petroleum Marketing Commission, dated 31 March 2020
Keystone XL (or Project)	Proposed expansion to the Keystone Pipeline System. Original proposal was to add a second pipeline from Alberta to an existing hub on the Keystone Pipeline System in Steele City, Nebraska, as well as connecting the southern portion of the Keystone Pipeline System to refineries on the U.S. Gulf Coast. Proposal was later amended to exclude the Gulf Coast portion
NAFTA	North American Free Trade Agreement
Presidential Permit	Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, granted by the United States on 29 March 2019
Revocation	Executive Order 13990 "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," dated 20 January 2021, which, *inter alia,* revoked the March 2019 Presidential Permit for the Keystone XL Project
SPVs	Special purpose vehicles

TC Energy	TC Energy Corporation and its subsidiaries (prior to May 2019 was known as TransCanada Corporation)
TCPL	TransCanada Pipelines Limited, parent organization of US Carrier
TransCanada LP (or, US Carrier)	TransCanada Keystone Pipeline, L.P., conducted the Keystone XL Project in the United States; holder of the Presidential Permit
US Carrier (or, TransCanada LP)	TransCanada Keystone Pipeline, L.P.; conducted the Keystone XL Project in the United States; holder of the Presidential Permit
US Carrier GP	TC Keystone Pipeline G.P. LLC, a Delaware company and General Partner of US Carrier
[redacted]	[redacted]
US SPV	18153111S Limited Partnership, responsible for administering all of the costs, revenues and management related to the Keystone XL Project
US SPV GP	18153111S LLC, one of two members of the US Carrier GP
USTR	United States Trade Representative

I. INTRODUCTION

1. Claimant submits its Counter-Memorial in response to the United States of America's Memorial on its Preliminary Objections dated 15 October 2024 (the "**Respondent's Memorial on Preliminary Objections**") pursuant to the Tribunal's directions in Procedural Order Nos. 1 and 4 and Annex B.

2. As Claimant detailed in its Memorial dated 16 April 2024, this case stems from President Biden's 20 January 2021 Revocation of the Presidential Permit for the Keystone XL Project.[1] The Biden Administration's initial defence to Claimant's case is based on jurisdictional objections grounded on a faulty interpretation of NAFTA and CUSMA. Some initial background is appropriate before addressing why these objections should be rejected.

A. Background: The Biden Revocation Violated the NAFTA Obligations Incorporated by CUSMA

3. As the largest consumer of oil in the world, the United States' economic and energy security goals necessitate a stable supply of oil.[2] The proposed Keystone XL Project would have helped to meet these needs, facilitating the economic transportation of Albertan oil to refineries on the U.S. Gulf Coast, which are designed to process the type of crude oil primarily produced in Alberta, Mexico, Venezuela, and OPEC.

4. The Project also served as the most environmentally sound means to transport crude oil from Alberta to the United States. According to the U.S. Government's exhaustive environmental assessment of the Project – conducted under multiple Presidential administrations – it was consistently determined that:

a. The Project would not significantly impact the rate of Alberta's oil production and therefore was unlikely to increase greenhouse gas ("**GHG**") emissions;[3] and

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1 Claimant's Memorial, dated 16 April 2024 ("**Claimant's Memorial**"), sec. II.E.

2 *Id.*, sec. II.A.

3 *Id.*, sec. II.B; Expert Report of James Coleman, dated 16 April 2024, paras. 28-29, 36, 38, 43, 45, 51, 54 ("*Over more than a decade of environmental review of the Keystone XL Project, each environmental impact stotement . . . .*

b. In the absence of the Keystone XL Project, crude oil would continue to be transported from Alberta to the United States, but in a less environmentally sound manner, such as by rail, which would result in substantially higher GHG emissions.[4]

5. Notwithstanding these findings, within the first hours of his Administration, President Biden revoked the Keystone XL Presidential Permit, destroying Claimant's investment without providing notice or the opportunity to engage in meaningful consultation. The Revocation was based on public perception rather than the Government's environmental analysis and claimed that allowing the Keystone XL Project to continue would undermine the United States' ability *"to exercise vigorous climate leadership in order to achieve a significant increase in global climate action . . . ."*[5]

6. As further described in Claimant's Memorial, the Revocation was a breach of the United States' obligations under NAFTA Articles 1102, 1103, 1105 and 1110.[6] More specifically the Revocation, which singled out just one pipeline – Keystone XL – was arbitrary, discriminatory, and expropriatory. It was manifestly not based on a rational policy justification, was a denial of due process, and was plainly contrary to the environmental policy of the U.S. Government in respect of climate change.

B. Respondent's Jurisdictional Objections Should be Rejected

7. Respondent seeks to deflect its liability with respect to its manifest breaches of NAFTA obligations by two ill-conceived jurisdictional objections. These objections must be rejected. The Tribunal has summarized Respondent's two objections as follows:

a. First, Respondent claims that CUSMA's Annex 14-C does not provide jurisdiction *ratione temporis*, because Annex 14-C only applies to breaches of obligations of

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reached the same conclusion—rejecting the Keystone XL pipeline would not reduce oil production in Canada and would increase greenhouse emissions by moving more oil transport to rail."), 55-62, 66.

4 Claimant's Memorial, sec. II.B; Expert Report of James Coleman, paras. 28-29, 36, 38, 43, 51, 54-62, 66-69.

5 Exec. Order No. 13990, § 6(d) (20 January 2021), 86 Fed. Reg. 7037 (25 January 2021) (C-3).

6 *See generally* Claimant's Memorial, sec. III.

the NAFTA while it was in force, and the NAFTA was terminated six months before the alleged breach (the *ratione temporis* objection); and,

b. Second, Respondent alleges that Claimant cannot demonstrate that it had an "*investment*" (as defined by NAFTA), particularly when the alleged breach occurred. Claimant has not established that any of its interests in the Keystone XL Project constituted an "*investment*" as defined by CUSMA's Annex 14-C and NAFTA Article 1139 (the *ratione materiae* objection).

8. The first issue involves the interaction of a new treaty, CUSMA, with the treaty it has replaced, NAFTA; in particular, the interpretation of Annex 14-C of CUSMA and the scope of the continuing application of NAFTA Chapter 11 provisions it provides, despite NAFTA's termination. While NAFTA has been replaced, there is no doubt that the CUSMA parties created fresh consent in Annex 14-C for the continuing use of the investment protections of Chapter 11 of NAFTA for an additional three years for a group of "*legacy investments*."

9. The principal object of that enquiry in this case is found in Annex 14-C, paragraph 1, which reads:

> *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:*
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> > *(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.*

10. The beginning of the analysis of such a provision is the interpretation of the text, done in good faith, and with a view to understanding what commitments the treaty parties can reasonably have been understood to attempt to achieve. Here, "[e]*ach Party* [newly] *consents,*

with respect to o legacy investment" the use of arbitration in accordance with Chapter 11 of NAFTA to make claims regarding obligations found in that chapter. It further incorporates the type of complaints that can be made: "*alleg*[ations of] *breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994*[.]" It is a new offer to submit grievances about legacy investments to the standards of Section A of Chapter 11 of NAFTA.

11. As discussed below in Section II, the analysis according to VCLT principles is to first look to the text at issue, and second to any surrounding context, or external evidence of the parties' intent. Respondent has inverted this process, repeatedly stating the assumption that CUSMA was intended to replace NAFTA.[7] But the actual task at hand is interpreting the text, context, and object and purpose of *Annex 14-C*, which is text inherently going beyond the basic purpose of CUSMA to replace NAFTA.

12. The evidence of the CUSMA negotiating parties' conduct from the time of that treaty's negotiation, and from the subsequent statements of negotiators for the treaty parties, also shows an intent to maintain NAFTA Chapter 11 protection for legacy investments for a transitional period.[8] Respondent attempts to dismiss this evidence or does not even address it. Instead, Respondent's arguments are based on questions related to: the Parties' alleged motives for the interpretation of the Annex 14-C text, without providing evidence;[9] the self-interested and *ex post facto* litigation tactics of the CUSMA parties;[10] and misleading comparisons to the CUSMA parties' treaty drafting practice.[11] On the last point, proper scrutiny of treaty text comparisons shows that the issues Respondent has raised are inconsistent with its own past treaty conduct. In addition, these comparisons show that the other CUSMA parties have used specific text absent from Annex 14-C to craft the more limited past-claims-only transitionary regime which Respondent suggests they agreed to in the Annex 14-C text.[12]

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7 *See, e.g.,* Respondent's Memorial on Preliminary Objections, dated 15 October 2024 ("**Respondent's Memorial on Preliminary Objections**"), paras. 30, 40, 45-54, 71-74.

8 *See infra* sec. II.F.ii.

9 *See, e.g., infra* sec. II.D.ii.

10 *See infra* sec. II.E.

11 *See infra* sec. II.F.i.

12 *See infra* sec. II.F.i.

13. This issue of the proper interpretation of Annex 14-C has been reviewed by a prior tribunal in *TC Energy v. United States of America*. It is important to observe that Respondent seeks to substantially rely upon the *TC Energy* award, but fails to mention that the tribunal was divided in its decision. Dissenting Arbitrator Henri Alvarez provided an analysis beginning from the first principle of textual interpretation of the core text at hand in Annex 14-C; he decided that, taken holistically, Annex 14-C extended NAFTA Chapter 11 protection for the limited legacy investment class for a limited period.[13] His opinion then shows that the alleged problems with the extended transitionary coverage of NAFTA Chapter 11 raised by the majority are unfounded, and that the majority ignored, dismissed or misrepresented key supporting evidence on the record.[14] Respondent claims the majority's award on this topic is "*well-reasoned.*"[15] The majority's award, like Respondent's argument, regularly assumes that which it claims it seeks to interpret and determine.[16] The award makes sweeping erroneous assertions regarding evidence,[17] and fundamental mistakes of legal reasoning.[18]

14. As to the second issue for the Tribunal's determination, the question is whether Claimant had a legacy investment, as required under Annex 14-C. Given the definition of a "*legacy investment*" in paragraph 6(a) of Annex 14-C, what Respondent's fresh Annex 14-C consent protected is further defined by NAFTA Article 1139. Claimant certainly made its investment before CUSMA came into force, satisfying one element of a "*legacy investment*." On this second debate, Respondent is trying to excuse itself from liability by focusing on a restructuring of Claimant's investment in January 2021 and making demands of the NAFTA Article 1139 treaty language that it chose not to include either in 1992 when NAFTA was concluded or in any way change in 2018 when Annex 14-C was drafted, rather than respecting the specific language it did choose.

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13 *TC Energy Corp. And TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Dissenting Opinion Arbitrator Henri C. Alvarez, K.C., dated 12 July 2024 ("**Alvarez Dissent**"), paras. 9-10 (CLA-64).

14 Alvarez Dissent, paras. 11-32.

15 Respondent's Memorial on Preliminary Objections, para. 4.

16 *See, e.g., infra* para. 38, n.106.

17 *See infra* paras. 110-11, 113, n.78.

18 *See infra* paras. 40-41, 63-64, 74, n.60, 105.

15. As detailed in Claimant's Memorial, in March 2019, Respondent granted the Presidential Permit for the Keystone XL Project.[19] In March 2020, Claimant agreed to invest in that Project, and spent a year providing nearly US$ 500 million for the construction of pipeline and pumping station facilities and logistical assistance across Montana and Nebraska, as well as funding construction in Canada, for a Project that was on course for completion by 2023 in line with the deadline set by the Presidential Permit.[20] It did so after entering into an Investment Agreement with its Project partner and several ancillary instruments, creating rights and responsibilities across a range of companies and partnership entities in Canada and the United States.[21]

16. On 20 January 2021 when Respondent issued the Revocation, the investment capital Claimant had provided for Project construction in the United States was still at risk, and Claimant was still a partner in the Project with a managerial stake in a group of American enterprises charged with completing construction on that Project, with interests in profit making and sharing in the assets of such enterprises.[22] Those interests satisfied various elements of the Article 1139 of NAFTA categories of an "*investment*", including:

a. Claimant had multiple enterprises inside the territory of the United States, satisfying category (a);

b. Claimant had interests in revenue and profits, and in assets on dissolution which it was forced to exercise, in American enterprises, satisfying categories (e) and (f); and

c. Claimant had a beneficial economic interest arising from capital contribution to enterprises in the United States, satisfying category (h).

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19 Claimant's Memorial, sec. II.B.

20 Witness Statement of Adrian Begley, dated 16 April 2024 ("**Begley Witness Statement**"), paras. 19, 37-45.

21 Claimant's Memorial, sec. II.C.2.

22 Begley Witness Statement, para. 24.

17. Thus, Claimant satisfied the requirement of paragraph 6(a) of Annex 14-C to have a legacy investment. All of those interests were in place when the Revocation occurred. Indeed, that the risk to Claimant from its capital contributions in the United States remained present was made clear by Claimant losing almost its entire investment when it was required to honour a promise to pay for the consequences of Project failure, caused by the Revocation, resulting in losses over US$ 1 billion.

18. This Counter-Memorial is accompanied by the expert opinion of Prof. Christoph Schreuer on the meaning of Annex 14-C, and the supplemental expert opinion of Mr. Patrick Maguire K.C. supplementing his first report on the structure of Claimant's investment in the Keystone XL Project.

II. CUSMA ANNEX 14-C EXTENDS APPLICATION OF CHAPTER 11 OF NAFTA FOR LEGACY INVESTMENTS FOR THREE YEARS

A. International Law Principles of Interpretation Require the Same Good Faith Interpretation of Jurisdictional Text as Any Other Parts of a Treaty

19. The Tribunal and the Parties are agreed that the issues "*are to be determined by reference to, and in the manner provided by, the customary rules of treaty interpretation and termination, as codified in the VCLT.*"[23]

20. VCLT Article 31(1) provides a primary rule of treaty interpretation:

> *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.*[24]

21. The notion of good faith in the interpretation of the text of a treaty is of particular importance in Article 31(1). The VCLT also refers to good faith in its Preamble: "*Noting that the principles of free consent and of good faith and the* pacta sunt servanda *rule are universally recognized*"; and at Article 26, "*Pacta sunt servanda*[,]" "*Every treaty in force is binding upon the*

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[23] Procedural Order No. 4, para. 73; *see also, e.g.,* Respondent's Memorial on Preliminary Objections, paras. 10, 13.

[24] Vienna Convention on the Laws of Treaties, 8 I.L.M. 679 ("**VCLT**"), art. 31(1) (CLA-42).

parties to it and must be performed by them in good faith." As noted in the ILC Commentaries to the draft VCLT, "*the interpretation of treaties in good faith and according to law is essential if the* pacta sunt servanda *rule is to have any real meaning*."[25] More particularly, the ILC Commentaries explain the fundamental significance of good faith in Article 31(1) (as adopted), which:

> *requires that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.*[26]

22. There are no special considerations for the interpretation of particular aspects of treaties or types of treaties under the VCLT. As was noted in the *Mondev* NAFTA Chapter 11 case also involving the United States:

> *In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the* [VCLT], *which for this purpose can be taken to reflect the position under customary international law.*[27]

23. Thus, the interpretation of Annex 14-C should receive the same treatment as any other aspect and function of CUSMA: "*any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.*"[28]

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[25] Draft Articles on the Law of Treaties with Commentaries, II Y.B. OF THE INT'L LAW COMMISSION ("**Draft Articles on the Law of Treaties with Commentaries**"), draft articles 27 and 28, cmt (5) (CLA-43).

[26] Draft Articles on the Law of Treaties with Commentaries, draft articles 27 and 28, cmt (6) (italics omitted).

[27] *Mondev Int'l Ltd. v United States*, ICSID Case No. ARB(AF)/99/2, Award dated 11 October 2022, para. 43 (citations omitted) (CLA-65). *See further* discussion in Expert Report of Prof. Christof Schreuer, dated 16 December 2024 ("**Schreuer Expert Report**"), sec. C.

[28] *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction dated 25 September 1983, para. 14 (CLA-61).

24. In the remainder of this Section, Claimant will set out:

a. In Section II.A, that Respondent has unquestionably consented afresh to arbitrate disputes in Annex 14-C according to conditions which Claimant has satisfied;

b. In Section II.B, the ordinary meaning of paragraphs 1 and 3 of Annex 14-C indicates a new offer to arbitrate pertains to claims incorporating the obligations of NAFTA Chapter 11 for a specific period, not a more limited continuation of NAFTA for pre-existing claims only;

c. In Section II.C, pursuant to VCLT Articles 31(1) and 31(2): (i) the object and purpose of CUSMA, as reflected in its preamble and Protocol, contemplate the incorporation of NAFTA obligations; and (ii) the surrounding context of Annex 14-C, including footnotes 20 and 21 and the definition of a "*legacy investment*" within it, and other drafting in Chapters 14 and 34 of CUSMA, have effective meaning on Claimant's interpretation or are otherwise consistent with it;

d. In Section II.D, that Respondent's appeal to VCLT Article 31(3) is shown to be an appeal to impermissibly modify Annex 14-C, not interpret it; and

e. In Section II.E, pursuant to VCLT Article 32: (i) Respondent's comparison to the CUSMA parties' comparative treaty drafting is incomplete and in fact the parties have drafted specific language to create historic claims continuation regimes differently from how Annex 14-C is drafted; and (ii) evidence of the negotiating parties' intent in drafting Annex 14-C supports Claimant's interpretation.

B. Annex 14-C Unequivocally Grants Jurisdiction *Ratione Voluntatis*

25. Respondent has sought to frame the question of jurisdiction as one of consent, or jurisdiction *ratione voluntatis*, alleging there must be an unequivocal showing.[29] As discussed above, a good faith interpretation of treaty text regarding jurisdictional issues has no special

[29] Respondent's Memorial on Preliminary Objections, para. 9.

requirement of heightened scrutiny. But Respondent in any event sets up a straw man. As previously set out,[30] there is certain and unequivocal consent to arbitration found in paragraph 1 of Annex 14-C, as conditioned by paragraph 3:

- *"Each Party consents, with respect to a legacy investment"* where a *"legacy investment"* is defined at Paragraph 6(a). Although Respondent now also spuriously attacks whether Claimant had an investment under the NAFTA definition and Annex 14-C paragraph 6(a),[31] the basic meaning of a qualifying *"legacy investment"* is not in dispute;
- *" . . . to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex . . . "* Claimant followed the procedures set out in Section B of Chapter 11 of NAFTA, and Respondent makes no objection in this regard;
- *". . . alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994;"* Claimant alleged breach of obligations contained in Chapter 11 Section A at Articles 1102, 1103, 1105 and 1110;
- And finally: *"A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994."* Claimant followed the procedures set out in Section B of Chapter 11 of NAFTA to commence an arbitration before July 2023.

26. Mr. Alvarez concurred in his *TC Energy* opinion as to the conditions of consent under Annex 14-C:

> *In my view, the plain or ordinary language of Annex 14-C to the USMCA offers consent by the State Parties to arbitrate all legacy investment claims, subject only to four conditions.*
>
> *These are that:*
>
> *a) the claim must be with respect to a legacy investment:*

30 Claimant's Memorial, para. 215.

31 *See further infra* sec. III.

> *b) the claim alleges the breach of an obligation under NAFTA Chapter 11, section A;*
>
> *c) the claim must be made under the procedure set out in NAFTA, Chapter 11 section B;* [and]
>
> *d) the claim must be brought within three years of NAFTA's termination.*[32]

27. Clearly, there is no dispute that there is jurisdiction *ratione voluntatis*.

C. VCLT Article 31(1): The Ordinary Meaning of Annex 14-C Paragraphs 1 and 3

i. Annex 14-C, Paragraph 1 Incorporates the NAFTA Chapter 11 Section A Standards into CUSMA for Legacy Investment Claims

28. The plain and ordinary meaning of paragraph 1 of Annex 14-C is to provide fresh consent under a new treaty to arbitrate claims alleging breach of obligations promised by borrowing parts of another treaty to make that new set of promises and offers. Paragraph 1 of Annex 14-C states:

> *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.*

29. The prospective claimant must "*alleg*[e] *breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994*[,]" which Claimant has done here. An obligation under Section A of Chapter 11 refers to the standards therein. Paragraph 1 of Annex 14-C also requires a claimant must make a claim "*in accordance with Section B of Chapter 11*[,]" which sets

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[32] Alvarez Dissent, para. 3 (CLA-64); *see also* Schreuer Expert Report, paras. 27-32.

out the procedures and obligations that Respondent must honour in an arbitral process. Given NAFTA was superseded, such reference to Section B must incorporate it into CUSMA in order to give it continued force within Annex 14-C. Section B is a set of obligations, which as well as setting parameters for a prospective claimant to bring a claim, requires a NAFTA party to follow the procedures of an arbitral process up to and including the State's compliance with any resulting award (at Article 1136). Similarly, "*an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994*" refers to the external source of standards and obligations about which prospective claimants may make future allegations as a result of this new treaty promise. There is no distinction between "*in accordance with*" and "*under*" as incorporating references. In other words, although the obligations are found in Chapter 11 of NAFTA, they have been used and incorporated by Annex 14-C of CUSMA to make a new offer that applies on a prospective basis.

30. Reinforcing that, the sentence is structured to give consent to arbitrate not to some group of "legacy claims", but to claims "*with respect to a legacy investment*" (a defined term discussed further below) which invoke the obligations in Section A of NAFTA Chapter 11.[33] Paragraph 1 of Annex 14-C does not expressly restrict the temporal aspect of the measures[34] that could lead to a claim regarding a legacy investment.[35] The logical construction is that Section A of NAFTA Chapter 11 is incorporated for future claims about "*legacy investments*" as much as is the case with Section B.

31. This interpretation is also consistent with VCLT Article 31(3)(c), which provides that the interpretation of text may also take into account "*any relevant rules of international law applicable in the relations between the parties.*" This is often understood as an expression of integrationist principles in international law.[36] Although there is no particular scope for

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33 *See also* Schreuer Expert Report, para. 45.

34 As defined in NAFTA Article 201(1): "[M]*easure includes any law, regulation, procedure, requirement or practice;*" North American Free Trade Agreement, Can.-Mex.-U.S., 17 Dec. 1992, 32 I.L.M 289 (1993) ("**NAFTA**"), art. 201(1) (CLA-38).

35 *See also* Schreuer Expert Report, para. 43.

36 Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 ICLQ 279 (April 2005) (CLA-66).

discussion of such integration concepts in the interpretation of Annex 14-C, it could be said that certain rules of the law of treaties itself could be considered tools under Article 31(3)(c).

32. VCLT Article 28 establishes the principle that parties may contract out of the basic premise that treaties do not apply to acts or facts which occurred before the treaty came into force, stating under the heading "[n]*on-retroactivity of treaties*" that:

> *Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*[37] (emphasis added)

33. Equally, Article 70(1) of the VCLT provides that the termination of a treaty ordinarily releases a party from obligations of performance of a treaty "[u]*nless the treaty otherwise provides or the parties otherwise agree*[.]"[38] While Claimant has already acknowledged that NAFTA does not itself "*otherwise provide*" for a sunset period,[39] as addressed in the ILC Commentaries: "*when a treaty is about to terminate or a party proposes to withdraw, the parties may consult together and agree upon conditions to regulate the termination or withdrawal. Clearly, any such conditions provided for in the treaty or agreed upon by the parties must prevail, and the opening words of paragraph 1 of the article . . . so provide.*"[40]

34. The context of Annex 14-C fundamentally involves variance from the default understanding under Article 70(1) regulating the continued operation of NAFTA within a specific, limited context, and limited time as part of the CUSMA parties' agreement for that new treaty. This dovetails with the presumption of VCLT Article 28 that CUSMA should be read as creating obligations going forward unless another intention is manifest. With no express reference to the

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37 VCLT, art. 28 (CLA-42).

38 *Id.*, art. 70.

39 Claimant's Observations on Request for Bifurcation, dated 17 June 2024 ("**Claimant's Observations on Request for Bifurcation**"), para. 24.

40 Draft Articles on the Law of Treaties with Commentaries, draft article 66, cmt (2) (CLA-43).

temporal context of the claims, the first presumption should be an understanding that CUSMA was drafted to allow claims by integrating Section A of NAFTA Chapter 11 going forward.

35. Both Respondent and the *TC Energy* award majority agree on the continued relevance of NAFTA Chapter 11, Section B, but there is an inconsistency in their treatment of the text of paragraph 1 "*alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994*[.]" Respondent claims "*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.*"[41] This is incorrect.

36. Paragraph 1 must keep NAFTA Chapter 11 obligations in force to have any effect. In both cases of reference to "*in accordance with Section B*" and "*alleging breach of an obligation under: (a) Section A*[,]" an aspect of NAFTA Chapter 11 obligations is imported into the function of CUSMA Annex 14-C with continued force in order for paragraph 1 to make sense. This permits arbitration in accordance with the processes and obligations of Section B to continue to be effective despite NAFTA's replacement, regulating disputes invoking the obligations of Section A. As argued by Respondent, in order to achieve different implications, "*an obligation*" of Section A is apparently implied to have no ability to be self-sustaining by incorporation, while reference to an entire set of obligations, *i.e.*, "*Section B*[,]" is. This is not logical and simply cannot be correct.

37. Respondent does not interpret the text of paragraph 1 of Annex 14-C as a whole in context (as it should under VCLT Article 31(1)), but rather interprets each phrase differently, by assuming the former incorporates Section B and continues its obligations in force, while reference to "*an obligation under: (o) Section A*" must be implied to mean the obligation while NAFTA was in force.[42] Generally, this interpretation results from improper invocation of the proposition that "[a]*n act occurring before the obligation became binding or after it ceased to be*

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41 Respondent's Memorial on Preliminary Objections, para. 20.

42 *See, e.g., id.*, para. 21 ("[T]*his 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.*" (emphasis added)).

binding cannot constitute a breach of the obligation."[43] From there Respondent assumes that the use of the phrase "*an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994*" is of an inherently different character than "*in accordance with Section B Chapter 11 (Investment) of NAFTA 1994 . . . .*" If Respondent's position were consistently applied, a claim "*in accordance with Section B*" of Chapter 11 of NAFTA would be a contradiction in terms, since it is no longer in force for potential claimants to invoke and expect Respondent to honour.

38. The *TC Energy* tribunal majority revealed itself to be driven similarly. It dismissed briefly whether there was anything different in the use of the words "*standards*" as against "obligation."[44] Had the text of paragraph 1 read "*submission of a claim to arbitration for breach of the standards under: (a) Section A of Chapter 11,*" it appears that the majority would have determined that Section A had been imported into CUSMA for a specific purpose by Annex 14-C. But there is no effective interpretive reason to treat the word "*obligation*" differently than "*standards*", and the *TC Energy* majority even said so.[45] Yet it plainly *did* give "*obligation*" a special meaning – specifically the *TC Energy* majority gave a meaning that the legal effectiveness of the Section A standards only applied while NAFTA was in force, rather than their being incorporated for purposes of claims under Annex 14-C. At the same time, it later inconsistently concluded that the reference to a claim "*in accordance with*" Section B did incorporate a set of obligations that remained in force. However, the *TC Energy* majority could only have done so by implication.[46]

39. Arbitrator Alvarez in *TC Energy* instead was conscious of the proper understanding of "*obligation*" in the context of paragraph 1 of Annex 14-C:

> *It was common ground that Annex 14-C provided for the continued application of certain parts of NAFTA, Chapter 11 until 30 June 2023, despite the termination of NAFTA; Annex 14-C created a limited exception to the general rule that Parties are released from*

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[43] *Id.* Respondent invokes article 13 of the ILC Articles on this point. The principle is not disputed. It simply cannot *per se* explain the meaning of "*an obligation*" without considering the context of its use.

[44] *TC Energy Corp. And TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Award dispatched 12 July 2024 ("***TC Energy* Award**"), para. 131 (RL-0060).

[45] *Id.*

[46] *Id.*, para. 146.

> *obligations under a treaty after its termination. In these circumstances, it is not logical to find that the general rule prevails by separately considering the word "obligation" and imbuing it with the meaning ascribed by the majority. It is not disputed that NAFTA Chapter 11, Section A contains specific obligations. Grammatically, this provision must be read as a whole. In these circumstances, the ordinary meaning of Annex 14-C is that the Parties consented to arbitrate claims that alleged "breach of an obligation under Section A of Chapter 11 (Investment) of NAFTA 1994". Here, Annex 14-C 1 provides consent to the submission of a legacy investment claim alleging a breach of an obligation under NAFTA Chapter 11 A, in accordance with Chapter 11, Section B. Annex 14-C 3 confirms that this consent expires three years after the termination of NAFTA.*
>
> *In my view, the natural meaning of Annex 14-C is that the Parties agreed to arbitrate claims alleging breaches of obligations under NAFTA Chapter 11, Section A for a period of three years after the termination of NAFTA. Therefore, unless the text otherwise expressly provides, for the purposes of Annex 14-C, Chapter 11, Section A must remain in force. Again, Annex 14-C 1 does not limit its application to alleged breaches that occurred prior to the termination of NAFTA. Rother, it provides consent to arbitrate claims alleging a breach of an obligation of Section A of Chapter 11 with respect to legacy investments, without distinguishing between breaches that occurred before or after the termination of NAFTA.*[47]

40. Respondent's continued reliance on *Feldman v. Mexico* and related authorities to support its strained and inconsistent position on the meaning of the term "*obligation*" is misplaced because the facts in *Feldman* are fundamentally different to those of the present case.[48] The *TC Energy* majority, relied upon by Respondent,[49] was in error regarding the relevance of *Feldman* to Annex 14-C analysis in stating "*the situation in this case is not conceptually different than that which led the* Feldman *tribunal to decline jurisdiction: for the*

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[47] Alvarez Dissent, paras. 8-9 (emphasis added) (CLA-64); *see also* Schreuer Expert Report, para. 50 ("*Annex 14-C gives continued effect to certain provisions of NAFTA for a limited period. This continued effect is uncontested as far as Section B of Chapter 11 is concerned. It is, however, not restricted to Section B of Chapter 11 but extends to its Section A which contains the substantive standards of protection. Annex 14-C refers to Section A as well as to Section B of Chapter 11 of NAFTA with respect to legacy investments.*").

[48] Respondent's Memorial on Preliminary Objections, para. 22 (*citing Marvin Roy Feldman Karpa v. United Mexican Stotes,* ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues dated 6 December 2000, para. 62 (RL-20)); *see also* Request for Bifurcation of Respondent United States of America, para. 18 (citing *Feldman*, paras. 60, 62).

[49] Respondent's Memorial on Preliminary Objections, para. 23.

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."[50]

41. *Feldman* and its related cases interpret NAFTA as not creating binding obligations regarding events before it was in force, *i.e.*, that NAFTA was not drafted to displace the default presumption under VCLT Article 28. The present situation requires determination of this Tribunal's jurisdiction under Annex 14-C of CUSMA, a treaty currently in force, regarding acts while it is in force, and how it incorporates aspects of NAFTA to define that jurisdiction. It does not require determination of whether a proposed NAFTA tribunal "*equally lacks jurisdiction on breaches post-dating its termination*." This Tribunal exists because of Annex 14-C, and the situation calls for an analysis of whether the default principle of VCLT Article 28 has been deviated from by Annex 14-C, and acknowledgment that the default principle of VCLT Article 70 regarding the legal status of any relevant aspect of NAFTA may also be deviated from by agreeing to a new treaty.[51] Claimant is not seeking for this Tribunal to simply "*ignore*"[52] *Feldman* and similar cases; Claimant urges the Tribunal to recognise that this is a fundamentally different scenario.

ii. The Incorporation of NAFTA Article 1131 Also Incorporates Section A Standards as Governing Law

42. Respondent claims that Articles 1116(1) and 1117(1) of NAFTA Chapter 11, Section B,[53] by definition cannot be satisfied on the assumption that invoking an obligation in Section A of Chapter 11 would mean in this case invoking terminated obligations.[54] A claim made "*in accordance with Section B*" under Annex 14-C paragraph 1 is a claim made under an arbitral procedure where NAFTA Article 1131 (which is located in Section B) provides that a tribunal "*shall*

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50 *TC Energy* Award, para. 207 (RL-0060).

51 *See also* Schreuer Report, para. 87 ("*The continuation of treoty provisions after the treaty's termination and their applicotion before the treaty's entry into force are two distinct questions that ore governed by different provisions of the VCLT. What they have in common is that they are both subject to on ogreement of the parties. In principle, treaties creote obligations only while they are in force. But there are exceptions. Under the low of treaties obligotions can orise before a treoty enters into force and ofter it is terminated if the parties so agree.*")

52 Respondent's Memorial on Preliminary Objections, para. 23.

53 NAFTA Article 1116(1) states: "*An investor of o Party moy submit to arbitration under this Section a claim that another Party has breached an obligation under: (o) Section A . . . .*" (CLA-38). Article 1117(1) states similarly regarding claims made on behalf of an enterprise.

54 Respondent's Memorial on Preliminary Objections, para. 26.

decide the issues in dispute in accordance with this Agreement [*i.e.* NAFTA] *and applicable rules of international law.*"

43. Again, Respondent makes a circular argument that Claimant's claims "*cannot allege a breach of the NAFTA Chapter 11 obligations because these obligations were not in force . . . .*"[55] The reference to the Chapter 11 obligations in Article 1116 of Section B is now in the context of the offer to use NAFTA Chapter 11, Section B for claims by the new treaty, CUSMA. NAFTA is not in force, but Section B is retained in force for the specific purpose of the claims under Annex 14-C, using the NAFTA Chapter 11, Section A obligations as the governing law by instruction of the integrated Article 1131. In this new context, Article 1116(1) simply overlaps with the statement of the type of claim offered in paragraph 1 of Annex 14-C itself.[56]

iii. Annex 14-C, Paragraph 3 Has Substantive and Procedural Function

44. When read together, paragraphs 1 and 3 of Annex 14-C create a closed transitionary period during which claims regarding NAFTA Chapter 11 Section A obligations may continue for three years. Respondent says nothing more of the three year cut off in paragraph 3 other than stating that it speaks explicitly of consent to arbitrate, rather than ending the applicability of Section A. It goes on to say that paragraph 3 was required because "[o]*therwise, the NAFTA Chapter 11 obligations would remain binding on the USMCA Parties indefinitely*[.]"[57] But paragraph 1, properly read and understood, incorporated and sustained the Chapter 11, Section A NAFTA obligations for the purpose of the renewed consent to arbitration in accordance with Chapter 11, Section B. The end of that consent in paragraph 3 naturally closes off their continued application, which was sustained for no other purpose in paragraph 1.[58]

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55 *Id.*

56 *See also* Alvarez Dissent, para. 10 ("*Annex 14-C 1 plainly refers to both sections of Chapter 11 and provides for the application of each in the case of a claim with respect to a legacy investment. The application of Section A is confirmed by footnote 20. In addition, Article 1131, contained in Section B, provides for the application of NAFTA, whose most relevant provisions relating to investment disputes are contained in Chapter 11 A, and the applicable rules of international law.*") (CLA-64); *see also* Schreuer Expert Report, para. 100.

57 Respondent's Memorial on Preliminary Objections, para. 39.

58 As discussed further below, Annex 14-C does not seek to extend inter-State obligations regarding NAFTA Chapter 11 including by explicit confirmation in one regard. *See infra* para. 65.

45. Moreover, as Claimant has previously noted,[59] but was not now discussed by Respondent, NAFTA Articles 1116(2) and 1117(2) in Section B both state that: "*An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*" Given claimant-investors must bring their claims within 3 years of when they "*should have first acquired*" knowledge of the breach and damages in order to bring an Annex 14-C claim "*in accordance with Section B*[,]" if the only claims which are possible are historic claims (which Respondent asserts), then paragraph 3 would be redundant – the possibility of consent would naturally terminate applying NAFTA Articles 1116 and 1117. Paragraph 3 instead must have effective purpose and can reasonably be only considered as a sharp cut off to end a transitionary regime of continuing claims.[60] This natural purposive reading is supported by supplementary evidence on intent by the very author of Annex 14-C, as discussed in Section II.F.ii below.

D. VCLT Article 31(1) and (2): The Context of Annex 14-C and Relevant Object and Purpose

46. VCLT Article 31(1) also notes that the meaning of terms in a treaty should be considered "*in their context and in the light of its object and purpose.*" This is expanded upon in VCLT Article 31(2):

> *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> > *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*

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59 Claimant's Memorial, para. 228.

60 While the Respondent's Memorial on Preliminary Objections does not approach this point, the *TC Energy* majority did, and again fell into error: "*Because Articles 1116(2) and 1117(2) set the* dies a quo *at the latest at the date of knowledge of the breach and the date of knowledge of the loss, the time during which claims could be brought under Annex 14-C would be indefinite.*" *TC Energy* Award, para. 158 (RL-0060). The requirement is when a claimant has knowledge or "*should have first acquired*" knowledge.

> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

47. Thus, a treaty interpreter, seeking to interpret the ordinary meaning of a particular provision, may review all the surrounding text of the treaty, including preambular language and agreements associated with the conclusion of the treaty. An important consideration when interpreting the ordinary meaning of the text is that an interpretation is to be disfavoured that "*does not enable the treaty to have appropriate effects*[.]"[61] Respondent's focus on the preamble to CUSMA and Protocol is misguided, since those passages directly contemplate both the spirit of continued investment protection and function of aspects of NAFTA inherent to Annex 14-C.[62] As discussed below, Claimant's ordinary language reading of the paragraphs of Annex 14-C at issue gives purpose and effect to footnotes 20 and 21 and the selection of the defined class of "*legacy investment*" for protection.[63] The function and plausibility of their purpose is fraught with confusion and ambiguity on Respondent's interpretation.

i. The Object and Purpose of CUSMA Reflected in the Preamble and Protocol Contemplates Continued Investment Protection

48. There is no doubt that CUSMA was intended to replace NAFTA, and that the CUSMA Preamble says so. However, the preambular clause indicating this intention is not the only clause in the Preamble relevant to the proper interpretation of Annex 14-C. The Preamble also indicates the object and purpose of CUSMA is to:

> *ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment* [and] *ESTABLISH an Agreement*

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61 Draft Articles on the Law of Treaties with Commentaries, draft articles 27 and 28, cmt (6) (CLA-43). Indeed, "[t]*he principle of* effet utile *mandates not just that treaty terms be given weight and effect, but alsa thot they be accorded 'their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reasan and a meaning can be attributed to every part af the text.'" Murphy Exploration and Praduction Co. Int'l v. Republic of Ecuador*, UNCITRAL, Partial Award on Jurisdiction, dated 13 November 2013, para. 180 (quoting R. Gardiner, Treaty Interpretation 169 (2008) (RL-0058*bis*) (quoting Waldock, Third Report at 55)) (CLA-67).

62 *See infra* sec. II.D.i.

63 *See infra* secs. II.D.ii and II.D.iii.

> *to address future trade and investment challenges and opportunities, and contribute to advancing their respective priorities over time*[.]

These additional preambular clauses show that Claimant's interpretation of Annex 14-C is supported by the object and purpose provided by the Preamble.

49. The CUSMA Protocol specifically contemplates:

> *Upon entry into force of this Protocol, the* [CUSMA], *attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the* [CUSMA] *that refer to provisions of the NAFTA.*[64]

50. Respondent has made a rather long and complicated complaint that the Protocol does not say expressly that NAFTA provisions will have continued effect, and so Annex 14-C cannot play that role.[65] But the Parties in the proceeding are really in agreement on the meaning of the Protocol. Respondent says: "[t]*he effect (if any) of the referenced NAFTA provisions depends entirely on the meaning of each of the USMCA provisions at issue*."[66] Thus, Claimant did not "*largely ignore*[] *the stated purpose of the USMCA Protocol*"[67] in its prior submissions. Claimant also acknowledged the whole purpose of the Protocol, which despite its declaration that NAFTA was being replaced by CUSMA, states that CUSMA would in certain respects maintain NAFTA provisions for certain purposes.[68] The disputing Parties can thus be said to be in agreement on the Protocol that provisions of the NAFTA may not be superseded if CUSMA provisions, such as Annex 14-C, say so. More than that, the Protocol has little to offer to the analysis.

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64 Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States, dated 30 November 2018 (CLA-39).

65 Respondent's Memorial on Preliminary Objections, paras. 50-54.

66 *Id.*, para. 51.

67 *Id.*, para. 50.

68 "*Article 1 of the Protocol replacing NAFTA with CUSMA is express in providing such an exception . . .*" Claimant's Memorial, para. 222 (emphasis added); *see also* Claimant's Observations on Request for Bifurcation, para. 23.

ii. Claimant's Interpretation Ensures that the Whole Definition of "*Legacy Investment*" is Imbued with Meaning

51. VCLT Article 31(4) indicates that the standard of ordinary meaning of text under Article 31(1) may be overridden by express choice of the parties. Paragraph 6(a) defines a "*legacy investment*" as an investment "*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). The class of protected investments existing when Annex 14-C comes into force is a logical requirement to encourage sustained investment when Annex 14-C is understood to provide continued protection for them. It would encourage the continued establishment of investments during a transitionary period when coupled with an interpretation that Annex 14-C sustains NAFTA's Chapter 11 protections for those investments already established and then maintained until after CUSMA enters into force. Respondent offers no explanation why the CUSMA parties would have required the class of investments Annex 14-C protects to include investments continuing to exist when CUSMA came into force if they wished solely to allow claimants to continue to make claims regarding historic events alone.

52. If the protection of Annex 14-C is understood as backward looking only, there is no plausible reason to insist not just that an investment be made during NAFTA's protection but that it be sustained until CUSMA's entry into force. Claimant has previously shown Respondent's logic excludes the overwhelming majority of likely historical claims, *i.e.*, expropriation claims.[69] Since the basis of such a claim would be the substantial or complete deprivation of an investment, an historical claim for expropriation prior to CUSMA entering into force is a claim based on an investment that effectively no longer exists.[70] Respondent alleges that this would not affect indirect expropriation claims in any event, implying that the investment would still be deemed to exist despite such expropriation. However, its *ratione materiae* objection in these proceedings makes clear that it would object to an economically valueless holding, even if nominally extant, being treated as an investment.[71] If the CUSMA parties wished simply to allow historic claims

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69 Claimant's Observations on Request for Bifurcation, paras. 34-35.

70 *See* Claimant's Memorial, n.410 and citations therein.

71 For example, in this case, despite the NAFTA Article 1139 definition of investment including simple ownership of an enterprise, Claimant's indirect ownership in various U.S. enterprises is dismissed for lacking

while NAFTA was in force to be continued, the legacy investment definition could and would have been *"established or acquired between January 1, 1994, and the date of termination of NAFTA 1994"* (*i.e.*, before CUSMA came into force) and nothing more.

53. Respondent has also claimed that *"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."*[72] No evidence is offered (although such evidence would be in the possession and control of Respondent), nor any explanation provided, as to the rationale for this alleged deliberate "choice" to gratuitously permit investors holding existing investments the opportunity to pursue claims regarding only prior allegations for breach of NAFTA obligations but to remove protection for expropriation claims.[73]

54. Thus, it is Respondent, rather than Claimant, that makes a *"convoluted"*[74] construction of Annex 14-C and the legacy investment definition. The convoluted discussion above is a product of Respondent attempting to squeeze the metaphorical square peg into the round hole, by trying to make sense of the function of paragraphs 1 and 6(a) of Annex 14-C if one has interpreted paragraph 1 to only apply to prior existing claims. Claimant's position, rather, is that insistence on investments continuing to exist when CUSMA enters into force is entirely more plausible where the objective was to continue to protect those very same sustained investments for a further period of time, instead of gratuitously offering limited exposure to liability for no continuing benefit to the State parties.

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economic interest or value. *See* Respondent's Memorial on Preliminary Objections, paras. 122-28. This cynical approach taken could be as easily directed to denouncing the validity of an enterprise as an investment where its economic value had been substantially or completely deprived by prior government conduct.

72 Respondent's Memorial on Preliminary Objections, para. 29.

73 As Respondent notes, "[i]*n the obsence 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*[.]" *Id.* (italics omitted).

74 *Id.*, para. 28.

iii. Annex 14-C Footnotes 20 and 21 Add Clarity and Resolve Concerns

55. Footnote 20 of Annex 14-C paragraph 1 supports Claimant's ordinary reading of the paragraph by confirming that relevant provisions of NAFTA apply to paragraph 1 claims, stating:

> *For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.*[75]

56. This footnote confirms a reading of paragraph 1 as part of a currently subsisting treaty incorporating and extending NAFTA Chapter 11 provisions, within the confines of the jurisdiction *ratione voluntatis* qualifications discussed above. It does not add temporal restrictions on the claims.

57. Respondent suggests this footnote merely confirms the intertemporal principle in general international law.[76] But it cannot; as Respondent says itself, footnote 20 states provisions of NAFTA "*apply with respect to* [such] *a claim*[,]" the temporal scope of which is not delimited by an ordinary construction of paragraph 1.[77] The value of footnote 20 is reinforcing that provisions of NAFTA "*apply*," *i.e.*, are incorporated and extended by Annex 14-C paragraph 1, for those claims to be made effectively. That expressly includes "*Chapter 11 (Section A) (Investment)*." It also now adds to paragraph 1 by expressly stating the range of other NAFTA provisions that are relevant to making the available claims, so that the obligations of Chapter 11 remain operative in the manner they would have been under NAFTA.

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75 The "*claim*" thus being a reference back to the "*alleg*[ed] *breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA* . . . ." CUSMA, Annex 14-C(1)(a) (CLA-40). Notably, the titles of both NAFTA Articles 1116 and 1117 begin with the words "*Claim by an Investor of a Party* . . . ." NAFTA, arts. 1116, 1117 (CLA-38).

76 Respondent's Memorial on Preliminary Objections, para. 33.

77 *Id.*

58. Respondent also asserts that the phrase *"for greater certainty"* means the following text applies a rule of law otherwise arising from primary treaty text, and effectively adds nothing.[78] A good faith interpretation of treaty texts requires giving effective meaning to *all* the text.[79] And, within Chapter 14 of CUSMA alone, the phrase is used forty-one (41) times in a variety of contexts, some of which clearly are meant to modify or otherwise reduce the scope of interpretation of other provisions.[80]

59. Indeed, paragraph 4 of Annex 14-C modifies the obligation in paragraph 1 of Annex 14-C, stating:

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[78] *Id.*, para. 34. It is also notable that the *TC Energy* majority merely accepted Respondent's assertion of the meaning of *"far greater certainty"*, citing to a passage from Respondent's jurisdictional pleading in that proceeding instead of engaging in its own interpretive exercise on the phrase in context: *see TC Energy* Award, para. 162, n.137 (*citing* Respondent's oral submissions and its pleading in those proceedings, which was itself only a bare assertion) (RL-0060).

[79] *"The principle of* effet utile *mandates not just that treaty terms be given weight and effect, but also that they be accorded 'their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.'" Murphy Exploration and Production Co. Int'l v. Republic of Ecuador*, UNCITRAL, Partial Award on Jurisdiction, dated 13 November 2013, para. 180 (CLA-67).

[80] For example, in Annex 14-B, footnote 19 provides greater specificity to the requirement to establish an indirect expropriation according to whether the investor had *"distinct, reasonable investment-backed expectations"* by requiring:

"For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector."

There may not necessarily, for example, need be legally binding written assurances to establish reasonable expectations and this footnote clarifies the CUSMA parties' intent that such a requirement be in play in this case.

Furthermore, Articles 14.4(4) and 14.5(4) provide additional requirements concerning the comparison of the circumstances of national and foreign investors, in the context of the national treatment and most-favoured nation treatment obligations. Articles 14.4(4) and 14.5(4) require:

"For greater certainty, whether treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."

Prior analyses of *"like circumstances"* have not focused on the objectives of the State, such as public welfare, with respect to the treatment accorded to define the *"like circumstances"*, they have instead focused on the type of investment, industrial sector analysis and other similar issues regarding the investment. *See* Claimant's Memorial, sec. III.B.1 and authorities discussed therein with respect to the "like circumstances" test under Articles 1102 and 1103 of NAFTA.

> *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, . . . 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.*

The ordinary implication of the continued validity of Chapter 11, Section B of NAFTA established by paragraph 1 of Annex 14-C would have been that all paragraphs of Article 1136 continued to operate, along with the rest of Section B. Paragraph 4 of Annex 14-C thus has the effect of explicitly reversing that implication as it clarifies that paragraph 5 of NAFTA Article 1136 does not apply.[81]

60. By comparison, under Claimant's interpretation, footnote 20 is given appropriate effect by understanding it as expressly confirming and adding to those provisions of NAFTA which are incorporated for purposes of the offer to make claims regarding Chapter 11, Section A obligations.

61. Respondent also raises a concern regarding overlapping regimes in the continued application of NAFTA provisions to matters covered by CUSMA,[82] relying on the *TC Energy* majority finding that:

> *Because the substantive provisions of USMCA apply to legacy investments, 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.*[83]

62. Respondent's concern, however, is unwarranted. The provisions of NAFTA referred to in footnote 20 have no enduring effect except to permit the appropriate scope of standards for a legacy investment claim as the standards would have operated under NAFTA.

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[81] Article 1136, paragraph 5, allowed for the NAFTA Commission to establish an Arbitral Panel regarding failure to comply with an arbitral award. NAFTA, (CLA-38). The continued existence of the NAFTA Commission for this sole purpose was entirely possible and confirmed as ended by paragraph 4 of Annex 14-C. CUSMA, Annex 14-C (CLA-40).

[82] Respondent's Memorial on Preliminary Objections, n.41 and paras. 49, 73, 78.

[83] *TC Energy* Award, para. 165 (cited at Respondent's Memorial on Preliminary Objections, n.41) (RL-0060).

Any other obligations which may have arisen in the areas of competition, intellectual property, or financial services have no continuing effect.

63. In particular, the TC Energy majority states *"Although a claim under Annex 14-C could not be directly based on Chapters 14 or 17, a breach of any provision of these two chapters would fall under its scope if contrary to the obligations established under Article 1110 (concerning the issuance of compulsory licenses or intellectual property rights) . . . ."*[84] But Chapter 11, Section A contains an exception at Article 1101(3) that it *"does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services)."*[85] That is the only way in which Chapter 14 is mentioned in Chapter 11. And at Article 1110(7), Chapter 17 is incorporated to disallow claims under Article 1110, rather than breach of Chapter 17 creating a subsidiary basis for breach of Article 1110 obligation, since that article *"does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property)."*[86]

64. Footnote 20 states that the *"relevant provisions"* of the various chapters apply. The references in Chapter 11, Section A, and therefore the purpose of *"relevant"* continued application, of Chapters 14 and 17 is precisely the reverse of the *TC Energy* majority's contention. It is to create exceptions to the potential for obligations in Section A, not to apply further obligations, as *TC Energy* arbitrator Alvarez agrees.[87]

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84 *Id.*

85 NAFTA (CLA-38).

86 *Id.*, art. 1110.

87 *"[T]he chapters listed in footnote 20 apply only to the extent they are relevant to a legacy investment claim alleging a breach of an obligation under Chapter 11, Section A. They do not apply as wholesale requirements going forward during the transition period and claims cannot be brought for a breach of the provisions of those chapters. In my view, the potential overlap of the provisions of the chapters listed in footnote 20 and the chapters or provisions of the USMCA relating to the same subject matter are limited. To the extent that they are relevant to a claim under Chapter 11 A, Annex 14-C provides that the NAFTA chapters listed in footnote 20 apply. Therefore, the provisions of the corresponding chapters in the USMCA do not apply to the claim and there is no conflict or inconsistency with respect to the rules applicable to the claim. Apart from the context of a legacy investment claim, the NAFTA chapters listed in Footnote 20 have no enduring effect. Therefore, to the extent there may be an inconsistency arising from*

65. Moreover, Annex 14-C does not seek to sustain dispute resolution between the CUSMA parties regarding NAFTA Chapter 11 obligations, not even regarding compliance with investor-state awards (the former would have required reference to NAFTA Chapter 20, and the latter is explicitly removed by exclusion of Article 1136, paragraph 5, in both paragraphs 4 and 5 of Annex 14-C). The only overlap could therefore be regarding investor claims for breach of NAFTA Chapter 11 or CUSMA Chapter 14 obligations.

66. Legacy investments also have limited investor-State arbitration coverage overlap with the Chapter 14 CUSMA investment protection afforded to investors going forward. CUSMA offers no dispute resolution mechanism to Canadian investors or against Canada regarding the new investment protections regime set out in Chapter 14.

67. The real possibility of overlap is dealt with in the drafting of Annex 14-C by the inclusion of footnote 21, and by the manner in which the scope of investor class, claim types and procedures under Annexes 14-D and 14-E are defined.[88] Footnote 21 addresses the regime overlap between Annex 14-C and Annex 14-E and eliminates it.

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additional obligations in the USMCA, these would not be relevant to claims under Annex 14-C, to which the provisions of NAFTA apply. To the extent that there may be some overlap more generally, outside the scope of a legacy investment claim, it is not unusuol for two treaties to apply in situotions that address the same subject matter. Here there was no evidence of any actual conflict between the relevant provisions of NAFTA ond the USMCA and their potential effect.

I do not share the majority's view that the extension of the applicotion of NAFTA Chapter 11, Section A for that period is implausible and extremely unlikely because footnote 20 would extend the application of a number of other chapters of NAFTA, including Chapters 14 (Financial Services), 15 (Competition Policy, Monopolies and State Enterprises) ond Chapter 17 (Intellectual Property). A number of the chapters in question ore referred to in NAFTA Chapter 11, certain contain exceptions applicable to the obligations in Chapter 11, Section A, and others contain definitions of terms that are used in Chapter 11, Section A." Alvarez Dissent, paras. 11-12 (emphasis added) (CLA-64).

[88] The arbitration mechanism in Annex 14-D to Chapter 14 has a very limited scope of application which stops most of the overlap for American or Mexican investments in the corresponding host State generally, and therefore even potentially such legacy investments. Annex 14-D permits solely claims with regard to Article 14.4 (National Treatment) or Article 14.5 (Most-Favored-Nation Treatment), except with respect to the establishment or acquisition of an investment, or Article 14.8 (Expropriation and Compensation), except with respect to indirect expropriation. Moreover, claims may only be brought after receipt of judgment from a court of last resort in the host state or the passage of 30 months of litigation before competent host state courts. Given the 3 year, or 36 month, period of consent under Annex 14-C, the first possibility of eligible claims under Annex 14-D was calibrated to occur only just before the period of consent in Annex 14-C ended.

68. Footnote 21 reads:

> *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).*

69. Footnote 21 addresses the regime overlap between Annex 14-C and Annex 14-E and eliminates it.

70. Under Annex 14-E to Chapter 14 of CUSMA, which is limited to a special class of American or Mexican investors relating to certain government contracts only, investor-State arbitration is provided regarding the full range of typical investment protection treaty obligations, which do heavily overlap with NAFTA Chapter 11. Article 14.2(3) in CUSMA Chapter 14 confirms the Chapter creates no obligations regarding measures pre-dating entry into force of CUSMA except as provided for by Annex 14-C (the further import of which is discussed below). Therefore, in order for there to be an overlap in the claims and consent of Annexes 14-C and 14-E, Annex 14-C must necessarily and logically be available to bring claims regarding measures *after* CUSMA entered into force.

71. The logic of footnote 21 is thus clear: in order to resolve this one area of overlap in offering the possibility of continued claims for incorporated NAFTA obligations, Mexico and the United States agreed to establish a "fork in the road"; they closed off that aspect of Annex 14-C for the group of covered government contract investors to whom they continued to offer a full range of investment protection in Chapter 14 of CUSMA and arbitration of claims in Annex 14-E.

72. Respondent, as with its arguments regarding Annex 14-C paragraph 3, avers that the footnote explicitly refers to consent and not to an express carveout of the application of Section A of NAFTA Chapter 11 and so it does not assist showing the Section A standards have been incorporated by Annex 14-C.[89] As in the case of Respondent's arguments concerning

[89] Respondent's Memorial on Preliminary Objections, para. 36.

paragraph 3, the exclusion of consent to arbitration efficiently removes the relevance of continued Chapter 11, Section A application created by Annex 14-C from this class of investor claim. It is not dispositive of the issue as to whether Section A obligations have been incorporated for other claims.

73. Respondent's other argument is an implausibility endorsed by the *TC Energy* majority which speculated that footnote 21 "*may*"[90] have been intended to avoid parallel arbitration regarding continuous or composite breaches regarding a series of events occurring before and after CUSMA entered into force.[91] But as the commentary to the Articles on State Responsibility set out, continuous and composite breaches are fact-intensive investigations of a series of events, and it may be possible to pin-point the event to assess as breach at various moments in the course of events.[92] A potential claimant could have no choice but to protect its position with parallel claims under this reasoning, uncertain whether Annex 14-C or Annex 14-E is applicable to a complex factual matrix. Footnote 21 can therefore not offer clarity to avoid parallel proceedings on this theory. But on Claimant's interpretation of Annex 14-C paragraph 1, where otherwise two sets of standards could apply to the same facts, the function of the footnote is to close off a genuine choice.

74. Respondent offered a different theory of footnote 21 in the *TC Energy* proceeding that it does not even mention now, and which even the majority in that case rejected as implausible, calling it "*speculation*" (even though it was persuaded by the above argument which it also considered speculative).[93] Respondent's inconsistency demonstrates that it is not seeking to present the CUSMA parties' intentions, but *post facto* interpretations it hopes might be persuasive.

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90 *TC Energy* Award, para. 167 (RL-0060).

91 Respondent's Memorial on Preliminary Objections, para. 37 (citing *TC Energy* Award, para. 167 (RL-0060)).

92 Draft Articles on the Law of Treaties with Commentaries, commentary on arts 14 and 15 (CLA-43).

93 *TC Energy* Award, para. 169 ("*The second possible explanation odvanced by the Respondent is that footnote 21 applies to categories of investors rother than claims. In other words, its purpose would simply be to exclude those investors who qualify under the favorable regime established by Annex 14-E from benefiting as well from Annex 14-C. That may well have been the result of a bargain between the United States (which sought to protect its investors in the Mexican governmental sector) and Mexica. That, however, is na more than speculation.*" (citation omitted)) (RL-0060).

iv. Contrary to Respondent's Claims, CUSMA Art. 14.2(3) Does not Exclude Future Events from the Application of Annex 14-C

75. CUSMA Article 14.2(3) states:

> *3. 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.*

76. Respondent asserts that this statement confirms that Annex 14-C has no role except with regard to an act or fact that took place or a situation that ceased to exist before the date of entry into force of CUSMA. It contains no such assertion.

77. Respondent overstates its case in claiming Claimant's prior comments[94] are "*solely*"[95] how Article 14.2(3) makes sense on Claimant's construction. It is true that the most obvious manner in which Annex 14-C pertains to acts initiated or occurring prior to the termination of NAFTA is through Annex 14-C paragraph 5, which provides a guarantee that "Pending Claims" may continue to completion.[96] But it is equally the case that the phrase "*except as provided for in Annex 14-C*" does nothing more than acknowledge that Annex 14-C creates some obligations about acts, facts or situations which occurred or ceased to exist before CUSMA came into force. It acknowledges an explicit exception to VCLT Article 28, which reflects the position that CUSMA could not otherwise "*bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force*" of CUSMA.[97] But it does not state that is universally the function of Annex 14-C. Article 14.2(3) does not

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94 Claimant's Memorial, paras. 229-31.

95 Respondent's Memorial on Preliminary Objections, para. 60.

96 "*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.*" CUSMA, Annex 14-C(5) (CLA-40).

97 "*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*" VCLT, art. 28 (CLA-42).

exclude Annex 14-C's application to future events – an intent to fully reverse the presumption of VCLT Article 28 requires construing Annex 14-C itself.[98]

v. There is Substance and Procedure throughout CUSMA Chapter 14 and Elsewhere

78. Respondent has also stated that various contextual elements are indicative of Annex 14-C being "procedural" rather than "substantive". In particular, Respondent points to: (i) CUSMA Article 14.2(4), (ii) the placement of Annex 14-C as an annex, and (iii) CUSMA Article 34.[99] But, as described herein, these elements add little to the context in support of Respondent's position, and instead emphasise that Annex 14-C plays a unique role in CUSMA.

79. On the basis of the ordinary meaning of the text of sub-article 14.2(4), the implication is that Annex 14-C would offer investors an opportunity to bring claims for breach of obligations contained in Chapter 14 itself, since it states: "*an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C . . . .*" (emphasis added).[100] It is only by reading Annex 14-C that one can determine that the function of Annex 14-C is to incorporate aspects of NAFTA rather than permit the arbitration of the obligations set out in CUSMA Chapter 14. Once that is clear, Article 14.2(4) cannot assist in determining the scope and function of incorporation of the obligations from NAFTA by Annex 14-C.

80. In one sense all the Chapter 14 arbitration annexes provide substance in that they set out which investors have rights regarding which obligations in the Chapter. Without the annexes, there are no obligations to investors, only to each of the fellow CUSMA State parties which can be enforced through the mechanisms of Chapter 31 of CUSMA. The CUSMA parties have dealt with similar transitionary matters with respect to investors in replacement treaties:

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98 Schreuer Expert Report, para. 57.

99 Respondent's Memorial on Preliminary Objections, paras. 55-57, 62-64.

100 "*For greater certainty, an investor may only submit a claim to arbitration under this Chapter 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).*" CUSMA, art. 14.2(4) (CLA-40).

with entirely separate instruments rather than annexes;[101] in initial provisions and chapters;[102] or in the main body of the chapter where there is relevant overlap with a prior treaty.[103] More important than where these matters are addressed is the explicit text the parties chose to use in those examples, which will be discussed further in Section II.F.i.

81. Article 34.1 of CUSMA contains transitionary provisions. Respondent focuses on the absence of a mention of Chapter 11 of NAFTA there and compares that absence to the reference to Chapter 19 of NAFTA at Article 34.1(4), such that Chapter 19 "*shall continue to apply*" for certain purposes. Respondent's point appears to be that CUSMA Chapter 34 maintains substantive obligations rather than procedural ones from NAFTA, and the absence of mention of NAFTA Chapter 11 therefore means the CUSMA parties did not intend to retain any substantive obligations from that chapter.[104] Yet NAFTA Chapter 19 is a dispute resolution chapter relating to antidumping and countervailing duty matters. No inference can be drawn regarding the continued application of Chapter 11 substantive standards from the declaration regarding the continued application of procedural points from NAFTA in Article 34.1.[105]

82. As discussed above, paragraph 1 of Annex 14-C does not explicitly state that any part of NAFTA Chapter 11 "*shall continue to apply*," and yet Respondent agrees at least Section B must be construed to do so. Of course, footnote 20 explicitly states that relevant provisions of NAFTA "*apply with respect to* [an Annex 14-C paragraph 1] *claim*" including Section A of Chapter 11. Meanwhile, Article 34.2 notes that "*the annexes, appendices, and footnotes to this Agreement constitute an integral part of this Agreement*." This provision indicates that other parts of CUSMA such as Annex 14-C are vital parts of the treaty as well as the body of the

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101 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, 5 August 2004 (RL-0087).

102 United States-Republic of Panama Trade Promotion Agreement, signed 28 June 2007, ch. 1 (RL-0086).

103 European Commission, EU-Mexico agreement: The Agreement in Principle, announced 21 April 2018 (CLA-68).

104 Respondent's Memorial on Preliminary Objections, para. 62.

105 The *TC Energy* majority also claimed distinctions between procedure and substance and commented at paragraph 153 that "[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*" (emphasis added). However, the issues considered in article 34.1 are more in the area of procedure than substance regarding the wind down of on-going work of the NAFTA Commission, Chapter 19 panel reviews, and the maintenance of the Committee for the transition from NAFTA Chapter 20 to CUSMA Chapter 31 for inter-State dispute resolution.

Agreement. The Protocol too had indicated not that Chapter 34 may retain parts of NAFTA, but provisions throughout CUSMA.[106] That Annex 14-C is appended to Chapter 14 instead of being incorporated into Chapter 34 does not change its function. It makes sense that the CUSMA parties would include all provisions related to handle the continuation of NAFTA Chapter 11 in a single annex rather than disparate references across CUSMA Chapters 14 and 34.

E. VCLT Article 31(3) Cannot Save Respondent Because There is No Subsequent Agreement and Subsequent Practice Cannot Modify Treaty Text

83. Respondent asserts that the CUSMA Parties are *ad idem* on the meaning of Annex 14-C.[107] Respondent provides no proof of this beyond the CUSMA Parties' submissions before tribunals. VCLT Article 31(3) invites "*subsequent agreement*" and "*subsequent practice*" to be "*taken into account*" in interpretation under Article 31,[108] but notably this is not dispositive over text. And there is authority rejecting reliance on self-interested arguments in formal dispute procedures between States and investors as "*subsequent practice*" or evidencing "*agreement . . .*"[109]

84. The fact that Respondent continues to make no attempt to rely upon contemporaneous proof for its positions will be discussed further below in the context of VCLT Article 32. Respondent considers it convenient instead to rely on *post hoc* positions of the CUSMA parties, taken now that no more claims under Annex 14-C are possible and with obvious motivation to reduce their liability now that all three CUSMA parties have attracted claims against them under Annex 14-C.

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106 The *TC Energy* majority claims that the Protocol demonstrates Annex 14-C has a purely procedural function because the Protocol allows for CUSMA provisions to maintain NAFTA provisions: *see TC Energy* Award, para. 150 (RL-0060). The discussion simply assumes that which is to be proven.

107 Respondent's Memorial on Preliminary Objections, paras. 65-67.

108 VCLT, Article 31(3): "*There 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.*" VCLT, art. 31(3) (CLA-42).

109 "*In the Tribunal's view, Costa Rica's and Canada's concurrent positions in this arbitration do not amount to an agreement within the meaning of Article 31(3) of the VCLT.*" *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award dated 3 June 2021, para. 338 (CLA-69); *see generally* Schreuer Expert Report, sec. F.

85. Indeed, Canada's position was "*recently confirmed*"[110] in *Ruby River v. Canada* following the United States' litigation position on Annex 14-C in *TC Energy* proceeding only after that award had been made public, although Canada could have made submissions earlier in those proceedings if it had so wished.[111] Canada also has made no interventions in the other proceedings where the United States and Mexico have asserted this objection. As will be discussed below, just as with the United States there is evidence that Mexico's stance in *Legacy Vulcan* goes against contemporaneous understanding of Annex 14-C by its negotiating team during the CUSMA negotiations.[112]

86. The ILC cautions against considering subsequent conduct as interpretation when really it is modification:

> *It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has nat been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the 1969 Vienna Convention and under customary international law.*[113]

87. In reality, the CUSMA parties have had a change of heart about the agreement they created in Annex 14-C and that is plainly evident in their conduct.

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110 Respondent's Memorial on Preliminary Objections, para. 66.

111 *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5, Contre-Mémoire Sur Le Fond Et Mémoire Sur La Compétence Du CanSda dated 15 July 2024, paras. 191-270 (R-17).

112 *See infra* sec. II.F.ii.

113 International Law Commission, 2018 Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, conclusion 7(3) (CLA-70); *see also Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award dated 28 September 2007, para. 386 ("[E]*ven if this interpretation were shared today by both parties to the Treaty, it still would not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries.*") (CLA-71).

F. VCLT Article 32 Endorses Examination of the CUSMA Parties' Comparative Treaty Practice and Evidence of the Negotiating History to Support Claimant's Ordinary Meaning Interpretation

88. While interpretation is driven by an examination of the text of a treaty as the first port of call, supplementary means of interpretation are available under Article 32 of the VCLT:

> *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order 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.*

89. Thus, the goal of the Article 32 interpretive exercise is either to resolve confusion, or to confirm the Article 31 exercise. As stated by the *TC Energy* majority, showing a point of agreement generally found among parties, arbitrators and experts engaged in interpreting Annex 14-C: "*The fact that the general rule of interpretation leads to a clear conclusion does however not preclude the Arbitral Tribunal from applying Article 32.*"[114]

90. As Claimant has previously noted, there is no defined scope of "*supplementary means*" and the ILC Commentaries on VCLT drafting make clear that the ILC "*did not think that anything would be gained by trying to define* travaux préparatoires[.]"[115] Although there is no specific definition, clearly *travaux préparatoires* would pre-date conclusion of the treaty. Nevertheless, the broader scope of Article 32 is useful to elucidating and evidencing the outcome of the Article 31 exercise beyond the text of the treaty, including material which post-dates the

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[114] *TC Energy* Award, para. 180 (RL-60). Prof. Gardiner in his expert report and Mr. Alvarez in his dissenting opinion agree: Expert Report of Professor Richard Gardiner, dated 11 October 2024, para. E.1; Alvarez Dissent, para. 13 (CLA-64); *see also* Respondent's Memorial on Preliminary Objections, para. 76.

[115] Claimant's Memorial, para. 236; Draft Articles on the Law of Treaties with Commentaries, draft articles 27 and 28, cmt (20) (1966) (CLA-43).

conclusion of a treaty but which discusses the negotiation process that can naturally evidence the process and intentions of the treaty parties as well as the contemporaneous record.[116]

91. Article 32 of the VCLT is important because there is public evidence that Respondent's position at the time CUSMA was negotiated later changed once it attracted NAFTA legacy investment claims.[117] While Claimant's interpretation of Annex 14-C is clear under the Article 31 principles of the VCLT, any assertion by Respondent that Annex 14-C should be construed otherwise, or any belief that the interpretation might run against the grain of Claimant's position, should and can be tested under VCLT Article 32 given that the record runs against Respondent. Moreover, as addressed in the next Section, Respondent has, in any event, proffered its own supplementary means of interpretation, but done so such as to merely highlight its own inconsistencies.

92. As discussed in Section II.F.ii below, although the *TC Energy* majority had endorsed disclosure of a record to consider under VCLT Article 32, it then betrayed a goal-directed approach to considering it. Moreover, Respondent has been selective in its approach, sometimes making assertions concerning the CUSMA parties' motives without proffering evidence within its control and which would clearly be best derived from *travaux préparatoires*.[118] While providing no affirmative evidence in support of its position, Respondent dismisses out of hand the application of Article 32 to the publicly available evidence plainly supporting Claimant's interpretation of Annex 14-C, which Claimant has already noted.[119] Further, Respondent voluntarily offers none of the record discussed by the *TC Energy* majority and dissent which, from what is public of that record, further supports the other publicly available evidence.

i. The CUSMA Parties' Treaty Drafting Contradicts Respondent's Interpretations of Investment Protection Regime Overlap

93. Respondent is keen to point out that the CUSMA parties have all produced model investment treaties with sunset clauses which state that, from termination of the treaty, their

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116 *See further infra* sec. II.F.ii.
117 Claimant's Memorial, secs. IV.C and IV.E.
118 *See, e.g.,* Respondent's Memorial on Preliminary Objections, para. 29.
119 Claimant's Memorial, sec IV.C.

provisions "*shall continue to apply*" or "*shall remain in force*" for a period of years.[120] First, it is natural that a treaty would describe any specific rules for its own termination. Second, similarly to the discussion of Article 34.1 above, footnote 20 of Annex 14-C does explicitly state that relevant provisions of NAFTA including Chapter 11, Section A "*apply with respect to* [an Annex 14-C paragraph 1] *claim.*" The Parties agree that Section B continues to apply even though there is no explicit reference to Section B "*continu*[ing] *to apply*" in paragraph 1 of Annex 14-C or indeed in footnote 20. As such, the sunset clauses of the CUSMA Parties' model investment treaties provide limited assistance to the proper interpretation of Annex 14-C.

94. A comparison with transitionary instruments or clauses where one treaty provides for continued application of aspects of a previous one, as is the case with Annex 14-C, provides more assistance. Here, two points emerge.

95. First, Respondent has ignored a whole range of transition instruments in which the CUSMA parties provided regimes for the limited application of replaced investment protection instruments and their investor-State arbitration mechanisms. Extracts from such treaties are provided in Appendix 1 to this Counter-Memorial. They share a common theme. They specifically control for the application of the transitionary regime to acts and events before the replacing treaty entered into force with express words. Canada and Mexico have both[121] sustained the operation of prior investment protection arbitration claims for a transitionary period by explicitly stating in the transition text that the extension of the claims is relevant to acts prior to entry into force of the new treaty. Sometimes those words make plain CUSMA treaty parties would draft text which assumes reference to the continuing effect of "*an obligation*" from a prior treaty could refer to a potential breach arising from conduct after the treaty was replaced

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120 Respondent's Memorial on Preliminary Objections, para. 83; 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) (RL-0051); 2021 Canada Model Agreement for the Promotion and Protection of Investments, art. 57(4) (RL-0053); 2008 Mexican Model of Investment Promotion and Protection Agreement, art. 30(4) (RL-0056).

121 In the context of overriding European Union member State investment treaties with those two countries by a pan-EU trade and investment agreement, and Mexico in the context of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. *See also* Appendix 1.

unless specifically controlled for in the text. For example, the Canada-Peru Free Trade Agreement states:

> *1. The Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments done in Hanoi on 14 November 2006 (the "FIPA") shall be suspended from the date of entry into force of this Agreement and until such time as this Agreement is no longer in force.*
>
> *2. Notwithstanding paragraph 1, the FIPA shall remain operative for a period of fifteen years after the entry into force of this Agreement for the purpose of any breach of the obligations of the FIPA that occurred before the entry into force of this Agreement. During this period the right of an investor of a Party to submit a claim to arbitration concerning such a breach shall be governed by the relevant provisions of the FIPA.*[122]

96. According to the logic of Respondent's analysis of the text of paragraph 1 of Annex 14-C in this case, the phrase "*that occurred before the entry into force of this Agreement*" would be inherently superfluous, although the drafters of the Canada-Peru Free Trade Agreement felt it necessary.

97. And in the Mexico-EU Agreement in Principle:

> [A] *claim may be submitted pursuant to an agreement listed in Annex Y (Agreements between the Member States of the European Union and Mexico), in accordance with the rules and procedures established in that agreement, provided that:*
>
> *(a) the claim arises from an alleged breach of that agreement that took place prior to the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement ceases to have effect pursuant to paragraph 1 prior to the date of entry into force of this Agreement*[.][123]

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[122] Free Trade Agreement Between Government of Canada and the Republic of Peru, signed 29 May 2008, *entered into force* 1 August 2009, art. 845 (emphasis added) (CLA-72); *see also* similar language in Free Trade Agreement Between Canada and the Republic of Panama, signed 14 May 2010, *entered into force* 1 April 2013, art. 9.38 (CLA-73); Appendix 1.

[123] European Commission, EU-Mexico agreement: The Agreement in Principle, announced 21 April 2018, Ch. XX, art. 22(3) (CLA-68); *see also* Appendix 1.

98. This begins similarly to Annex 14-C: the introductory passage confirms consent to submission of a claim "*in accordance with*" the procedure of a prior agreement. The difference is that Annex 14-C simply states the claims must allege breach of an obligation of Section A of Chapter 11, and does not seek to provide bounds regarding the temporal scope of claims made possible by its fresh consent. These transition regimes, by comparison, are plain that they are backward-looking only, requiring in this example that a "*claim arises from an alleged breach of that agreement that took place prior to the date of suspension of the agreement*" (emphasis added). Again, under Annex 14-C claimants must "*alleg*[e] *breach of an obligation under: (a) Section A*" and so Respondent must contend that the drafting here included irrelevant additions which require no respect of *effet utile*.

99. Turning to examples Respondent itself proffered, the United States has provided for the continued application of dispute resolution of prior investment treaties in instruments when agreeing to new trade and investment treaties with Morocco, Panama and Honduras.[124] The similarity of the language across these instruments in which the only common party is the United States is telling as to their origin. All of them explicitly suspend the dispute resolution procedures of prior investment treaty agreements and then provide an exception to that.

100. Respondent has specifically complained in this proceeding that Claimant's interpretation of Annex 14-C creates an unacceptable double regime for investment protection.[125] However, these other free trade agreements appear to have a double regime. In the United States-Morocco free trade agreement, its Chapter 10 creates an investment protection regime for "*covered investments*[,]" which are defined as investments existing at the time the treaty comes into force or thereafter, and with investor-state arbitration provisions.[126]

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[124] Respondent's Memorial on Preliminary Objections, paras. 86-88; United States-Morocco Free Trade Agreement, U.S.-Morocco, signed 15 June 2004, *entered into force* 1 January 2006 ("**U.S.-Morocco FTA**") (RL-0085); United States-Panama Trade Promotion Agreement, U.S.-Pan., 28 June 2007 (RL-0086); 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, dated 5 August 2004 (RL-0087).

[125] Respondent's Memorial on Preliminary Objections, n.41 and paras. 49, 73, 78.

[126] U.S.-Morocco FTA, Ch. 10 (CLA-74). The definition of "*covered investments*" is provided in the first Chapter: U.S.-Morocco FTA, art. 1.3 (RL-0085).

101. An exception to suspension of the dispute resolution provisions of the parties' existing investment treaty agreement, the US-Morocco BIT,[127] occurred in the United States-Morocco FTA and reads as follows, at Article 1.2(4):

> *4. Notwithstanding paragraph 3* [which states the suspension of the dispute resolution provisions of the BIT], *for a period of ten years beginning on the date of entry into force of this Agreement, Articles VI and VII of the Treaty shall not be suspended:*
>
> *(a) in the case of investments covered by the Treaty as of the date of entry into force of this Agreement; or*
>
> *(b) in the case of disputes that arose prior to the date of entry into force of this Agreement and that are otherwise eligible to be submitted for settlement under Article VI or VII.*[128]

102. Respondent declares that "[t]*his 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.*"[129] This statement embraces a double regime given Chapter 10 also provides investment protection and investor arbitration for investments existing when the new free trade agreement came into force.[130] Thus, it is clear that the United States has not avoided double regimes in every new treaty and the existence of a double regime does not undermine Claimant's interpretation.[131]

103. As discussed, the CUSMA Parties drafted Annex 14-C, and Chapter 14 generally, to control such potential overlaps[132] while the United States-Morocco FTA does not. It is unclear if

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127 Treaty Between the United States Of America And The Kingdom Of Morocco Concerning The Encouragement And Reciprocal Protection Of Investments, signed 11 July 1985, *entered into force* 29 May 2006 ("**US-Morocco BIT**") (CLA-75).

128 U.S.-Morocco FTA (RL-0085).

129 Respondent's Memorial on Preliminary Objections, para. 86.

130 *Id.*, paras. 34, 49.

131 The United States free trade agreement with Panama is structured similarly: *see* United States-Panama Trade Promotion Agreement, Pub. L. No. 112-43, 125 Stat. 497, Ch. 2 (containing a definition of covered investments) (CL-76) and Ch. 10 (drafted very similarly to Chapter 10 of the US-Morocco Free Trade Agreement) (CL-77). And also, the CAFTA-DR: *see* Dominican Republic-Central America-United States Free Trade Agreement, signed 5 August 2004, *entered into force* 1 March 2006, Ch. 2 (containing a definition of covered investments) (CL-78) and Ch. 10 (also drafted very similarly to Chapter 10 of the US-Morocco Free Trade Agreement) (CL-79).

132 *Supra* II.D.iii. Indeed, the regime in the US-Morocco FTA would allow State-State dispute resolution to continue under parallel regimes as well, unlike the situation created by Annex 14-C of CUSMA which does not seek

both the continued forward and backward-looking application of the United States-Morocco investment treaty is really the intended function of this language, since sub-category (b) would appear an explicit inclusion of a category already covered by sub-category (a) (a dispute could hardly arise prior to the date of entry into force regarding an investment which did not exist). Claimants have understood that they had rights to invoke under both regimes simultaneously regarding the same State conduct and have filed claims accordingly.[133] But to the extent that sub-category (b) was considered necessary, it demonstrates the United States's consciousness of explicit language regarding existing claims when creating transitionary regimes. No such explicit language is used in Annex 14-C paragraph 1, and yet Respondent would claim that is all the paragraph is about.

ii. Evidence of the Parties' Negotiation Intent is also Appropriate Supplementary Means of Interpretation

104. Respondent has repeatedly refused to volunteer the CUSMA *travaux préparatoires* record throughout these proceedings.[134] Since even before these proceedings, and throughout, the FOIA offices of various departments and agencies of Respondent have continued to delay or provide very limited disclosure of CUSMA negotiating records in response to requests on behalf of Claimant.[135] Respondent offered commentary with its jurisdiction objections

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to expressly continue to apply the NAFTA State to State dispute resolution chapter, Chapter 20 of NAFTA. *See* US-Morocco BIT, art. VII (CLA-75) and U.S.-Morocco FTA, Ch. 20 (CLA-80).

133 *See, e.g., Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Award dated 14 October 2022 (CLA-81), bringing claims under both the Panama-USA BIT and Panama-USA TPA regarding events after entry into force of the TPA. Others have simply brought claims under the Panama-USA BIT regarding events after entry into force of the TPA.

134 Within the proceedings, Claimant proposed, and the parties and Tribunal discussed early disclosure prior to the first procedural conference. Respondent did not volunteer any documents after Claimant made clear again it would request them: Claimant's Memorial, sec. IV.E. Respondent refused to do so after it became inevitable such records would have an impact on these proceedings owing to their disclosure in the *TC Energy* proceedings: Claimant's Request for Revision of the Schedule and Production of Documents, dated 22 May 2024; Respondent's Response to Claimant's Request, dated 4 June 2024.

135 Email from U.S. Department of State to Crowell and Moring, dated 18 December 2023 (C-248); Series of emails between U.S. Department of State, FOIA Requester Service Center and Crowell and Moring, dated 24 February 2023-21 October 2024 (estimated date of completion is 31 December 2025) (C-298); Series of emails between U.S. Department of State, FOIA Requester Service Center and Crowell and Moring, dated 17 June 2024-20 November 2024 (estimated date of completion is 29 May 2026) (C-299); Series of emails between U.S. Department of State, FOIA Requester Service Center and Crowell and Moring, dated 31 July 2024-1 November 2024 (estimated date of completion is 30 April 2026) (C-300).

submission on the *TC Energy* award regarding other issues while knowing that the award showed controversy within the panel over that very record, with extensive disagreement set out by Mr. Alvarez. Yet, Respondent has not volunteered the record discussed in those proceedings now.

105. This matters because, as discussed above, under VCLT Article 32 a wide range of "*supplementary means*" may be brought to bear in an enquiry on treaty interpretation. From the outset of the proceedings there has been public evidence that Respondent's position is not consistent with the intent of the CUSMA negotiators. Article 32 does not provide an exhaustive scope of the means to rely upon, since to do so "*might only lead to the possible exclusion of relevant evidence.*"[136] The present circumstances are a paradigmatic example where a respondent State's reticence calls for an exploration of supplementary means to ensure a good faith interpretation in accordance with VCLT Article 31(1). While the broad goal of a wider review would still be to ascertain a common intention of treaty parties embodied in the treaty text, evidence from individual States or negotiators could potentially illuminate the process of treaty agreement, and thereby test the Article 31(1) examination.[137]

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[136] Draft Articles on the Law of Treaties with Commentaries, draft articles 27 and 28, cmt (20) (regarding the scope of *travaux préparataires*) (CLA-43).

[137] "*Article 32 VCLT allows recourse to the preparatary wark of the treoty and the circumstances surrounding the treaty's conclusian. It does nat give an exhaustive list of admissible materials and the Tribunal thus has latitude to include any element capable of shedding light on the interpretation of 'shall assent.'*" *Churchill Mining Plc v. Republic of Indonesia,* ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction dated 24 February 2014, para. 181; *see also* para. 212 (CLA-82). "[T]*he apinion af thase wha were responsible for the drafting and negotiatian of a State's bilateral treaties* [is not] *irrelevant, in that it serves, precisely, to establish the original intentian.*" *Sempra Energy Int'l v Argentine Republic,* ICSID Case No ARB/02/16, Decision on Objections to Jurisdiction dated 11 May 2005, para. 145 (CLA-83). "*An 'event, act or instrument' may be relevant as supplementary means of interpretatian not only if it has actually influenced a specific aspect of the treaty text in the sense af a relationship of cause and effect; it may also qualify as a 'circumstance of the conclusion' when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect ta the treaty ar specific provision . . . it shauld not be misconstrued as introducing a concept that an act, event, or instrument qualifies as a circumstance only when it has influenced the intent of all the parties. Thus, not only 'multilateral' sources, but also 'unilaterol' acts, instruments, or statements of individual negotiating parties may be useful in oscertaining 'the reality af the situation which the parties wished to regulate by means of the treaty' and, ultimately, for discerning the common intentions of the parties.*" Appellate Body Report, European Communities—Customs Classification of Frozen Boneless Chicken Cuts, para. 289, WTO Doc. WT/DS269/AB/R and WT/DS286/AB/R (adopted 12 September 2005) (CLA-84).

106. In this case, as Claimant has noted,[138] Mr. Lauren Mandell, the principal author of Annex 14-C, has publicly endorsed Claimant's interpretation.[139] Further relevant evidence from Mr. Mandell entered the record of the *TC Energy* proceeding corroborating this; Mr. Alvarez reproduced a response from Mr. Mandell to a former colleague at the USTR, as quoted by that colleague:

> *Regarding your question, we intended the annex to cover measures in existence before AND after USMCA entry into force. That could probably be clearer. I'd have to think about the best textual argument, but the one that immediately comes to mind rests on paragraph 3. If we were just intending to allow claims for pre-existing measures, we likely wouldn't have framed a three-year consent period -- we would have just defaulted to the statute of limitations in NAFTA Secon [sic] B that would apply to claims for those measures. In other words, we would have omitted paragraph 3 altogether. The contrary argument -- the purpose of paragraph 3 was intended to alter the SOL for claims with respect to pre-existing measures, that's it, doesn't make a lot of sense. I think it's also significant that the title of the annex -- and the key concept in the annex -- references legacy investments, not legacy measures. If we were focused only on legacy measures, it would have been easy to expressly limit paragraph 1 accordingly, but we didn't. Finally, I think footnote 21 probably helps as well. The whole point of the footnate was to require keyhole investors to arbitrate under the "new and improved" USMCA rules and procedures (there was no reason to give them the option of arbitrating under NAFTA rules and procedures under 14-C instead). If 14-C only applied to pre-existing meosures, there'd be no reason to say thot. We'd just be punishing keyhole investors, which is contrary to the clear intentions of the whole keyhole framework.*[140]
>
> *Are [sic] friends ocross the border aren't questioning this, are they?*[141]

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138 Claimant's Memorial, paras. 239-44.

139 WilmerHale Alert, Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims, dated 18 March 2021, at 1-2 (C-251); *see also* U.S. Trade Representative FOIA package at 1-4, 21-23 (C-250).

140 Alvarez Dissent, para. 29 (emphasis added) (CLA-64).

141 *Id.*, n.11 (explaining this was an addition in the original email from Mr. Mandell).

107. All of these points are remarks Claimant raised previously regarding the implications of various facets of Annex 14-C.[142] The remarks also appear to directly implicate the meeting of minds between the CUSMA parties during the negotiations, not simply to state Mr. Mandell's own opinion, given the remarks open with "*we intended*[,]" and conclude with "*Are [sic] friends across the border aren't questioning this, are they?*"

108. Respondent dismissed Mr. Mandell's public remarks,[143] and those of Mr. Romero Martinez, CUSMA negotiator responsible for Chapter 14 for Mexico,[144] by referring to them as "*the law firm marketing memos,* [and arguing that] *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.*"[145] Respondent has simply ignored that Mr. Mandell made corroborating remarks in his above email in the context of communications with former USTR colleagues where such considerations as soliciting business would not have weight. As will be discussed below, another CUSMA negotiator from the Mexican delegation has come forward to corroborate the position of Mr. Romero Martinez.

109. The TC Energy majority suggested "*it cannot be excluded that Mr. Mandell misunderstood the legal implications of the language of Paragraph 1 of Annex 14-C limiting the affer to arbitrate to a breach of NAFTA*"[146] and that Mr. Mandell's commentary had "*no evidentiary value.*"[147] While a tribunal may be in command of the evidentiary weight of the record it has admitted, Mr. Mandell's statements are plainly relevant and material, directly supporting TC Energy's, and Claimant's, position on the core question in dispute. The *TC Energy* majority provides no evidence that Mr. Mandell was not credible. The limit of the analysis is that the majority speculated that a chief negotiator lacked sufficient qualifications or understanding

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142 *See* Claimant's Memorial, paras. 228 (regarding paragraph 3 of Annex 14-C), 224, 246 (regarding the framing of Annex 14-C regarding legacy investments, not legacy claims), 232 (the implications of footnote 21).

143 U.S. Trade Representative FOIA package at 1-4, 21-23 (C-250); WilmerHale Alert, Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims, dated 18 March 2021, at 1-2 (C-251).

144 First Trinational Seminar: Mexico-United States-Canada, dated 21 April 2023, at 3 (C-249).

145 Respondent's Memorial on Preliminary Objections, para. 91.

146 *TC Energy* Award, para. 190 (RL-0060).

147 *Id.*, para. 196.

of the very provisions he negotiated. Evidence cannot be denied evidentiary weight because it is inconvenient. At a minimum, that would require an explanation. None was forthcoming.

110. Paragraphs 15-32 of Mr. Alvarez's dissent provide extensive commentary on the negotiating record which was disclosed in the *TC Energy* proceeding, regarding comments made not just by United States negotiators (although much of this record is redacted beyond the remarks of Mr. Mandell noted above, and will need to be the subject of disclosure in these proceedings).[148] Given the *TC Energy* majority's erroneous approach to Mr. Mandell's commentary generally, a serious independent appraisal is called for regarding this material.[149] A further point not redacted in Mr. Alvarez's commentary reveals Respondent's dismissive remarks regarding the public record from Canadian sources[150] are contradicted by evidence available in the *TC Energy* proceeding noting that, prior to signature of CUSMA "*Canada agrees to 3-years grandfathering of ISDS.*"[151] Mr. Alvarez further comments that "[t]*he* [*TC Energy* tribunal] *majority speculates that preceding the signature of the USMCA, Canada may have revisited its legal analysis of the meaning of Annex 14-C and come to the conclusion that it did not imply an extension of the substantive provisions of NAFTA. There is no evidence of this.*"[152]

111. Mexico's Chief Negotiator of CUSMA, Mr. Kenneth Smith Ramos, has recently offered witness testimony in another case, *Cyrus Financial v. Mexico*. Like Mr. Mandell, Mr. Smith Ramos has also publicly endorsed Claimant's interpretation of Annex 14-C. As stated in that case:

> *Mexico's Chief Negotiator of the USMCA, Mr. Kenneth Smith Ramos, provides further context on the goal and function of Annex 14-C, as informed by his experience negotiating the provision. As described in his witness statement, Mr. Smith confirms that:*

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148 Alvarez Dissent (CLA-64).

149 Claimant also stands by the remarks it made regarding the ITAC report (C-253) (*see* Claimant's Memorial, para. 247). Respondent dismisses the report as not "*proper supplementary means*": Respondent's Memorial on Preliminary Objections, para. 92. This reinforces that, evidence contradicting its position being public, Respondent's refusal to volunteer even those documents it produced in *TC Energy* is counterproductive.

150 Respondent's Memorial on Preliminary Objections, para. 94.

151 Exhibit C-206 in the *TC Energy* proceeding, a US-Canada Closing Term Sheet, dated 28 September 2018 (as cited in the Alvarez Dissent, para. 21, n.9 (CLA-64)).

152 Alvarez Dissent, para. 23 (CLA-64).

> *the Mexican position regarding the legacy provisions, and the intention of the negotiators of Mexico, Canada, and the United States, was to ensure that all of the substantive provisions of NAFTA Chapter 11, as well as the ISDS mechanism, would be extended for three years after the NAFTA had been replaced by the new agreement.*
>
> *Mr. Smith further confirms that no argument arose – at any point during the course of the negotiations concerning the legacy provisions – that the substantive provisions of NAFTA Chapter 11 would not apply during the Transition Period. Mr. Smith cites to three meetings with Mexican Ministry of Economy officials and other Mexican stakeholders concerning the legacy investment provisions, each of which involved explicit discussions on the intent of the parties to extend NAFTA Chapter 11's substantive investment protections for three years after NAFTA terminated.*[153]

112. Respondent repeats its remarks made in this proceeding that overstate the case of what Article 14.2(3) of CUSMA means, relying on comments explaining that the article was edited in a "scrub phase" to refer to the exception of Annex 14-C having relevance to acts or facts prior to CUSMA coming into force.[154] This no more confirms Annex 14-C was solely backward looking than the text of Article 14.2(3) itself does. The *TC Energy* majority is also incorrect about this evidence.[155]

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[153] *Cyrus Capital Partners, L.P. Cantrarian Capital Management, LLC v. United Mexican States,* Claimants' Counter-Memorial on Jurisdiction, dated 29 August 2024, paras. 232-33 (citing Witness Statement-Kenneth Smith Ramos-Counter-Memorial on Jurisdiction) (emphasis added) (C-297).

[154] Respondent's Memorial on Preliminary Objections, para. 95 (discussing U.S. Trade Representative FOIA package at 168 (C-250)).

[155] The *TC Energy* majority comments of this document (C-250 at 168, and C-114 on the record in that case): "*It is reasonable to infer from that language that the author of the document understood that the offer to 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 Annex 14-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) ollows 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 ollowed "where the olleged breoch took place before entry into force of the USMCA" indicotes that there was no intention to extend the offer to arbitrote where the alleged breach took place ofter the entry into force of USCMA.*" *TC Energy* Award, para. 197 (italics omitted) (RL-0060).

But that is an interpretation of the document which takes it out of context. The comment in the document actually began: "*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 Vienno Convention rules. In the scrub, we clarified that there is one exception*[.]" U.S. Trade Representative FOIA package at 168 (C-250). The author

113. The most important point for the present proceedings is that there is a record, both pre- and post- signature of CUSMA, which undermines Respondent's position and which it has consistently resisted being open about.

III. CLAIMANT HAD LEGACY INVESTMENTS UNDER NAFTA ARTICLE 1139 AND ANNEX 14-C

114. In its second jurisdictional objection, Respondent argues that Claimant cannot demonstrate that it had a "*legacy investment*" (as defined under CUSMA Annex 14-C and NAFTA Article 1139). On its face, this is simply incorrect and contrary to an extensive record and expert evidence as presented by Claimant. As discussed below, the evidence presented clearly supports the conclusion that Claimant's investment meets the definition of "*investment*" under NAFTA Article 1139, subsections (a), (e), (f), and (h).

115. Although Respondent does not appear to dispute what Claimant has already proven regarding its investments, it appears to contradict itself and dispute that Claimant has met its burden of proof.[156] Respondent then goes on to mischaracterize the implications of the facts as presented, and the treaty requirements for qualifying investments under NAFTA Article 1139.

116. For example, and as further discussed below, Respondent claims "*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*[.]"[157] The simple facts are that in 2020 Claimant contributed and put at risk around US$ 500 million[158] to the building of the Keystone XL Project in the United States, on the basis of an Investment Agreement and set of corporate entities organized in the United States to execute

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of the document is explaining why draft Article 14.2(3) had been edited. Therefore (and quite the reverse of the majority's claim), that there was an aspect of Annex 14-C allowing "*arbitration under Section A for facts postdating the expiry of NAFTA*" would not explain the edit to Article 14.2(3), and so it had no cause to be mentioned in this context.

156 *See* Respondent's Memorial on Preliminary Objections, para. 104. Claimant of course expects to have the burden to prove the facts on which it relies to make its claim, as noted by Respondent. That is a basic principle of UNCITRAL Rules Article 24(1).

157 *Id.*, para. 99.

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

that Project, as well as contributing a lesser amount to Project construction in Canada. By the beginning of 2021, the structure of the investment contribution changed, but Claimant's prior financial contributions to the United States remained at risk,[159] and then suffered losses when rights granted by the United States held by one of those American enterprises were later withdrawn by the Permit Revocation.[160] On this simple summary of Claimant's involvement in the Project, it has demonstrated that it made an "*investment*" as defined under NAFTA Article 1139.

117. More specifically, Claimant had indirect ownership over a series of American enterprises on its own and together with its Keystone XL Project investment partner, which satisfy category (a) of the "*investment*" definition under Article 1139. Respondent alleges that, unless Claimant's planned financial contributions and benefits from the Keystone XL Project flowed directly into and out of each enterprise, they cannot be Claimant's investments.[161] That is not a requirement of the definitions of Articles 201 and 1139 of NAFTA.

118. While the Tribunal has jurisdiction on the basis of the American enterprises as investments alone, the primary planned benefit to Claimant satisfies Article 1139 category (h) as a protected investment as well. Claimant's US Class A Interest accretion rights (*i.e.* entitlement to payments) were based on the aggregate amount of US Class A accretion after TCPL's repurchase of those Class A shares, financed thanks to APMC's guarantee.[162] They therefore arose from capital commitments passed down from APMC to the US SPV and US Carrier for Project construction in the United States. Respondent relies on irrelevant authority regarding the need for enterprises to reside in the territory of the host State and a claimant otherwise having more than merely export sale contract rights, and a failure to apply the plain and ordinary meaning of the category, to claim how Claimant would get paid matters, not how Claimant's interest arose.[163]

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159 *See infra* secs. III.B and III.C.ii.
160 *See* Begley Witness Statement, secs. V, VI.
161 *See infra* sec. III.C.i.
162 *See infra* sec. III.C.ii.
163 *Id.*

119. Finally, Claimant had rights arising from the Investment Agreement structure protecting its investment against risk in the form of Article 1139 category (e) and (f) interests to share in income and profits of American enterprises, and to their assets on dissolution, through Class B and Class C conversion rights. Claimant's dissolution interests were exercised as a direct result of the Revocation. Particularly in the case of these Class C conversion rights, Respondent inexplicably asserts (again against the plain and ordinary meaning of the categories) that an interest in a contingency is no interest, in part by inaccurate citation to authority.[164]

120. The bottom line of Respondent's *ratione materiae* objection appears to be that a restructuring of Claimant's investment, without meaningfully changing Claimant's interests, should deny it the protection of an investor despite still having nearly US$ 500 million of prior contribution to a construction project inside the United States at risk on 20 January 2021 arising from capital contributions previously made to American enterprises for construction of infrastructure on U.S. territory, and up to US$ 4.2 billion at risk overall,[165] in a cross-border infrastructure Project specifically approved and encouraged by Respondent.[166]

A. Investment is Defined by NAFTA Article 1139, Not Other Notions

121. As a starting point for any discussion on the scope of an investment, it is important to examine the applicable treaty definitions. Respondent insists that Article 1139 of NAFTA is "*exhaustive*"[167] but then contradicts itself stating that the ordinary meaning of "*investment*" has some inherent "*hallmark characteristics*"[168] largely discussed in ICSID arbitration jurisprudence. As noted earlier, VCLT Article 31(4) declares that ordinary meaning may be displaced by specific choice of the parties. Paragraph 6(b) of Annex 14-C of CUSMA states that:

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164 *See infra* sec. III.C.iii.

165 Investment Agreement between TransCanada Pipelines Ltd. and APMC, dated 31 March 2020, [redacted] (C-110); [redacted]; Begley Witness Statement, paras. 19, 24.

166 Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, dated 29 March 2019, 84 Fed. Reg. 13101 (3 April 2019) (C-86).

167 Respondent's Memorial on Preliminary Objections, para. 102.

168 *Id.*, para. 103.

> *"investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994.*

122. Therefore, the characteristics of an investment required under Annex 14-C of CUSMA are those of the definition in Article 1139 of NAFTA. As discussed below, Respondent has expressly relied, although incorrectly, on the *Grand River* tribunal later in its argument on investment,[169] despite that tribunal also stating:

> *NAFTA's Article 1139 is neither broad nor open-textured. It prescribes an exclusive list of elements or activities that constitute an investment for purposes of NAFTA.*[170]

123. Yet, Respondent has relied on disconnected discussions to muddy the waters over what constitutes an investment. Much of the authority Respondent relies on for these "*hallmark characteristics*" is from ICSID arbitration jurisprudence,[171] which Respondent has previously claimed is irrelevant to this UNCITRAL arbitration.[172] Whatever the definitions of investment in other contexts, reading extra requirements into Article 1139 which the CUSMA parties did not add is simply inappropriate.[173]

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169 *See* Respondent's Memorial on Preliminary Objections, para. 132. *See infra* sec. III.C.ii.

170 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award dated 12 January 2011), para. 82 (RL-29). Other NAFTA tribunals have stated similarly: *"Art. 1139 NAFTA does not define "investment" as an abstract notion. It simply states that "investment means" one of eight categories of assets or "interests", each defined in a separate paragraph, and each subject to specific requirements. The technique followed by Art. 1139 has an important implication: to be considered as a protected investment, an asset or interest must meet the requirements of one of the eight categories. If an investor holds several interests, and all qualify under different paragraphs of Art. 1139, each interest will be protected. And if some of these interests meet the requirements, and others do not, those compliant will still enjoy protection: an investor cannot be denied protection for compliant interests simply because he or she also holds non-compliant assets." Lion Mexico Consolidated LP v. United Mexican States*, Case No. ARB(AF)/15/2, Decision on Jurisdiction dated 30 July 2018, para. 248 (RL-101).

171 Respondent's Memorial on Preliminary Objections, n.129.

172 Reply of the United States of America to Claimant's Observations on the Request for Bifurcation, paras. 9-12 (complaining Claimant's submissions, including references to decisions in ICSID arbitral proceedings, constituted an irrelevant "*foray into inapplicable rules and treaties*[.]").

173 A point made generally regarding the implications of defining "*investment*," or indeed other terms, in such treaties. As Butcher J commented in the English High Court: "[T]*here is no basis for 'reading into' the BIT requirements as to what may constitute an investment which are not specified.*" *Mohammad Reza Dayyani & Ors v The Republic of Korea* [2019] EWHC 3580 (Comm), [58] (CLA-85). Butcher J also rejected the relevance of the *Romak* tribunal's views, cited by Respondent here also (see Respondent's Memorial on Preliminary Objections, n.129, 178) that "*investment*" must inherently be understood with certain requirements of capital contribution or other elements when not expanded upon in the treaty language: "*I did not find the decision of the tribunal in Ramak [...] persuasive of any different interpretation of the BIT. In the bilateral investment treaty considered in Romak the term*

124. However, even if one were minded to apply an ICSID approach, *"the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and/or duration"*[174] were all present here in any case throughout Claimant's investment in the Keystone XL Project. [redacted]

B. The Context of the US SPV Class A Interest Repurchase

125. Respondent characterizes the plan for the US SPV Class A Interest repurchase in January 2021 under the Investment Agreement as having Claimant *"exit"*[176] the US SPV at that time. [redacted]

"investments" was not defined in terms of other words but was simply stated to "include every kind of asset". This left room, which to my mind there is not in this case, for the "reading in" of characteristics supposedly inherent in the undefined word "investment"." *Id.*, [59] (*citing Guaracachi, America, Inc. and Rurelec PLC v. Plurinational State of Bolivia,* PCA Case No. 2011-17, Award dated 31 January 2014, para. 364 (CLA-86) and the underlying award of the tribunal in the case he was charged with examining at paras. 244-45). As noted in a commentary which Respondent raised: "[T]*he very fact that the Petrobart Tribunal found an investment to exist demonstrates an intention, similar to that shown by the Tribunal dealing with nationality in Tokios Tokelės v Ukraine, not to read limiting phrases into treaties where none exist in the text. The requirement in the US model BIT that an 'investment' should have 'the characteristics of an investment' is precisely such a limiting phrase.*" CAMPBELL MCLACHLAN, LAURENCE SHORE, ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, 229, para. 6.47 (2d ed. 2017) (citing *Tokios Tokelės v. Ukraine,* ICSID Case No ARB/02/18, Decision on Jurisdiction dated 29 April 2004, para. 52 (CLA-87)) (RL-28). *See also Petrobart Ltd. v. Kyrgyz Republic,* SCC Case 126/2003, Award dated 28 March 2005, at IIC 184 (CLA-88).

174 Respondent's Memorial on Preliminary Objections, para. 103.

175 [redacted]

176 Respondent's Memorial on Preliminary Objections, para. 109.

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

178 *Id.*, [redacted] (C-110). [redacted]

126. [redacted] the repurchase of Claimant's US SPV capital was not planned to stop the continued accumulation of Class A Accretion rights value; the value of capital Claimant provided in the US SPV would remain the basis for US Class A Accretion rights until Claimant's actual exit from the Project regardless. Although the repurchase technically reduced a formal equity share in the US SPV to a nominal level, nothing changed about the structure of control of the US enterprises.[179] Claimant and its subsidiary enterprises also remained in control of their interests regarding Class B and Class C entitlements should the circumstances arise.[180] Accordingly: [redacted]

C. Claimant's Interests Were NAFTA Article 1139 Investments

i. Claimant's Ownership of Enterprises Always Satisfied Category (a)

127. [redacted]

179 [redacted]
180 [redacted]
181 [redacted]

128. Respondent spends several paragraphs failing to address the actual terms of NAFTA Articles 201 and 1139 as to the requirements of an enterprise, and thereby an investment under category (a). As Claimant has previously set out:

> *Article 1139 defines "investment of an investor of a Party" as: "an investment owned or controlled directly or indirectly by an investor of such Party[.]" Sub-category (a) of the definition of "investment" is simply "an enterprise[,]" and the definition of an enterprise at article 201 is "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association[.]"*[182]

[182] Claimant's Rejoinder on Bifurcation, para. 27.

129. Respondent does not deny that any of the entities [redacted] fit the definition of Article 201 of NAFTA, or that they are enterprises within its territory. In order to qualify as investments, they further need be *"owned or controlled directly or indirectly by"* Claimant. Nothing more. They were Claimant's investments at the time of the Revocation.

130. Respondent appears to suggest that the repurchase meant that Claimant indirectly, and the APMC US Partner directly, no longer owned the US SPV.[183] That is factually incorrect. APMC US Partner continued to own equity in the US SPV.[184] To the extent that it matters to the analysis of whether the US SPV was an enterprise indirectly owned by Claimant, which it does not, Respondent misses the point claiming Claimant's equity contribution was no longer at risk by virtue of the repurchase.[185] [redacted] The benefits of that equity had been transferred, but would continue to accrue to the benefit of APMC through the accretion mechanism, and the risk that the value of the capital contribution to equity could be entirely lost to APMC remained,[186] as indeed transpired.

131. As for the APMC US Partner itself, and the US SPV GP, Respondent begrudgingly concedes *"Claimant maintained technical ownership interests"*[187] in them. That also ought to conclude the discussion, since no further characteristics are found in Articles 201 and 1139 of NAFTA. They are Claimant's enterprises and therefore its investments. Respondent claims that they lacked an economic interest for Claimant and therefore cannot be investments.[188] Respondent does not even discuss US Carrier and US Carrier GP directly. [redacted]

183 Respondent's Memorial on Preliminary Objections, para. 123.

184 [redacted]

185 Respondent's Memorial on Preliminary Objections, para. 124.

186 [redacted]

187 Respondent's Memorial on Preliminary Objections, para. 125.

188 *Id.*, para. 127. Respondent again relies on *Romak* inappropriately at Respondent's Memorial on Preliminary Objections, n.178. *See supra* n.176.

189 [redacted]

[redacted]

Direct economic interests are not to be expected of the managing partners of such a venture,[191] and are not a factor to define enterprises under Articles 201 and 1139 of NAFTA. [redacted]

132. Respondent suggests that its argument is reinforced because Claimant has asserted no damages with respect to these enterprises.[193] This is also incorrect on the extensive expert evidence of Mr. Maguire and the Secretariat Report. As Claimant has shown in great detail, the ownership structure and expected benefits to Claimant of its investment flowed through the enterprise network because US Carrier was the holder of the Presidential Permit. Claimant has asserted damages for the consequences to itself as a result of one of its investments, the enterprise US Carrier, having unfairly lost a right which rendered the purpose of the Investment Agreement and all the enterprises moot, and the loss of benefit and requirements of contract flowing from the destruction of purpose of the various enterprises.[194] The quantum of Claimant's loss and the appropriate methodology for calculating it are matters for the merits.

ii. Claimant's Accretion Rights Always Satisfied Category (h)

133. As set out several times now,[195] category (h) of Article 1139 provides for investments defined as:

190 [redacted]
191 [redacted]
192 [redacted]
193 Respondent's Memorial on Preliminary Objections, para. 127.
194 Claimant's Memorial, sec. V.B generally. [redacted]
195 *See* discussion in n.64 of Claimant's Observations.

> *(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*[.]

134. The primary expected benefit of the Keystone XL Project for Claimant was to receive accretion value for its financial contributions when its Class A Interests were bought out. That was true before the US Class A Interests repurchase and remained true after that. Respondent devotes much space to the fact that [redacted]

135. As Claimant has already explained, "*sub-category (h) does not condition how an investor's interest might be realised territorially, as long as that interest arises out of the commitment of capital in the territory of a relevant NAFTA party.*"[197] Respondent has not responded to this explanation, and it still does not directly confront the text of category (h). Respondent does, however, appear to concede that the only objection it has in this regard is a territorial one. It relies again on the *Bayview* case and now also on the *Grond River* case.[198] The analyses of these decisions are worthless to Respondent. Those awards emphasise that a relevant enterprise needs to be one inside the territory of the respondent State in order to be a relevant investment.[199] But there are several enterprises involved in this case inside the territory of the United States. At best in those cases the claimants had contracts for export into the respondent party trade zone, rather than enterprises, and Claimant acknowledges that mere

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196 Respondent's Memorial on Preliminary Objections, para. 130.

197 Claimant's Rejoinder on Bifurcation, para. 32.

198 *See* Respondent's Memorial on Preliminary Objections, para. 132.

199 *Grand River*, para. 85 (RL-29); *Bayview Irrigation District et. al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award dated 19 June 2007, paras. 112-113 (RL-34).

trade contracts are explicitly excluded from Article 1139.[200] But Claimant was not trying to profit from cross-border sales and trade. It was trying to profit from financing the construction of a capital project inside the United States.

136. In one sense, those cases indicate the analysis on category (h) is superfluous in this case, since there are relevant enterprises. In *Grand River* the tribunal did find it had jurisdiction regarding one of the claimants, because, as the United States conceded, he owned an American corporation, and therefore a relevant enterprise.[201]

137. But to the extent that there is a question of economic benefits being classified as investments under Article 1139, Respondent has not sought to reject the summation of the *Lone Pine* tribunal:

> *The term "interests" is not defined under NAFTA Article 1139(h). Therefore, the term "interests" under NAFTA Article 1139(h) must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty" [. . .]. The Tribunal considers that the term must be interpretated [sic] broadly as covering a broad range of interests, provided that (i) the interests arise out of the commitment of capital in the territory of a NAFTA party towards economic activity in that territory, pursuant to a contract; and (ii) are not covered by the exclusionary language under NAFTA Article 1139(i) ond (j) . . . .*[202]

138. The interest described in category (h) is not conditioned on how the investor would recoup benefits in the investment territorially.

139. Claimant's commitment of capital with enterprises in the territory of Respondent created an interest which was not excluded by categories (i) and (j). These exceptions are:

> *(i) claims to money that arise solely from*

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200 Article 1139 states "*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*[.]" NAFTA, art. 1139 (CLA-38).

201 *Grand River*, paras. 85, 93 (RL-29).

202 *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award dated 21 November 2022, para. 355 (CLA-63).

> *(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);*

140. The interest arising from the commitment of capital here was part of a substantial infrastructure construction collaboration with inherent risk permanently tied to Project completion success in the United States, and Claimant continued to have "*interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory*" after the repurchase. Further:

[redacted]

141. Consequently, it was manifestly not arising from sales of goods or services. Moreover, the Investment Agreement was not simply a loan or trade finance agreement. [redacted]

[redacted]

203 [redacted]

[redacted]

iii. Claimant's Right to Class B and Class C Interests Were Category (e) and (f) Interests

142. Article 1139 "*investment*" category (e) is "*an interest in an enterprise that entitles the owner to share in income or profits of the enterprise*" while category (f) is "*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).*"

143. [redacted] Category (e) discusses a right to share in "*income or profits.*" The choice to separate these terms is indicative of the former being analogous to revenue rather than merely equivalent terms. [redacted]

[redacted]

204 [redacted]

205 Investment Agreement, [redacted] (C-110); [redacted]

206 Respondent's Memorial on Preliminary Objections, para. 133.

207 [redacted]

208 Investment Agreement, [redacted] (C-110); [redacted]

[redacted]

144. Respondent's complaint is to claim that Claimant's rights were contingent interests, rather than presently entitling Claimant to share in income, profits or assets on dissolution.[210] Respondent erroneously asserts the tribunal in *Lion v Mexico* found that mortgages could not be considered property under Article 1139 category (g) because they were contingent rights.[211] But that was Mexico's argument. The tribunal in that case actually did find that mortgages are intangible property under Mexican law and thereby investments under category (g).[212] As the tribunal in *Apotex* noted, on which Respondent also relies, "*the critical enquiry must be as to the nature of the alleged 'property' as at the date of the alleged breach*[.]"[213] The issue being discussed was whether a "*tentatively approved ANDA*"[214] (an application to be approved by the U.S. Food and Drug Administration for the marketing and sale regulatory approval of a generic drug) submitted by a foreigner with no other Article 1139 "*investment*" presence constituted an investment under category (g). The tribunal noted that category (g) requires that property be "*acquired*[,]" and the right to export was determined by a final and not guaranteed approval – therefore a tentatively approved ANDA could not yet represent "*acquired*" property.[215] The tribunal was also uncertain that the marketing and sale regulatory approval an ANDA represents was even correctly construed as "*property*" within the meaning of category (g).[216] The analysis turned on those specific words in category (g). Category (h) discussed above, and categories (e) and (f), need to be construed on their own terms. And so, Respondent is wrong about one of these authorities entirely, and misapplies the other.

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209 [redacted]

210 Respondent's Memorial on Preliminary Objections, paras. 135, 140.

211 *Id.*, para. 136 (*quoting Lion Mexico Consolidoted LP v. United Mexican States,* Award on Jurisdiction, para. 122 (RL-101)).

212 *Lion Mexico Consolidated LP v. United Mexicon States*, Award on Jurisdiction, paras. 229-37 (RL-101).

213 Respondent's Memorial on Preliminary Objections, para. 136 (quoting *Apotex, Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, para. 215 (RL-37)).

214 Notwithstanding that the tribunal acknowledged the considerable resources that may be required to prepare an ANDA: *see, e.g., Apotex*, Award on Jurisdiction, para. 203 (RL-37).

215 *Apotex*, Award on Jurisdiction, paras. 209-10 (RL-37).

216 *Id.*, para. 219.

Respondent otherwise relies on authorities where contingent possibilities had yet to create any rights at all, and sometimes in irrelevant merits analysis contexts.[217]

145. Respondent's complaint regarding Claimant's rights on dissolution also turns on the contention that Claimant did not have "*an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution*" but was merely "*eligible*" to be issued with Class C interests upon triggering events.[218] However, [redacted]

[redacted]

[redacted]

[217] The other authorities in footnote 200 of the Respondent's Memorial on Preliminary Objections fall into two categories. In *Merrill* a tribunal rejected the prospect of contracts that could be made in the future as category (g) property and thereby an Article 1139 investment: *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award dated 31 March 2010, para. 140 (RL-59). The *Methanex* tribunal rejected goodwill and market share likewise: *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits dated 3 August 2005, Part IV, Chapter D, paras. 5, 17 (RL-100). These cases understandably reject a loss of opportunity to create private rights and benefits as existing category (g) intangible "*property*" rights. Claimant already had direct and indirect contractual rights at the time of the Revocation under the Investment Agreement and related contract suite which can be categorized under the Article 1139 "*investment*" definitions at (e), (f) and (h). Meanwhile, Respondent's reliance on *Internatianal Thunderbird* and *Feldman* is entirely misplaced. In these cases, the analysed issues were matters of the merits, not jurisdictional analyses of any of the Article 1139 categories. In *International Thunderbird* the "*vested right*" said not to exist and referred to in the passage Respondent has quoted was the question of whether or not Mexico had authorised the activities of the investor, thereby creating a right, and then undermined them with a regulatory taking: *see International Thunderbird Gaming Corp. v. United Mexican States,* UNCITRAL, Award dated 26 January 2006, paras. 166, 208 (RL-99). In *Feldman* again the question was whether the claimant's investment, a local enterprise, had a right in Mexican law which was interfered with sufficiently such that the enterprise could be considered indirectly expropriated: *see Feldman v United Mexican States*, award, paras. 96, 102, 118, 152 (CLA-24). US Carrier had a right through the Presidential Permit, and any further analysis on the point is for the merits. All Respondent's final citation in the footnote achieves is to show that it otherwise copied the rest of footnote 200 of the Respondent's Memorial on Preliminary Objections from footnote 5 of its non-disputing party submission in *Koch Industries* and simply added reference to its own argument to the end of it: *see Koch Industries, Inc. & Koch Supply & Trading, LP v. Government of Canada*, ICSID Case No. ARB/20/52, 1128 Submission of the United States (Oct. 28, 2022), n.5 (R-30).

[218] Respondent's Memorial on Preliminary Objections, paras. 102, 140.

[219] [redacted]

[redacted]

146. Respondent's argument that an entitlement to share in assets on dissolution will only be triggered by a dissolution event is specious. The mere use of the word "*entitle*" demonstrates the forward-looking nature of the definition. Respondent would have it that category (e) read something akin to "*the assets of an enterprise distributed to the investor on dissolution*", *i.e.*, that the entitlement, and thereby investment, begins when dissolution occurs, rather than being an entitlement defined by currently existing rights to participate in the future process of dissolution. In any event, Claimant had rights which were in fact triggered by the Revocation and led to sharing in assets upon a dissolution mechanism relating to an American enterprise, and in a far greater amount than the investor's formal equity position.[221]

IV. CONCLUSION

147. For the reasons given above, Claimant requests that the Tribunal issue an order:

a. dismissing Respondent's preliminary objections; and,

b. for Claimant's costs to be awarded after further submissions, as to be directed by the Tribunal.

Date Filed: 16 December 2024

Respectfully Submitted,

Crowell & Moring

For and on behalf of Claimant:
Ian A. Laird

220 [redacted]

221 Respondent's assertion that Claimant did not have a category (e) interest because it was an exercised interest misses the point: *see* Respondent's Memorial on Preliminary Objections, n.210. The fact that Claimant exercised its interest upon dissolution was a consequence of Respondent's breach of obligation: *see* Begley Witness Statement, sec. VI. Further analysis of Respondent's treatment of Claimant and its investments under the Section A NAFTA obligations and appropriate relief are matters for the merits.

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APPENDIX 1: Dispute Resolution Clauses

Treaty	Text
Canada-Peru Free Trade Agreement (CLA-72)	**Article 845: Suspension of Other Agreements** 1. The *Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments* done in Hanoi on 14 November 2006 (the "FIPA") shall be suspended from the date of entry into force of this Agreement and until such time as this Agreement is no longer in force. 2. Notwithstanding paragraph 1, the FIPA shall remain operative for a period of fifteen years after the entry into force of this Agreement for the purpose of any breach of the obligations of the FIPA that occurred before the entry into force of this Agreement. During this period the right of an investor of a Party to submit a claim to arbitration concerning such a breach shall be governed by the relevant provisions of the FIPA.
Canada-Panama Free Trade Agreement (CLA-73)	**Article 9.38: Suspension of other agreements** 1. The Treaty between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments, done at Guatemala on 12 September 1996 (the "FIPA") is suspended from the date of entry into force of this Agreement until such time as this Agreement is no longer in force. 2. Notwithstanding paragraph 1, the FIPA remains operative for a period of 15 years after the entry into force of this Agreement for the purpose of any breach of the obligations of the FIPA that occurred before the entry into force of this Agreement. During this period the right of an investor of a Party to submit a claim to arbitration concerning such a breach shall be governed by the relevant provisions of the FIPA.
Canada's Comprehensive Economic and Trade Agreement (CLA-89)	**Article 30.8 – Termination, suspension or incorporation of other existing agreements**

APPENDIX 1: Dispute Resolution Clauses

Treaty	Text
	1. The agreements listed in Annex 30-A shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the agreements listed in Annex 30-A shall take effect from the date of entry into force of this Agreement. 2. Notwithstanding paragraph 1, a claim may be submitted under an agreement listed in Annex 30-A in accordance with the rules and procedures established in the agreement if: (a)the treatment that is object of the claim was accorded when the agreement was not terminated; and (b)no more than three years have elapsed since the date of termination of the agreement.
Mexico-EU Agreement in Principle (CLA-68)	**Article 22 Relationship with Other Agreements** 1. On the date of entry into force of this Agreement, the agreements between Member States of the European Union and Mexico listed in Annex YY (Agreements between the Member States of the European Union and Mexico) including the rights and obligations derived therefrom shall cease to have effect and shall be replaced and superseded by this Agreement. ... 3. Notwithstanding paragraphs 1 and 2, a claim may be submitted pursuant to an agreement listed in Annex Y (Agreements between the Member States of the European Union and Mexico), in accordance with the rules and procedures established in that agreement, provided that: (a) the claim arises from an alleged breach of that agreement that took place prior to the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement ceases to have effect pursuant to paragraph 1 prior to the date of entry into force of this Agreement; and (b) no more than three years have elapsed from the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement ceases to have effect pursuant to paragraph 1, from the date of entry into force of this Agreement until the date of submission of the claim.

APPENDIX 1: Dispute Resolution Clauses

Treaty	Text
Mexico-Australia side letter dated 8 March 2018 in connection with the Comprehensive and Progressive agreement for Trans-Pacific Partnership (CLA-90)	1. Without prejudice to paragraph 2, the Parties agree to terminate the "Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments", and its Protocol, signed in Mexico City on 23 August 2005 (hereinafter referred to as the "IPPA"), on the date of entry into force of the Agreement for both Australia and the United Mexican States (hereinafter referred to as the "date of termination"). 2. The IPPA shall continue to apply for a period of three years from the date of termination to any investment (as defined in Article I(l)(a) (Definitions) of the IPPA) which was made before the entry into force of the Agreement for both Australia and the United Mexican States with respect to any act or fact that took place or any situation that existed before the date of termination.