IN THE MATTER OF AN ARBITRATION UNDER ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT, CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES (1976)

BETWEEN:

ALBERTA PETROLEUM MARKETING COMMISSION

Claimant

AND:

UNITED STATES OF AMERICA

Respondent

ICSID CASE NO. UNCT/23/4

NON-DISPUTING PARTY SUBMISSION OF THE GOVERNMENT OF CANADA PURSUANT TO NAFTA ARTICLE 1128

January 15, 2025

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I. INTRODUCTION

1. The Government of Canada makes this submission pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"),[1] which authorizes non-disputing Parties to make submissions to a tribunal on a question of interpretation of the NAFTA, and as a Party to the Canada-United States-Mexico Agreement ("CUSMA") Protocol[2] as well as the CUSMA, the successor agreement to the NAFTA.

2. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that certain issues raised by the disputing parties have not been addressed in this submission, Canada's silence should not be taken to constitute concurrence or disagreement with the positions the disputing parties have advanced.

3. Canada does not take a position on issues of fact or on how the interpretations it submits below apply to the facts of this dispute.

II. THE CUSMA PROTOCOL, CUSMA ANNEX 14-C AND NAFTA CHAPTER ELEVEN SECTION A

A. The CUSMA Protocol Terminated the NAFTA, Releasing the NAFTA Parties from the Substantive Obligations of NAFTA Chapter Eleven

4. On July 1, 2020, CUSMA entered into force and consequently, NAFTA was terminated. The Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States (the "Protocol") specifically states:

> 1. 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."

5. When CUSMA superseded NAFTA on July 1, 2020, the NAFTA was terminated, and no provision of the NAFTA continued to apply except those that were expressly referred to in the

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[1] *North American Free Trade Agreement*, 17 December 1994, (1993) 32 I.L.M. 289, 605 ("NAFTA").

[2] Canada-United States-Mexico Agreement – *Protocol replacing the North American Free Trade Agreement with the agreement between Canada, the United States of America, and the United Mexican States* ("Protocol"), 30 November 2018, ¶ 1.

CUSMA. As a result, upon termination, the NAFTA Parties were released from their obligations, consistent with customary international law as articulated in Article 70(1)(a) of the *Vienna Convention on the Law of Treaties* ("*VCLT*"). According to that rule, "unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty…releases the parties from any obligation further to perform the treaty".[3] As explained below, the NAFTA did not provide otherwise, and the NAFTA Parties did not otherwise agree to be bound by the substantive obligations of Chapter Eleven after the CUSMA entered into force.

6. The NAFTA did not contain a survival (or sunset) clause which are commonly found in bilateral investment treaties. When substantive obligations of the treaty are to remain in force for a certain period of time following the treaty's termination, the treaty makes this expressly clear.[4] The NAFTA Parties did not include such a survival clause in NAFTA and as a result NAFTA Chapter Eleven's substantive obligations did not remain in force upon the treaty's termination. For the substantive obligations of NAFTA Chapter Eleven to continue to apply after termination, clear text to that effect would have been required in the CUSMA Protocol or the CUSMA that NAFTA Chapter Eleven "continues to be effective" or "shall continue to apply" for a specified period of time from the date of termination.[5] In contrast to CUSMA Article 34.1 (Transitional Provisions from NAFTA 1994), which states that "Chapter Nineteen of NAFTA 1994 shall continue to apply…" the same continuation clause does not exist for NAFTA's substantive investment

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[3] *Vienna Convention on the Law of Treaties* ("*VCLT*"), Article 70(1)(a).

[4] Survival clauses have been included in bilateral investment treaties that Canada, Mexico, and the United States are party to. *See for e.g., Agreement between the Government of Canada and the Government of the People's Republic of China for the promotion and reciprocal protection of investments* ("Canada-China FIPA"), Article 35.3: "3. With respect to investments made prior to the date of termination of this Agreement, Articles 1 to 34, as well as paragraph 4 of this Article, shall continue to be effective for an additional fifteen-year period from the date of termination." *See also, United States – Morocco Free Trade Agreement*, Article 1.2(4): "4. Notwithstanding paragraph 3, 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."

[5] *See e.g.* Canada-China FIPA, Article 35.3, and *2012 U.S. Model Bilateral Investment Treaty*, Article 22.3: "3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments."

provisions.

7. Instead, as explained in the next section, the NAFTA Parties negotiated and set out specific protection for investors holding a "legacy investment" in CUSMA Annex 14-C (Legacy Investment Claims and Pending Claims). Annex 14-C provides the Parties' consent to the submission of a claim to arbitration in accordance with NAFTA Chapter Eleven, Section B with respect to a legacy investment for three years following NAFTA's termination. It is not a survival clause; it merely allows pre-termination breaches to be arbitrated under Section B of NAFTA Chapter Eleven for a defined period.

8. Likewise, the CUSMA Protocol does not contain a survival clause. To the contrary, it provides that the CUSMA "shall supersede the NAFTA without prejudice to those provisions set forth in the CUSMA that refer to provisions of the NAFTA". In other words, the NAFTA does not survive except to the extent and in the manner that the CUSMA refers to it. As detailed below, Annex 14-C provides consent to arbitration under NAFTA Chapter Eleven, Section B; it does not specify that NAFTA Chapter Eleven, Section A provisions shall continue to apply. It is impermissible to read into the "without prejudice" phrase survival commitments for Section A of NAFTA Chapter Eleven, Article 1502(3) and Article 1503(2)(a) that do not exist. It would also lead to a confusion of overlapping and potentially conflicting substantive obligations on investment.

9. The subsequent practice of all three CUSMA Parties demonstrates their collective agreement that the CUSMA Protocol and CUSMA Annex 14-C do not permit claims based on an alleged NAFTA breach that occurred after the NAFTA was terminated.[6] A tribunal constituted

[6] Each of the CUSMA Parties has publicly taken the position and affirmed that it did not consent in Annex 14-C to the submission of claims for alleged breaches of NAFTA obligations that occurred after the NAFTA terminated as those obligations were no longer in force. *See, e.g.*, United States Memorial on Preliminary Objections, ¶ 66, fns. 86-87; *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America* (ICSID Case No. ARB/21/63), Mexico's Submission Pursuant to Article 1128 of NAFTA, 11 September 2023, ¶ 5 (R-0013); *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Second Submission of the United States of America, 21 July 2023, ¶¶ 8-12 (R-0014); *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Mexico's Counter-Memorial on the Ancillary Claim, 19 December 2022, ¶¶ 407-14 (R-0015); *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Mexico's Rejoinder on the Ancillary Claim, 21 April 2023, ¶¶ 258-87 (R-0016) *Ruby River Capital LLC v. Canada* (ICSID Case No. ARB/23/5), Contre-Mémoire Sur Le Fond Et Mémoire Sur La Compétence Du Canada, 15 July 2024, ¶ 262 (R-0017).

under CUSMA Annex 14-C must take this subsequent practice and agreement into account.[7]

10. The fact that the positions of the Parties have been expressed in submissions to arbitral tribunals does not mean that they can be dismissed as irrelevant for the purposes of treaty interpretation. On the contrary, such positions are highly relevant as they bear precisely on the interpretive issue before the Tribunal. Moreover, the NAFTA and CUSMA Parties' positions take into account their interests as both home States of investors and as host States and there is no reason to believe that the Parties' positions systematically prioritize their interests as respondents in arbitration proceedings. In any case, nothing in VCLT Article 31(3) allows the treaty interpreter to delve into the motives underlying a Party's practice or agreement.

11. Thus, a State's conduct after the termination of NAFTA cannot directly engage the international responsibility of Canada, Mexico or the United States under that treaty. According to the fundamental rule of customary international law, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[8] The longstanding principle that a State's responsibility for a breach of an international obligation must be based on the obligations in force at the time the measure is taken has been consistently recognized by international investment tribunals.[9] The NAFTA Parties cannot therefore be liable for an alleged violation of NAFTA Chapter Eleven committed after the

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[7] *VCLT*, Article 31(3) reads as follows: "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;
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> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; […]."

[8] ILC Article 13.

[9] *OOO Manolium Processing v. Republic of Belarus* (PCA Case No. 2018-06), Final Award, 22 June 2021 ¶ 269: ("The prohibition of retroactivity implies that the legality of a Member State's actions under the EEU Treaty can only be assessed if the Treaty was in force at the time the act was performed. This principle – which is considered "well established" and supported by State practice – is also reflected in Art. 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts of 2001"); *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17) Award, 24 March 2016, ¶ 325 ("State conduct cannot be governed by rules that are not applicable when the conduct occurs"); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, ¶ 133 ("The rule that acts are governed by contemporaneous law is also reflected in Article 13 of the ILC Articles on State Responsibility ("ILC Articles"), which rules out responsibility for an act in violation of an obligation not in effect at the time of the performance of the act").

treaty was superseded by CUSMA.

B. CUSMA Annex 14-C Provides a Right to Bring a Claim for Breach only if It Occurred Prior to July 1, 2020

12. CUSMA Annex 14-C prescribes the CUSMA Parties' limited consent to arbitrate claims pertaining to a "legacy investment" for a transition period of three years following CUSMA's entry into force. In particular, paragraphs 1 and 3 set out the scope of the CUSMA Parties' consent to arbitration:

> 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
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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]
>
> […]
>
> 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.

13. Applying the general rule of treaty interpretation,[11] the ordinary meaning of the terms above, in their context and in light of the treaty's object and purpose, confirms that CUSMA Annex 14-C provides the Parties' consent to arbitration, not to the continued application of the substantive obligations that can be subject to arbitration.

14. Paragraph 1 provides the CUSMA Parties' consent to arbitrate claims for alleged breaches of specific obligations of the NAFTA. This consent is limited to "the submission of a claim to arbitration", and, according to paragraph 3, expires three years after the termination of NAFTA. Paragraph 3 extends the Parties' consent for the procedural remedy of arbitration; it does not

[10] CUSMA Annex 14-C, paragraph 1 (footnotes 20 and 21 omitted).

[11] *VCLT* Article 31.

extend Section A of NAFTA Chapters Eleven, Article 1502(3)(a) or Article 1503(2) beyond NAFTA's termination. The ordinary meaning of the terms is clear that the sole focus of Annex 14-C is the extension of the Parties' consent to arbitrate claims. Nothing in the text of Annex 14-C indicates that the substantive provisions continue to bind the Parties once CUSMA replaced the NAFTA.

15. Without providing investors an additional period to bring a NAFTA claim upon NAFTA's termination, CUSMA would have scuppered claims that had arisen prior to NAFTA's termination but had not yet been filed. Under the NAFTA, an investor had three years to submit a claim to arbitration from the date of actual or presumed knowledge of the alleged breach and resulting damage,[12] provided that it filed a Notice of Intent to submit a claim 90 days prior, *and* six months had elapsed since the events giving rise to the claim and its submission to arbitration.[13] Through Annex 14-C, the Parties provided their consent to an investor to bring a claim that they knew or should have known about prior to NAFTA's termination, but which they may or may not have been able to file, depending on the 90-day notification period and the six-month cooling off period. Without this extension of consent, the entry into force of the CUSMA and consequential termination of the NAFTA would have deprived certain investors of recourse to enforcement. CUSMA dispute settlement could not apply retroactively, and, at the same time, the CUSMA would have deprived the right of a NAFTA investor to bring a claim for a breach that had occurred when NAFTA was in force.

16. Relevant context confirms the interpretation of CUSMA Annex 14-C as not extending NAFTA Chapter Eleven's substantive obligations. For example, CUSMA Article 14.2.3 states that, "this Chapter, except as provided for in Annex 14-C […] does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist <u>before</u> the date of entry into force of this Agreement."[14] Therefore, measures taken by a CUSMA Party prior to July 1, 2020, are subject only to NAFTA Chapter Eleven's substantive obligations, while measures taken after July 1, 2020, are subject to the substantive obligations of CUSMA Chapter 14. If the interaction

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[12] *See* NAFTA Articles 1116(2), 1117(2).

[13] *See* NAFTA Articles 1119 and 1120.

[14] CUSMA Article 14.2.3.

between CUSMA Annex 14-C and Chapter 14's substantive obligations did not operate in this manner, the result would be that for a period of three years following CUSMA's entry into force, the CUSMA Parties would have been subject to two similar but distinct sets of substantive obligations vis-à-vis investors and investments of the other Parties, as well as distinct dispute settlement mechanisms under separate international trade agreements.[15] Such a result would run counter to the core object and purpose of CUSMA: to supersede the NAFTA, as set out below.[16]

17. Paragraph 3 of Annex 14-C also supports the position that CUSMA extends eligible claims and not the substantive investment provisions of the NAFTA. It sets the endpoint of the period during which claims can be brought, stating that the CUSMA Parties' "consent under paragraph 1 … shall expire three years after the termination of NAFTA 1994." Its focus on *consent to arbitration* and its specific mention of the termination of the NAFTA strongly support the interpretation that claims may be brought for pre-termination but not post-termination breaches.

18. Finally, the dual application of NAFTA Chapter Eleven and CUSMA Chapter 14 would run counter to the object and purpose of the CUSMA, which is clearly articulated as follows in the CUSMA Preamble, that the Parties "REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement".[17]

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[15] CUSMA removed the trilateral investor-State dispute settlement ("ISDS") mechanism that existed under the NAFTA. Under CUSMA Annex 14-D and Annex 14-E, a limited ISDS mechanism remains only between the United States and Mexico, while only a State-to-State dispute mechanism is available for Canada.

[16] *See* ¶ 17 below, citing to the Protocol replacing the North American Free Trade Agreement with the agreement between Canada, the United States of America, and the United Mexican States ("1. 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.") (emphasis added).

[17] *See e.g.* CUSMA Preamble, ¶ 3, where the CUSMA Parties resolve to "REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement […]" (emphasis added); Protocol replacing the North American Free Trade Agreement with the agreement between Canada, the United States of America, and the United Mexican States ("1. 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.") (emphasis added); Annex 14-C, ¶ 5 ("[…] the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994") (emphasis added).

Dated this 15th day of January, 2025

Respectfully submitted
on behalf of Canada,

[signed]

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