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

ALBERTA PETROLEUM MARKETING COMMISSION

Claimant

-and-

UNITED STATES OF AMERICA

Respondent.

ICSID CASE NO. UNCT/23/4

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

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1. In accordance with Procedural Order Nos. 1, 4, and 5, the United States hereby submits its Reply on its Preliminary Objections to the Tribunal's jurisdiction under Annex 14-C to the United States-Mexico-Canada Agreement ("USMCA"), as well as the second expert reports of Professor Richard Gardiner, Professor Hervé Ascensio, and Professor Michael Klausner.[1] To the extent they are not defined herein, abbreviations used in this submission have the same meaning as in the U.S. Memorial on its Preliminary Objections.

I. Introduction

2. As the United States made clear in its Memorial on Preliminary Objections, this Tribunal lacks jurisdiction for two independent reasons.

3. *First*, the Tribunal lacks jurisdiction *ratione temporis* because USMCA Annex 14-C expressly limits the States-Parties' consent to arbitrate under that Annex to a "breach of an obligation" under NAFTA Chapter 11, Section A. The phrase "breach of an obligation" was well understood by the USMCA Parties, and its use in Annex 14-C was consistent with international law, by which a treaty "obligation" may be "breached" only while it is in force. Nothing in USMCA Annex 14-C extended the NAFTA obligations past the termination of the treaty. The USMCA Parties thus did not agree in Annex 14-C to arbitrate a claim for "breach of an obligation" that arose after the NAFTA's termination on July 1, 2020. Claimant's claim, which arose on January 20, 2021, does not fall within the Annex 14-C consent to arbitrate.

[1] In this Reply, the United States cites Professor Gardiner's second report as "Gardiner Reply Report ¶ X," Professor Ascensio's second report as "Ascensio Reply Report ¶ X," and Professor Klausner's second report as "Klausner Reply Report ¶ X." The United States continues to cite the first reports by each expert as, respectively, "Gardiner Report ¶ X," "Ascensio Report ¶ X," and "Klausner Report ¶ X." The United States cites the Expert Report of Professor Christoph Schreuer as "Schreuer Report, ¶ X," the Expert Report of Patrick Maguire, K.C. as "First Maguire Report ¶ X," and the Supplemental Expert Report of Patrick Maguire as "Supplemental Maguire Report ¶ X."

4. *Second*, the Tribunal lacks jurisdiction *ratione materiae* because Claimant did not have an investment in the United States on the alleged date of breach. While Claimant at one time held Class A shares in a U.S. special purpose vehicle ("U.S. SPV"), Claimant sold those shares to TC Energy weeks before the alleged breach as part of a plan to avoid paying taxes in the United States. Through this divestiture—which was planned from the moment Claimant first purchased the Class A shares in the U.S. SPV—Claimant received "all of its money back plus a return." Claimant then repatriated those funds to Canada. After the sale, Claimant lacked a qualifying "investment" in the United States under USMCA Annex 14-C or NAFTA Article 1139.

5. While the U.S. objections to jurisdiction are relatively straightforward, Claimant's responses in its Counter-Memorial are scattershot and inconsistent. With respect to the objection *ratione temporis*, Claimant argues, *inter alia*, that:

- NAFTA Chapter 11 Section A provided the "standards" by which a claim under Annex 14-C would be assessed, thereby negating the well-established meaning of "breach of an obligation" under international law;
- The USMCA extended NAFTA Chapter 11's substantive obligations by three years;
- Annex 14-C did not extend NAFTA Chapter 11's substantive obligations, but NAFTA Chapter 11 Section A was nonetheless the "choice of law" for disputes arising under Annex 14-C; and
- Since Annex 14-C requires that a claim be filed in accordance with Section B of NAFTA Chapter 11, it must be that Section A of NAFTA Chapter 11 was also extended for three years.

6. The variety of Claimant's theories only underscores that none of them is grounded in the text of the treaty. The simple facts are that the treaty limits consent to arbitrate to an asserted "breach of an obligation"—a phrase that has an accepted meaning under international law—and Claimant's claims fall outside the scope of such consent. Claimant's alternative suggestions, based on implicit or tacit terms that must be read into the treaty, are not supported by the actual words employed by the USMCA Parties.

7. Claimant's various claims to an "investment" in response to the U.S. objection *ratione materiae* fare no better. For example, there is no merit to Claimant's assertion that its investment in a Canadian SPV, the value of which was calculated as if Claimant had retained its investment in the U.S. SPV, somehow constituted an investment in the United States. No matter how the remuneration for its investment in the Canadian SPV was calculated, it remained an investment in Canada, and was not an investment in the United States.

8. Likewise, Claimant's roles in certain other U.S. entities, which survived the divestiture of its Class A shares in the U.S. SPV, were all non-economic in nature. Claimant did not invest in these U.S. entities, did not incur any risk with respect to these entities, and did not receive compensation for its participation. Claimant's assertions with respect to its alleged right to one day acquire Class B and C shares similarly fail. Claimant admits that, as of the date of the permit revocation, it held neither Class B nor Class C shares in the U.S. SPV; it therefore had no vested rights associated with either of those share classes. Claimant also attempts to muddy the waters by consistently stating that it invested in "the Project," "Project construction," or "an integrated Project," all apparently referring to the construction of the Keystone XL pipeline. But nowhere does Claimant even attempt to argue that the pipeline project itself was a qualifying "investment."

9. In short, Claimant structured the relevant transactions from the beginning to limit its financial contribution in the United States to a short period of time, before withdrawing that contribution and investing solely in Canada. Claimant's choice to divest from the U.S. SPV to avoid paying U.S. taxes means that it is not entitled to claim solely for the purposes of this arbitration that it had an investment in the United States on the date of the permit revocation.

10. Because the Tribunal lacks jurisdiction *ratione temporis* and *ratione materiae*, the United States respectfully requests the immediate dismissal of this claim, with a costs award in its favor.

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

11. In its Memorial, the United States explained that the customary international law principles of treaty interpretation reflected in VCLT Article 31 give primacy to the treaty text.[2] Neither Claimant nor its expert, Christoph Schreuer, appear to disagree that the Tribunal's focus must be on the text of Annex 14-C.[3]

12. The meaning of that text is clear. The USMCA Parties consented in Paragraph 1 of Annex 14-C to the arbitration of claims alleging "breach" of certain specified NAFTA "obligation[s]," and nothing more. This limit on the USMCA Parties' consent imposed a corresponding limit on the Tribunal's jurisdiction *ratione temporis* because "[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

[2] U.S. Memorial ¶ 13 & n.10.

[3] Professor Schreuer does not directly address the issue in his report in this case, but in a 2018 expert opinion submitted in another investor-State case, Professor Schreuer wrote, "the text of the treaty must be presumed to be the authentic expression of the intentions of the parties. The interpretation of a treaty should proceed from the elucidation of the meaning of its text." *García Armas and others v. Venezuela (II)*, PCA Case No. 2016-08, Second Legal Opinion of Prof. Christoph Schreuer on Questions of Jurisdiction relating to Nationality ¶ 7 (May 31, 2018) (RL-0115).

time the act occurs."[4] Thus, the Tribunal lacks jurisdiction over claims based on acts that occurred before the NAFTA entered into force, as well as claims based on acts that—like the revocation of the Keystone XL pipeline permit—occurred after the USMCA Parties had terminated the NAFTA.

A. Claimant's Theories Are Inconsistent with the Text of Annex 14-C and Must Be Rejected

13. In response to this clear and consistent interpretation of Annex 14-C, which is shared by all of the USMCA Parties,[5] Claimant offers a jumbled mix of theories. **(1)** Claimant's first suggestion is that the "breach of an obligation" requirement in Paragraph 1 in fact imposes no limit on the Tribunal's jurisdiction *ratione temporis*, because Section A of NAFTA Chapter 11 provides the "standard" for an Annex 14-C claim. **(2)** Claimant's second and primary argument is that even if Paragraph 1 includes a temporal limit, it is satisfied with respect to Claimant's claims because the NAFTA's substantive investment obligations continued to bind the USMCA Parties after the NAFTA's termination. According to Claimant, the very same words that define the scope of the USMCA Parties' consent to arbitration are also an ***implicit*** agreement that the NAFTA's substantive investment obligations would survive the NAFTA's termination. **(3)** Claimant's final theory is that the USMCA Parties effectively subverted the *ratione temporis* limitation in Paragraph 1 by selecting Section A of NAFTA Chapter 11 as the governing law for disputes under Annex 14-C.

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[4] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001) ("ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts") (RL-0019) (emphasis added). *See also* Sean Murphy, *Temporal Issues Relating to BIT Dispute Resolution*, 37 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 51, 54 (2022) (RL-0116) (Observing, in discussing Articles 12-14 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, that "[f]or investor-State arbitration, the consequence of these articles is that the international obligation that the State is alleged to have breached (typically embedded in a BIT, but potentially in some other source) must have bound the State at the time of the allegedly wrongful act in question."); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, Rule 39, at 328 (2009) (RL-0038 *bis*) ("The tribunal's jurisdiction ratione temporis extends to claims relating to the claimant's investment, which are founded upon obligations in force and binding upon the host contracting state party at the time of the alleged breach.").

[5] *See infra* ¶¶ 90-94. *See also* U.S. Memorial ¶¶ 65-67.

14. In the sections that follow, the United States will demonstrate that each of Claimant's varying attempts at a proposed interpretation is inconsistent with the ordinary meaning of Annex 14-C's text.

1) The "Breach of an Obligation" Requirement in Paragraph 1 Limits the Tribunal's Jurisdiction *Ratione Temporis*

15. Claimant makes two points in its Counter-Memorial in support of its argument that Paragraph 1 imposes no limit on the Tribunal's jurisdiction *ratione temporis*. Neither need detain the Tribunal long.

16. *First*, Claimant asserts that it is sufficient under Annex 14-C to allege conduct by the United States that is inconsistent with the "standards" of NAFTA Chapter 11, Section A, regardless of when such conduct occurred.[6] Professor Schreuer makes a similar assertion.[7] But Paragraph 1 of Annex 14-C says nothing about a breach of "standards." Paragraph 1 instead provides that an investor must allege "breach of an obligation" under the specified NAFTA provisions.[8] Claimant's argument fails to appreciate that, under long-established international law, a "breach" of an international "obligation" has both (1) a material component, *i.e.*, that the State's act was "not in conformity with what [was] required of it by that obligation"[9] and (2) a temporal component, *i.e.*, that the "State [was] bound by the obligation at the time the act occur[red]."[10] Claimant's

[6] Claimant's Counter-Memorial ¶ 29 ("The prospective claimant [under Annex 14-C] 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.").
[7] Schreuer Report ¶ 29 ("Another condition [on the USMCA Parties' consent to arbitration] is that the claim alleges the breach of certain substantive standards, including those of Section A of Chapter 11 of the NAFTA.").
[8] Annex 14-C ¶ 1 (R-0002 *bis*). *See also* Gardiner Reply Report ¶ 10 ("The relevant condition in Annex 14-C is not that a claim alleges the breach of certain 'substantive standards'. Paragraph 1 of that Annex expresses consent with respect to submission to arbitration of a claim alleging 'breach of an obligation' under certain NAFTA provisions including Section A of Chapter 11 of NAFTA. This condition does not point to a claim merely of breach of standards. It indicates that consent is circumscribed by reference to breach of an obligation under listed elements of a legal regime. The difference is most material.").
[9] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 12 (RL-0019).
[10] *Id.*, art. 13 (RL-0019).

allegations at best satisfy the material component: Claimant has alleged that the U.S. revocation of the Keystone XL permit was "not in conformity with" one of the specified NAFTA obligations.[11] What Claimant has not and cannot do is satisfy the temporal component, which would require it to show that the United States was "bound by the obligation in question at the time" of the revocation.[12]

17. *Second*, Claimant states that "Paragraph 1 of Annex 14-C does not expressly restrict the temporal aspect of the measures that could lead to a claim regarding a legacy investment."[13] Claimant references the definition of "measure" in NAFTA Article 201 for no obvious reason;[14] perhaps Claimant means to suggest that the USMCA Parties could have but did not modify this definition as a way to circumscribe the scope of their consent. If so, however, the USMCA Parties circumscribed their consent by expressly limiting it to claims for "breach" of the specified NAFTA "obligation[s]," terms understood by the USMCA Parties to limit jurisdiction *ratione temporis*. It is irrelevant whether the USMCA Parties imposed a further, redundant limitation on their consent.

2) Paragraph 1 Provides the USMCA Parties' Consent to Arbitration, Not Their Commitment to the Survival of the NAFTA's Substantive Investment Obligations

18. Claimant's next and primary jurisdictional argument is that the NAFTA's substantive investment obligations continued to bind the USMCA Parties after the NAFTA's termination. Claimant's attempt to support this premise—despite Claimant's purported adherence to the textual

[11] *Id.*, art. 12 (RL-0019).
[12] *Id.*, art. 13 (RL-0019). *See also* Gardiner Reply Report ¶ 11 ("A 'standard' is a measure by which something is evaluated. An 'obligation' under the provisions of a treaty is a commitment which is legally binding. The condition of consent in the Annex is not expressed in terms of allegations of failure to meet specified standards but of allegations of breach of obligations under the stated treaty provisions. The existence of those obligations circumscribes the consent that is given. The obligations did not arise except when the specified NAFTA treaty provisions had force, which they did not after being superseded.").
[13] Claimant's Counter-Memorial ¶ 30.
[14] Claimant's Counter-Memorial ¶ 30 n.34.

approach embodied in VCLT Article 31—is less about what the text of Annex 14-C actually says than about what, according to Claimant, it should be read to imply. Specifically, Claimant argues that if the USMCA Parties consented to the submission of claims for breach of the NAFTA's substantive investment obligations for a period after the NAFTA's termination, then they must also have agreed that those obligations would continue to bind them for the same period. But Claimant's logic does not hold. Whether or not, at any given time, a particular treaty obligation is in force and binds the parties to that treaty is a question entirely separate from whether those parties have consented to the submission of claims for alleged breaches of that obligation.[15] Here, as the text of Annex 14-C makes clear, the USMCA Parties agreed that holders of legacy investments could continue to submit claims for breach of certain NAFTA obligations that had allegedly already occurred, but did ***not*** agree that those obligations would continue to bind them in their treatment of investments after NAFTA's termination and its replacement by the USMCA.

19. As Claimant accepts,[16] VCLT Article 70(1)—which reflects customary international law—provides the default rule for terminated treaties: "Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: . . . *releases the parties from any obligation further to perform the treaty*[.]"[17] This is the mirror image of VCLT Article 26, which provides that "[e]very treaty *in force* is binding upon the parties to it and must be performed by them in good faith."[18]

[15] USMCA Chapter 14 itself exemplifies this distinction: all three USMCA Parties agreed that they would be bound by Chapter 14's substantive investment obligations, but only Mexico and the United States agreed to investor-State dispute settlement for alleged breaches of those obligations under Annexes 14-D and 14-E.
[16] Claimant's Counter-Memorial ¶ 33.
[17] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 70(1)(a) ("VCLT") (RL-0017) (emphasis added).
[18] VCLT art. 26 (RL-0017) (emphasis added).

20. The NAFTA/USMCA Parties terminated the NAFTA on July 1, 2020, replacing it with the USMCA. The NAFTA itself contained no survival clause. Thus, if the NAFTA/USMCA Parties wanted any part of the NAFTA to survive termination, they needed to agree to that in the USMCA. What the NAFTA/USMCA Parties in fact agreed to in Annex 14-C is clear from its text. No implication or deduction is necessary. Consistent with its title—"Legacy Investment *Claims* and Pending *Claims*"—Annex 14-C is about the submission and resolution of *claims*, not the imposition of substantive obligations on the USMCA Parties.[19] Paragraph 1 of Annex 14-C provides the USMCA Parties' "consent[] . . . to the submission . . . to arbitration" of a claim for "breach" of specified NAFTA "obligation[s]" "in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994."[20] Paragraph 3 provides that "[a] Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994."[21] The combined effect of these two paragraphs is to create a three-year period after the NAFTA's termination during which the holders of legacy investments would be able to submit claims within the scope of Paragraph 1 to be resolved in accordance with the dispute settlement mechanism provided in Section B of NAFTA Chapter 11. These paragraphs make no reference to the extension of the NAFTA's substantive investment obligations (or to when such an alleged extension would come to an end), nor do any of the other provisions of Annex 14-C.[22] In other words, the Parties consented in Annex 14-C to

[19] Ascensio Reply Report ¶ 8 ("Annex 14-C does not set out a 'transition [or transitional] period', but deals with 'claims' only, as is evident in its title ('Legacy Investment Claims and Pending Claims'). It aims at specifying the procedures that may be used to settle certain categories of claims.").
[20] USMCA Annex 14-C ¶ 1 (R-0002 *bis*).
[21] USMCA Annex 14-C ¶ 3 (R-0002 *bis*).
[22] U.S. Memorial ¶¶ 38-41. *See also* Gardiner Reply Report ¶ 7 ("[P]aragraph 1 of Annex 14-C does not purport to apply provisions which have ceased to be in force. Neither paragraph 1 of the Annex nor any other provisions of the Annex or USMCA recreate, extend, or prolong the provisions of the regime in Section A of Chapter 11 of NAFTA 1994 or the specified elements of Articles 1502 and 1503 of NAFTA 1994 that have been superseded."); *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Award ¶ 146 (July 12, 2024) (RL-0060) ("*TC Energy* Award") ("[T]he USMCA parties could have agreed to make an exception to that general rule by extending the offer to arbitrate, by extending the substantive provisions of NAFTA, or both. The ordinary terms of Annex 14-C indicate that they agreed to extend the offer to arbitrate. They did however not agree to also extend Section A.").

the continued submission of claims for breach of obligations in Section A of NAFTA Chapter 11 for three years past NAFTA's termination, but did ***not*** agree to extend the obligations themselves.

21. As the United States explained in its Memorial, the language of Paragraph 1 is drawn primarily from NAFTA Articles 1116/1117 and 1122, which were part of Section B of NAFTA Chapter 11.[23] NAFTA Articles 1116 and 1117, which were titled, respectively, "Claim by an Investor of a Party on Its Own Behalf" and "Claim by an Investor of a Party on Behalf of an Enterprise," governed the submission of claims. NAFTA Article 1122, titled "Consent to Arbitration," provided the NAFTA Parties' consent to arbitration. These articles did not impose substantive investment obligations on the NAFTA Parties. Rather, the NAFTA's substantive investment obligations were set out in Section A of Chapter 11. Section B was, consistent with its title ("Settlement of Disputes between a Party and an Investor of Another Party"), limited to "establish[ing] a mechanism for the settlement of investment disputes."[24] As the *UPS v. Canada* tribunal observed regarding NAFTA Article 1116 and 1117:

> [T]he extent of substantive obligation is one thing; the extent of jurisdiction quite another. Jurisdiction is conferred by article 1116(1)(b) and is subject to its terms. Article 1116 concerning investor-State disputes, like the similar article 1117, states the extent of what the Parties have agreed to in respect of claims being submitted to arbitration against each of them by an investor of another Party.[25]

[23] U.S. Memorial ¶¶ 78-81.
[24] North American Free Trade Agreement, art. 1115 ("NAFTA") (R-0004 *bis*). *See also* MEG KINNEAR ET AL., *Introduction*, *in* INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 37 (2006) (RL-0075) ("Section A of Chapter 11 sets forth the primary obligations of the Parties, while Part B sets forth the investor-State dispute resolution mechanism."); *id.* at 38 ("Section B contains no substantive rights or obligations, but is devoted to the mechanism by which an investor may seek redress.").
[25] *United Parcel Service of America, Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Award on Jurisdiction ¶ 60 (Nov. 22, 2002) (RL-0117).

22. The NAFTA/USMCA Parties' use of language from these Section B articles in Annex 14-C Paragraph 1 is further confirmation that Annex 14-C is solely focused on the submission and resolution of claims, not the substantive investment obligations that bind the Parties. Moreover, the temporal limitation provided by the language that the USMCA Parties adapted from NAFTA Articles 1116 and 1117 for use in Paragraph 1 has long been well understood, as the United States explained in its Memorial.[26] In particular, the NAFTA/USMCA Parties all agreed that, by permitting only claims "that another Party has breached an obligation under" certain specified NAFTA provisions (including Section A of Chapter 11),[27] NAFTA Articles 1116 and 1117 limited consent to claims based on conduct occurring when the NAFTA was in force.[28] Scholars—including Claimant's expert[29]—and arbitral tribunals have likewise endorsed the NAFTA/USMCA Parties' understanding of this language as a temporal limit on the scope of their consent to arbitration.[30] There is no reason to interpret the nearly identical language in Annex 14-C any differently.

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[26] U.S. Memorial ¶ 22 & nn.20-22.
[27] NAFTA Article 1116(1) (R-0004 *bis*).
[28] U.S. Memorial ¶ 22 (citing sources).
[29] *See, e.g.*, CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 – Jurisdiction* ¶ 510 (2d ed. 2009) (RL-0069) ("A clause in a treaty or in legislation providing for consent may be broad and refer to investment disputes in general terms. Or it may be restricted to disputes concerning alleged violations of the document containing the consent. If consent to arbitration contained in a treaty is limited to violations of that treaty, the date of the treaty's entry into force is also necessarily the date from which acts and events are covered by consent to jurisdiction. For instance, under the NAFTA and under the ECT the scope of the consent to arbitration is limited to claims arising from alleged breaches of the respective treaties. In that case the entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law.") (internal citations omitted). *See also* CHRISTOPH SCHREUER, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 859-60 (Peter Muchlinski et al., eds., 2008) (RL-0063); CHRISTOPH SCHREUER, *Landmark Investment Cases on State Consent*, *in* INTERNATIONAL INVESTMENT LAW: AN ANALYSIS OF THE MAJOR DECISIONS 265 (Hélène Ruiz Fabri & Edoardo Stoppioni, eds., 2022) (RL-0118); Christoph H. Schreuer, *Consent to Arbitration*, 2(5) TRANSNAT'L DISP. MGMT. at 33 (2005, updated Feb. 2007) (RL-0119); STEPHAN W. SCHILL ET AL., SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *Article 25 – Jurisdiction* ¶ 941 (3rd ed. 2022) (RL-0120); Humphrey Waldock, *Third Report on the Law of Treaties* 11 (¶ 4), U.N. Doc. A/CN.4/167 (1964) (RL-0089).
[30] U.S. Memorial ¶ 22 (citing sources). Claimant suggests that the *Feldman* award is irrelevant because this case presents "a fundamentally different scenario." Claimant's Counter-Memorial ¶ 41. But Claimant's sole point of distinction remains that *Feldman* dealt with conduct before the NAFTA's entry into force, whereas this case deals

23. Nor is there any textual support for Claimant's assertion that Paragraph 1 should be interpreted as implicitly extending the investment obligations in Section A of NAFTA Chapter 11 past its termination.[31] Claimant rests its interpretation on a purported link between two phrases in Paragraph 1: "submission of a claim to arbitration *in accordance with* Section B of Chapter 11 (Investment) of NAFTA 1994" and "alleging breach of an obligation *under*: (a) Section A of Chapter 11 (Investment) of NAFTA 1994 . . . ."[32] Claimant incorrectly asserts that "[t]here is no distinction between 'in accordance with' and 'under' as incorporating references" and that, as a result, a finding that the USMCA Parties extended their consent to arbitration in accordance with Section B of NAFTA Chapter 11 leads necessarily to the conclusion that they also extended the substantive investment obligations in Section A.[33]

24. Claimant's assertion is baseless. As used in Annex 14-C and more generally, "in accordance with" refers to an action that conforms with whatever requirements follow the phrase.[34] Thus, in requiring "submission of a claim to arbitration *in accordance with* Section B of Chapter 11 (Investment) of NAFTA 1994," the USMCA Parties expressly provided for continued compliance with the provisions of that section in the submission and resolution of Paragraph 1 claims. "Under," on the other hand, is a generic preposition that does not by itself possess any such mandatory character. As used in Paragraph 1 of Annex 14-C, the word "under" merely

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with conduct after the NAFTA's termination. For the reasons explained in the U.S. Memorial, this is a distinction without a difference. U.S. Memorial ¶ 23.

[31] Gardiner Reply Report ¶ 8 ("To bring provisions of a treaty into force or to apply provisions to particular facts, transactions or as a regime, an express provision is necessary. This cannot be presumed from a provision which states that it is doing something else, a provision which in this case is expressing conditions for consent to arbitration.").

[32] USMCA Annex 14-C ¶ 1 (R-0002 *bis*).

[33] Claimant's Counter-Memorial ¶ 29. *See also id.* ¶ 36.

[34] BRYAN GARNER, A DICTIONARY OF MODERN LEGAL USAGE (3d ed. 2011) (RL-0121) ("To be *in accordance* is to be in conformity or compliance"); MERRIAM-WEBSTER DICTIONARY, *in accordance with* ("in a way that agrees with or follows (something, such as a rule or request)") (RL-0122), https://www.merriam-webster.com/dictionary/in%20accordance%20with (last accessed May 20, 2025).

identifies where to find the relevant obligations in the NAFTA; it does not extend those obligations. The distinction between the two phrases is made plain if one tries to swap them: requiring a claimant to allege "breach of an obligation *in accordance with*: (a) Section A of Chapter 11 (Investment) of NAFTA 1994" would be nonsensical because a breach of an obligation is, by definition, an act that is "is not in conformity with what is required . . . by that obligation."[35] The purported equivalency between "in accordance with" and "under" on which Claimant relies is therefore false.

25. Claimant's focus on these individual words also ignores the rest of the Paragraph 1.[36] As established above, the subject of Paragraph 1 is each USMCA Party's consent to arbitration, and its terms define the scope of that consent.[37] Paragraph 1's reference to "the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994" makes clear that the USMCA Parties' consent extends only to claims that comply with the requirements of Section B and to arbitration consistent with its provisions. The requirement that a claim "alleg[e] breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994" and two provisions of NAFTA Chapter 15 imposes a further limit on the scope of the USMCA Parties' consent, excluding claims that fail to satisfy both the material and temporal elements of the phrase "breach of an obligation."[38] In short, the reference in Paragraph 1 to the "breach of an obligation under . . . Section A of Chapter 11 (Investment) of NAFTA 1994" is exactly what it

[35] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 12 (RL-0019).
[36] Claimant's Counter-Memorial ¶ 39. The dissenting opinion of Henri Álvarez in *TC Energy*, on which Claimant attempts to rely, errs in the same respect. *See TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator, Henri C. Álvarez ¶¶ 8-9 (July 12, 2024) (CLA-064).
[37] Ascensio Reply Report ¶ 29 ("In its first paragraph, Annex 14-C mentions the substantive provisions of NAFTA in a list that adds precision to the expression 'breach of an obligation'. This expression has the meaning of cause of action (*causa petendi*) in any litigation system. All of these terms appear in a clause whose object and purpose are to give consent for a category of claims, which it therefore defines in referring to the obligations that may have been breached.").
[38] *See supra* ¶ 16.

appears to be: a limitation on the scope of the USMCA Parties' consent.[39] It cannot be read as the opposite: an implicit three-year extension of the Section A obligations and consequent *expansion* of the scope of the USMCA Parties' consent to cover conduct occurring after the NAFTA's termination.[40]

26. Claimant also suggests that the U.S. interpretation of Annex 14-C relies on giving a "special meaning" to the word "obligation."[41] But Paragraph 1 does not refer merely to the "obligations" under Section A of NAFTA Chapter 11. Instead, the word is used as part of the phrase "breach of an obligation." The phrase "breach of an obligation" has an inherent temporal dimension, because "[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."[42] Moreover, as discussed above, attention must be paid to the way the phrase "breach of an obligation" is used in Paragraph 1, in the context of defining (and limiting) the scope of the USMCA Parties' consent. Accordingly, the U.S. interpretation does not rely on giving the word "obligation" a special meaning, but rather relies on the ordinary meaning of the word in its context, as required by VCLT Article 31(1).

27. Nor is there anything incongruous about the USMCA Parties' decision to limit their consent to arbitration only to those claims alleging breach prior to the NAFTA's termination. Under the customary international law principles reflected in VCLT Article 70(1)(b), the

[39] Ascensio Reply Report ¶ 30 ("In Annex 14-C, paragraph 1 refers to NAFTA only to define the possible causes of action, and thus to specify the category of claims that may be submitted to arbitration.").
[40] Ascensio Reply Report ¶ 8 ("[Annex 14-C's] function is to define the categories of disputes for which the Annex provides resolution procedures, and for which the Parties consent to arbitration. It is not to modify in any respect the subject-matter of the claims or the law applicable to them. As a consequence, the expression 'legacy investment *claims*' must be understood as a category of claims that determines the limits of the jurisdiction of the arbitral tribunal under Annex 14-C."); Gardiner Reply Report ¶ 17 ("Consent to arbitration is not a means of expressing consent to be bound by a treaty or of establishing treaty relations.").
[41] Claimant's Counter-Memorial ¶ 38.
[42] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 13 (RL-0019).

termination of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."[43] This means that while the termination of the NAFTA ended the substantive obligations in Section A of NAFTA Chapter 11 going forward, it did not wipe away breaches of those obligations, if any, that occurred while they were in force.[44] Annex 14-C provides an additional three years past NAFTA's termination for qualifying investors to file a claim in relation to such breaches, which they otherwise would not have had.

28. Claims alleging such breaches fall into two categories and Annex 14-C expressly deals with them both.[45] *First*, for claims that had been submitted to arbitration before the NAFTA's termination—the "pending claims" referred to in the title of Annex 14-C—the USMCA Parties included Paragraph 5, which confirmed that, "[f]or 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" and that "the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994."[46]

29. *Second*, for claims that had not yet been submitted to arbitration—the "legacy investment claims"—the USMCA Parties consented in Paragraph 1 to the continued submission of such claims for three years "after the termination of NAFTA 1994," as specified in Paragraph 3.[47]

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[43] VCLT art. 70(1)(b) (RL-0017).
[44] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 13, commentary (7) (RL-0057) ("[O]nce responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law.").
[45] Ascensio Reply Report ¶ 10 ("What 'pending claims' and 'legacy investment claims' have in common is that the claims all relate to events that occurred before the treaty ended.").
[46] Annex 14-C ¶ 5 (R-0002 *bis*).
[47] Annex 14-C ¶¶ 1, 3 (R-0002 *bis*).

Paragraph 4 parallels Paragraph 5, confirming that "[f]or 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 that "the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3."[48]

30. Annex 14-C therefore comprehensively addresses two sets of claims based on conduct that occurred while the NAFTA was in force, ensuring that already "pending claims" could be heard to completion and permitting the holders of "legacy investment claims" that were not submitted prior to the NAFTA's termination a further opportunity to arbitrate them.[49] Annex 14-C provided a particularly important benefit to the latter category of investors because, in its absence, they would have lost the ability to submit their claims to arbitration after the NAFTA terminated, even though the alleged breach occurred at a time when NAFTA was still in force.

31. Claimant's interpretation of Annex 14-C, by contrast, turns it into a far more radical proposition. Rather than simply ensuring that failure to submit a preexisting "legacy investment claim" for breach of the obligations under Section A of NAFTA Chapter 11 before the NAFTA's termination would not result in the loss of such a claim—a procedural fix for a procedural problem—Claimant contends that Annex 14-C established a parallel set of substantive investment obligations (*i.e.*, Section A of NAFTA Chapter 11), and a mechanism for the settlement of disputes for alleged breaches of such obligations (*i.e.*, Section B of NAFTA Chapter 11), that would exist alongside USMCA Chapter 14's different investment obligations and dispute settlement

[48] Annex 14-C ¶ 4 (R-0002 *bis*).
[49] Subject to the carveout in footnote 21, addressed below. *See infra* ¶¶ 72-77.

mechanisms for a three-year period.[50] As Claimant would have it, the USMCA Parties subjected themselves to three further years of the NAFTA's investment regime in their treatment of ***all*** holders of legacy investments—not just those who decided to assert claims—under the guise of an annex that on its face deals solely with the submission and resolution of claims. This makes little sense and, more importantly, it is entirely unsupported by the ordinary meaning of Annex 14-C's terms.

32. Claimant attempts to minimize the far-reaching consequences of its interpretation by suggesting, in its discussion of Paragraph 3 of Annex 14-C, that the NAFTA's obligations could somehow be extended exclusively for investor-State dispute settlement. Claimant asserts that "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" and that "[t]he end of that consent in paragraph 3 naturally closes off their continued application, which was sustained for no other purpose in paragraph 1."[51] But, of course, the USMCA Parties could not know in advance which investors might assert claims. To be subject to breach, the NAFTA's substantive investment obligations would have to be extended across all holders of legacy investments (who would have simultaneously been covered by the USMCA's investment protections). As already explained, there is nothing in the text of Annex 14-C to suggest that the USMCA Parties agreed to this. To the contrary, as the United States pointed out in its Memorial, Paragraph 3's text is far more consistent with the U.S. interpretation. Paragraph 3 provides only for the expiration of "[a] [USMCA] Party's *consent* under paragraph 1"[52] and, accordingly, that is all it does. There is simply no basis to conclude that the USMCA Parties

[50] As discussed below in the context of footnote 20, Claimant's interpretation would also result in overlap between the NAFTA and USMCA regimes in other areas. *See infra* ¶¶ 66-71.
[51] Claimant's Counter-Memorial ¶ 44.
[52] USMCA Annex 14-C ¶ 3 (R-0002 *bis*) (emphasis added). *See also* U.S. Memorial ¶ 39.

extended the NAFTA's substantive obligations ***by implication*** in Paragraph 1 and then terminated this extension after three years ***by implication*** in Paragraph 3.

33. In sum, the USMCA Parties' consent to arbitrate claims for "breach of an obligation" under certain NAFTA provisions in Paragraph 1 of Annex 14-C does not equate to an agreement to the survival of those obligations after the NAFTA's termination. The USMCA Parties could have included language providing for the post-termination survival of the NAFTA's substantive investment obligations, but they did not do so. Accordingly, this interpretation of Annex 14-C must be rejected.

3) Claimant's Applicable Law Theory Is Inconsistent with the Ordinary Meaning of Annex 14-C

34. Claimant's third proposed interpretation of Annex 14-C is that the USMCA Parties' choice of NAFTA as the applicable law for Annex 14-C arbitrations allows an investor to assert claims for breaches of the NAFTA's obligations, regardless of when the conduct underlying the alleged breach occurred. Claimant devotes a mere two paragraphs to this theory in its Counter-Memorial,[53] but it is more central to the report prepared by Claimant's expert, Professor Schreuer. In any event, this theory is no more compelling than the other two theories that Claimant puts forward.

35. As explained by Professor Schreuer, the applicable law theory posits that, when Claimant submitted a claim under Annex 14-C, it formed an arbitration agreement with the United States that includes the choice of "NAFTA's substantive obligations and applicable rules of international law as the governing law"[54] and, as a consequence, "the substantive protections of NAFTA and

[53] Claimant's Counter-Memorial ¶¶ 42-43.
[54] Schreuer Report ¶ 100. *See also id.* ¶ 12 ("Claimant' [*sic*] core argument is that Annex 14-C allows claims in connection with measures taken during the transition period. That conclusion follows from the rules of

applicable rules of international law are to be applied in legacy investment arbitrations independently of NAFTA's termination."[55]

36. The applicable law theory fails at the first hurdle, however, because no arbitration agreement was formed between Claimant and the United States for the simple reason that Claimant did not—and could not—accept the offer to arbitrate made by the USMCA Parties in Annex 14-C.

37. As Professor Schreuer has explained in his academic work on the ICSID Convention, in terms equally applicable to the jurisdiction of this Tribunal:

> Where . . . jurisdiction is based on an offer made by one party, subsequently accepted by the other, the parties' consent exists only to the extent that offer and acceptance coincide. . . . It is evident that the investor's acceptance may not validly go beyond the limits of the host State's offer. Therefore, any limitations contained in the legislation or treaty would apply irrespective of the terms of the investor's acceptance. *If the terms of acceptance do not coincide with the terms of the offer there is no perfected consent*.[56]

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interpretation in the Vienna Convention on the Law of Treaties ('VCLT') and *the parties' arbitration agreement*.") (emphasis added); ¶ 89 ("In treaty arbitration, investment treaties often contain provisions on the applicable law. By instituting arbitration under these treaties, the claimants accept the choice of law clauses contained in them. In this way, these clauses become agreements on the applicable law. It is accepted practice that a choice of law provision in an investment treaty leads to an agreement on applicable law by the parties to the dispute.").

[55] *Id.* ¶ 100. *See also* Claimant's Counter-Memorial ¶ 43 ("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.").

[56] CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 – Jurisdiction* ¶ 514 (2d ed. 2009) (RL-0069) (emphasis added); STEPHAN W. SCHILL ET AL., SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *Article 25 – Jurisdiction* ¶ 950 (3rd ed. 2022) (RL-0120) (same); Christoph Schreuer, *Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, *in* U.N. CONF. ON TRADE & DEV. DISPUTE SETTLEMENT: ICSID: 2.3 CONSENT TO ARBITRATION, UNCTAD/EDM/Misc.232/Add.2, at 30 (2003) (RL-0123) (same). *See also* Paul C. Szasz, *The Investment Disputes Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)*, 5 J.L. & ECON. DEV. 23 at 29 (1970-1971) (RL-0124) ("The related point to be observed when consent is expressed in diverse instruments, is the extent to which these overlap—for it is only in the area of coincidence that the consent is both effective and irrevocable."); *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award ¶ 6.2.1 (July 2, 2013) (RL-0125) ("It is a fundamental principle that an agreement is formed by offer and acceptance. But for an agreement to result, there must be acceptance of the offer *as made*. It follows that an arbitration agreement, such as would provide for the Centre to have jurisdiction under Article 25 of the ICSID Convention, can only come into existence through a qualifying investor's acceptance of a host state's standing offer as made (*i.e.*, under its terms and conditions).") (emphasis in original).

38. As already discussed, the USMCA Parties did not consent in Paragraph 1 of Annex 14-C to arbitrate ***any*** dispute concerning a legacy investment. Rather, they limited their consent to claims "alleging breach of an obligation under" certain specified NAFTA provisions.[57] An investor seeking to accept the offer in Annex 14-C must therefore submit a claim that complies with this limitation. Events occurring after the NAFTA's termination, when the NAFTA's obligations were no longer binding on the USMCA Parties, cannot constitute a breach of the NAFTA. Accordingly, a claim that is based on such events—like Claimant's claims in this case—"go[es] beyond the limits of the . . . offer" in Annex 14-C.[58] In the absence of a claim that "coincide[s] with the terms of the offer" in Annex 14-C, "there is no perfected consent,"[59] and therefore no arbitration agreement to which "applicable law" is relevant.

39. Nor can a governing law clause be used to cure this critical flaw in Claimant's jurisdictional case. Professor Schreuer's own academic work rules out any attempt to give the law applicable to the merits a role in deciding the Tribunal's jurisdiction: "Tribunals have held consistently that questions of jurisdiction are not subject to the law applicable to the merits of the case. Questions of jurisdiction are governed by their own system which is defined by the instruments containing the parties' consent to jurisdiction."[60]

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[57] Annex 14-C, ¶ 1 (R-0002 *bis*). *See also* CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 – Jurisdiction* ¶¶ 526-39 (2d ed. 2009) (RL-0069) (providing examples of different types of consent clauses that States include in their treaties).

[58] CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 – Jurisdiction* ¶ 514 (2d ed. 2009) (RL-069); STEPHAN W. SCHILL ET AL., SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *Article 25 – Jurisdiction* ¶ 950 (3rd ed. 2022) (RL-0120).

[59] STEPHAN W. SCHILL ET AL., SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *Article 25 – Jurisdiction* ¶ 950 (3rd ed. 2022) (RL-0120).

[60] Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL JOURNAL OF DISPUTE RESOLUTION 1, 3 (2014) (RL-0126). *See also* Ascensio Reply Report ¶ 34 ("It is difficult to understand how a reference to NAFTA as the applicable law—a question that pertains to the merits of a dispute—could modify the jurisdiction *ratione temporis* of an arbitral tribunal, and expand the effects of a treaty over time in a manner equivalent to a survival clause."); Gardiner Reply Report ¶ 33 ("Article 1131(1) of the NAFTA prescribes the law and rules on how such a Tribunal is to decide the issues in dispute. For a Tribunal to reach the stage of deciding these issues it must first be shown to have jurisdiction.").

40. The tribunal's decision in *CSOB v. Slovak Republic*, on which Professor Schreuer attempts to rely,[61] helpfully highlights the distinction between a case in which the two disputing parties have successfully entered into a binding agreement to arbitrate and cases, like this one, in which they have not. Professor Schreuer cites *CSOB* because, in his view, it confirms that "[i]n choosing the governing law the parties may also agree on the application of a treaty that is not in force."[62] But there is a critical difference between *CSOB* and this case. In *CSOB*, the disputing parties' choice of law was embodied in a contract, the so-called Consolidation Agreement concluded between the claimant (CSOB), the respondent (the Slovak Republic), and the Czech Republic several years before the dispute arose.[63] The Consolidation Agreement specified that it "shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Mutual Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992."[64] The *CSOB* tribunal concluded that, by specifying the Czech-Slovak bilateral investment treaty as the governing law, the parties to the Consolidation Agreement "intended to incorporate Article 8 of the BIT by reference . . . in order to provide for international arbitration as their chosen dispute-settlement method."[65] In other words, "the parties have consented in the Consolidation Agreement to ICSID jurisdiction and . . . the date of such Agreement is, for all relevant purposes, the date of their consent."[66]

[61] Schreuer Report ¶ 94.
[62] *Id.*
[63] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction ¶ 1 (May 24, 1999) (CS-20).
[64] *Id.* ¶ 49 (quoting Article 7 of the Consolidation Agreement).
[65] *Id.* ¶ 55.
[66] *Id.* ¶ 59.

41. The disputing parties in *CSOB* had therefore formed an agreement to arbitrate as part of the broader Consolidation Agreement, which was concluded between them before any dispute arose. While the *CSOB* tribunal found "uncertainties relating to the entry into force of the BIT[,]"[67] there was no doubt that the Consolidation Agreement, including its express governing law provision and its agreement to arbitrate, was binding on the disputing parties. Consent to arbitrate had, in other words, been perfected. Here, by contrast, there was no preexisting contractual relationship between Claimant and the United States, and no pre-existing agreement to arbitrate. An agreement to arbitrate could only have been formed if Claimant had accepted the offer contained in Paragraph 1 of Annex 14-C. Claimant could not possibly do so, however, and no such agreement was formed.

42. Moreover, the same governing law provision on which Claimant and Professor Schreuer rely in the Annex 14-C context—NAFTA Article 1131—also applied in the NAFTA context without having the impact that they urge here. If Claimant were correct that designating the NAFTA as the law applicable to the substance of the dispute obviated the need to consider whether a claim is based on events occurring when the NAFTA was in force, the same would necessarily have held true in the NAFTA context. Yet, that is not how the three NAFTA/USMCA Parties, the *Feldman* tribunal, and others interpreted the NAFTA. To the contrary, the *Feldman* tribunal concluded that events predating the NAFTA's entry into force were outside the scope of its jurisdiction *ratione temporis*.[68] Nowhere did the *Feldman* tribunal suggest that NAFTA Article 1131 might abrogate this limitation. Nor would Professor Schreuer's earlier observations on the *ratione temporis* limitation imposed by NAFTA Articles 1116 and 1117 make sense if such a

[67] *Id.* ¶ 43.
[68] U.S. Memorial ¶ 22 (citing *Marvin Roy Feldman Karpa v. United Mexican States,* NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000) (RL-0020)).

limitation could be undermined by a provision specifying the law applicable to the substance of the dispute.[69]

43. To sum up, the applicable law theory fails at the outset because it hinges on the existence of an agreement to arbitrate that was never formed. The USMCA Parties limited their consent in Paragraph 1 of Annex 14-C to claims "alleging breach of an obligation" under the specified NAFTA provisions. Claimant's attempted acceptance of the USMCA Parties' offer to arbitrate in Annex 14-C went beyond the scope of that offer. Accordingly, "there is no perfected consent,"[70] no agreement to arbitrate, and no agreement to apply the obligations in Section A of NAFTA Chapter 11 to the substance of Claimant's claims.

B. The Context of Annex 14-C and the USMCA's Object and Purpose Further Undermine Claimant's Theories

1) Claimant's Analysis of the Relevant Context Is Flawed

44. The context of Paragraph 1 of Annex 14-C does not support Claimant's interpretation. As Professor Gardiner explains, "[t]he primary role of context in treaty interpretation is to assist in identifying the ordinary meaning of the terms used in the treaty being interpreted."[71] The context of the treaty may not be used "to read into its terms meanings or assumptions which are not consistent with the ordinary meaning of the words used."[72] Here, the relevant context of Annex 14-C is entirely consistent with the ordinary meaning of Annex 14-C, including **(a)** the Preamble to the USMCA ("Preamble") and the USMCA Protocol; **(b)** the placement of Annex 14-C within

[69] *See supra* ¶ 22 & n.29.
[70] CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 – Jurisdiction* ¶ 514 (2d ed. 2009) (RL-069); STEPHAN W. SCHILL ET AL., SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *Article 25 – Jurisdiction* ¶ 950 (3d ed. 2022) (RL-0120).
[71] Gardiner Reply Report ¶ 27.
[72] *Id*.

the USMCA; **(c)** the "legacy investment" definition; **(d)** footnotes 20 and 21; **(e)** USMCA Article 14.2(3); and **(f)** USMCA Article 34.1.

45. Customary international law as reflected in VCLT Article 31(3) requires that the Tribunal also take into account, together with context, the USMCA Parties' common understanding regarding the meaning of Annex 14-C and relevant rules of international law.[73] Both provide further support to the U.S. interpretation. The USMCA Parties' common understanding of their treaty is discussed in section **(g)**. There is no need to further discuss the relevant rules of international law, which were covered in the U.S. Memorial,[74] because Claimant does not dispute that VCLT Article 70 and Article 13 of the ILC's Draft Articles on State Responsibility bear on the interpretation of Annex 14-C.[75]

a. The Preamble and the USMCA Protocol Support the Ordinary Meaning of Annex 14-C

46. As the United States explained in its Memorial, the Preamble and the USMCA Protocol provide useful context for interpreting Annex 14-C.[76] Among other things, they state clearly the USMCA Parties' intent to bring NAFTA to an end and have the USMCA govern trade and investment going forward.

[73] VCLT, art. 31(3)(a-c) (RL-0017) ("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.").
[74] U.S. Memorial ¶¶ 68-70.
[75] Claimant's Counter-Memorial ¶¶ 33-34, n.43.
[76] U.S. Memorial ¶¶ 45-54.

47. In its Counter-Memorial, Claimant acknowledges that the NAFTA was replaced and superseded by the USMCA, as provided in the Preamble and the USMCA Protocol.[77] Claimant also admits that the "without prejudice" phrase in paragraph 1 of the Protocol[78] does not mean that Section A of NAFTA Chapter 11 is extended to cover claims arising after NAFTA's termination; rather, Claimant agrees with the United States that such phrase simply means that NAFTA provisions shall have whatever effect they are given in the USMCA provision at issue, notwithstanding that the NAFTA was terminated.[79] As explained in Section II.A above, the obligations in Section A of NAFTA Chapter 11 are mentioned in Paragraph 1 of Annex 14-C as a constraint on the scope of the USMCA Parties' consent to arbitration.

48. In sum, the Preamble and USMCA Protocol support the ordinary meaning of Paragraph 1 of Annex 14-C. After the NAFTA's termination, the treatment of Claimant's alleged investments was governed by the USMCA, not the NAFTA.

b. Annex 14-C's Placement Outside the Body of Chapter 14 Confirms That It Does Not Extend Substantive Investment Obligations

49. The structure of USMCA Chapter 14 confirms that, consistent with its title, Annex 14-C is a dispute resolution annex and does not impose substantive investment obligations. Both the USMCA and the NAFTA include (1) a set of substantive obligations for treatment of investments (found in the body of Chapter 14 of the USMCA, and Section A of Chapter 11 in the NAFTA); and, separately, (2) a set of jurisdictional and procedural rules for arbitration of disputes concerning

[77] Claimant's Counter-Memorial ¶ 48 ("There is no doubt that CUSMA was intended to replace NAFTA, and that the CUSMA Preamble says so."); *id*. ¶ 50 (acknowledging that the USMCA Protocol declares that NAFTA was being replaced by the USMCA).
[78] USMCA Protocol ¶ 1 (R-0001 *bis*) ("Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.").
[79] Claimant's Counter-Memorial ¶¶ 49-50.

the substantive obligations (found in Annexes 14-C, 14-D, and 14-E of the USMCA, and Section B of Chapter 11 in the NAFTA).[80] While the body of Chapter 14 addresses substantive obligations for treatment of investments, Annex 14-C addresses only procedural matters and does not impose substantive investment obligations. There is no language in Annex 14-C providing for the extension of the NAFTA's substantive investment obligations beyond its termination, nor would any such language fit within this type of dispute settlement annex.

50. Claimant contends in its Counter-Memorial that "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[.]"[81] Claimant is flatly wrong. The obligations to investors are detailed in the body of Chapter 14 and have force regardless of whether there is any dispute resolution provision. There are any number of treaties that impose obligations on States vis-à-vis investors, but do not include an offer to arbitrate directly with investors. The U.S.-Australia Free Trade Agreement, for example, includes a full chapter on investment protections for investors, but does not include an investor-State dispute settlement mechanism.[82] The United States and Australia are bound to provide these protections to investors,

[80] Gardiner Report ¶¶ A.5-A.7. *See also* MEG KINNEAR ET AL., *Introduction*, *in* INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 38 (2006) (RL-0075) ("Section B contains no substantive rights or obligations, but is devoted to the mechanism by which an investor may seek redress."); U.S. Memorial ¶ 55 & n.69.

[81] Claimant's Counter-Memorial ¶ 80. Claimant's expert alleges that Section B of NAFTA Chapter 11 and Annex 14-D include provisions on governing law, but those provisions do not impose obligations on the treaty Parties. They simply provide the law that the tribunal shall apply when deciding the issues in dispute. *See* Schreuer Report ¶ 53.

[82] *See* United States-Australia Free Trade Agreement, Chapter 11, May 18, 2004 (RL-0076).

even if the investor cannot assert claims in arbitration.[83] It is not the dispute resolution mechanism that creates substantive obligations owed to investors; it is the substantive provisions themselves.[84]

51. To use another example from the USMCA itself, Canada chose not to join the USMCA investor-State dispute settlement regimes outlined in Annexes 14-D and 14-E, but regardless, all of the USMCA Parties are bound by the substantive investment obligations in Chapter 14. While it is true that Canadian investors cannot submit claims to arbitration directly against the United States or Mexico under Annexes 14-D or 14-E, nor can U.S. or Mexican investors submit claims directly against Canada, the United States, Mexico, or Canada may invoke the USMCA Dispute Settlement Chapter (Chapter 31) if, for example, they consider that an actual or proposed measure of another Party is or would be inconsistent with an obligation of the agreement (including obligations in Chapter 14) or that another Party has otherwise failed to carry out an obligation of the agreement (including obligations in Chapter 14).

52. Finally, USMCA Article 14.2(4) makes clear that Annexes 14-C, 14-D, and 14-E have a procedural function.[85] It states "for greater certainty" that investors "may only submit a claim to arbitration" under these three annexes. This indicates that the function of the annexes is to provide dispute settlement procedures, which include the USMCA Parties' consent to arbitrate certain claims for breaches of investment obligations defined outside of the annexes themselves. Annexes 14-D and 14-E provide consent to arbitrate breaches of obligations detailed in the body of Chapter

[83] *See, e.g.*, *id*. art. 11.3(1) ("Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale of other disposition of investments in its territory.")
[84] *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Award on the Merits ¶ 70 (May 24, 2007) (RL-0127) ("[L]imits on arbitrability do not affect the existence and binding character of the substantive obligations, including any which may fall outside the scope of the arbitration provisions.").
[85] Ascensio Reply Report ¶ 13 ("This provision [Article 14.2(4)] therefore expressly states that the function of Annex 14-C, like that of the other two [i.e., Annexes 14-D and 14-E], is exclusively procedural. At no point is it suggested that this annex might modify the substantive obligations of the Parties.").

14. Annex 14-C provides the USMCA Parties' consent to arbitrate claims alleging a breach of an obligation that existed under Section A of Chapter 11 of NAFTA. None of these annexes impose substantive investment obligations.

c. The Definition of "Legacy Investment" Confirms That the USMCA Parties' Consent Is Limited to Breaches Predating the NAFTA's Termination

53. Claimant insists that the definition of "legacy investment" supports its interpretation of Annex 14-C.[86] But the definition of "legacy investment" nowhere provides that the NAFTA's substantive investment protections will continue to apply following its termination.

54. Paragraph 6 of Annex 14-C defines "legacy investment" as an investment established or acquired while the NAFTA was in force, and in existence on the date of entry into force of the USMCA. The consent to arbitration in Paragraph 1 of Annex 14-C is limited to "legacy investments." Thus, a "legacy investment claim" must be one involving a "legacy investment" that was subject to a breach of a NAFTA obligation as required by Paragraph 1.[87]

55. The definition of "legacy investment" does not, explicitly or implicitly, allow the arbitration of claims arising from measures taken *after* the NAFTA's termination. Rather, the legacy investment definition excluded from the USMCA Parties' consent (1) investments that pre-dated the NAFTA and (2) investments that were established or acquired while the NAFTA was in force but were no longer in existence on the date of entry into force of the USMCA. At most, the legacy investment definition signals the USMCA Parties' preference for permitting claims by investors who maintained their investments as of the USMCA's entry into force, as opposed to

[86] Claimant's Counter-Memorial ¶¶ 51-54; Claimant's Observations on Request for Bifurcation ¶¶ 34-35.
[87] Gardiner Report ¶ F.4 (noting that the definition of legacy investment serves to show that "consent is given only for acts or events while those [NAFTA] obligations were in force"). *See also* Ascensio Reply Report ¶¶ 8-10.

those investors who did not.[88] The USMCA Parties had no reason to make Annex 14-C available to investors who had divested before the USMCA's entry into force.[89] In any event, following the NAFTA's termination, the USMCA Parties were entitled to subject their consent to arbitration in Annex 14-C to whatever conditions they saw fit.[90]

56. Claimant argues that if Annex 14-C is limited to "historical claims," the "overwhelming majority of likely historical claims, *i.e.*, expropriation claims," would be excluded by the legacy investment definition, because investments that had previously been expropriated would not be "in existence" at the time the USMCA entered into force.[91] But an investment subject to an indirect expropriation—the vast majority of expropriation claims[92]—does not necessarily cease to exist; that will depend on the nature of the conduct allegedly constituting the expropriation and its effect on the investment.[93]

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[88] USMCA Article 14.1 defines "covered investment" as "an investment in its territory of an investor of another Party *in existence as of the date of entry into force of this Agreement* or established, acquired, or expanded thereafter." (R-0002 *bis*) (emphasis added).

[89] *Westmoreland Coal Company v. Government of Canada*, USMCA/ICSID Case No. UNCT/23/2, Award ¶ 164 (Dec. 17, 2024) (RL-0128) ("[I]t is understandable that the USMCA Parties made the protection conditional upon an investor's ownership or control over the investment that is the subject of the Chapter 11 claim at the time the USMCA entered into force. They had no reason to offer Chapter 11 benefits to investors who had divested before NAFTA's termination and thus lacked an 'ongoing interest in the [USMCA] world.'") (internal citations omitted).

[90] *Id.* ¶ 166 (noting that "there is nothing 'absurd' about investors, whose claims arise from acts taken while NAFTA was in force but who filed their claims after NAFTA was terminated, having to meet new requirements under the USMCA framework to receive NAFTA protection" and that the treaty Parties "were entitled to tailor their consent to ISDS as they saw fit" including by requiring that the investments be "in existence") (internal citations omitted).

[91] *See* Claimant's Counter-Memorial ¶ 52.

[92] U.S. Reply to Claimant's Observations on Bifurcation ¶ 26 (noting that indirect expropriation claims account for 550 of the 710 expropriation claims in the UNCTAD database on which Claimant relies, and only five out of 92 NAFTA cases alleged direct expropriation (none of them against the United States)); U.S. Memorial ¶ 31 (showing that the vast majority of expropriation claims asserted are for indirect expropriation).

[93] Claimant asserts that the U.S. argument in this regard conflicts with its *ratione materiae* argument, because the United States "would object to an economically valueless holding, even if nominally extant, being treated as an investment." Claimant's Counter-Memorial ¶ 52. This is an inapt comparison. In the case of an alleged expropriation, an investment claim is sustainable because the investment, or the entirety of its value, has been supposedly taken by the State. The investment would have had "economic value" but for the act of State. In this case, however, there is no jurisdiction *ratione materiae* not because of any alleged act of the United States, but because Claimant itself chose to sell its Class A shares in the U.S. SPV prior to the date of breach. There was no investment because Claimant removed the economic value of the supposed investment from the United States to Canada.

57. There is no language in the definition of "legacy investment" that suggests that NAFTA's substantive investment protections will continue to apply following its termination. Nor does the definition say anything about the timing of acts or omissions that may be subject to claims under Annex 14-C. Accordingly, the definition is no help to Claimant.

d. The Footnotes to Annex 14-C Do Not Support Claimant's Interpretation

58. Neither **(i)** footnote 20, nor **(ii)** footnote 21 to Annex 14-C support Claimant's interpretation, and Claimant's attempt to rely on them only serves to highlight the implausibility of its position.

(i) Footnote 20

59. Footnote 20 states "[f]or greater certainty" that the "relevant provisions" of certain NAFTA chapters "apply with respect to . . . a claim" submitted to arbitration under Paragraph 1 of Annex 14-C.[94] Consistent with the general principle of intertemporal law, a tribunal must apply the "law contemporary with" the facts underlying a Paragraph 1 claim—which, for the reasons above, must necessarily be facts arising while the NAFTA was in force—and not the "law in force at the time when a dispute in regard to it arises or falls to be settled,"[95] which would be the USMCA.[96] Footnote 20 thus confirms this otherwise applicable general principle only "for greater certainty."

[94] Annex 14-C ¶ 1 n.20 (R-0002 *bis*). *See* U.S. Memorial ¶¶ 33-34.
[95] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 13, commentary (1) (RL-0057) (quoting Judge Huber in the *Island of Palmas* case).
[96] Ascensio Reply Report ¶ 37 ("[R]eference to NAFTA Chapter 11, Section A, is perfectly consistent with the rules on intertemporal law in public international law: disputes must be resolved in accordance with the law in force at the time the alleged breach took place. The application of NAFTA to the merits stems from the fact that the claims concerned are those arising from breaches of this treaty at the time it was in force, and not subsequently."). *See also* Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL JOURNAL OF DISPUTE RESOLUTION 1, 20 (2014) (RL-0126) ("The principle of contemporaneity is well established in arbitral practice. It means that the legality of a state's conduct must be assessed in light of the law that was in force at the time of its conduct.").

60. In response to this straightforward reading of footnote 20, Claimant offers three rebuttals. None have merit.

61. *First*, Claimant takes issue with the definition provided in the U.S. Memorial of the phrase "for greater certainty," where the United States explained that this phrase signals confirmatory or clarifying language.[97] This interpretation is supported by the ordinary meaning of the words "for greater certainty," which indicate that the purpose of the language that follows is to reduce uncertainty and provide clarity.[98] Claimant suggests that this interpretation of footnote 20, and of "for greater certainty" provisions in general, would not be consistent with the principle of *effet utile*.[99] Claimant does not, however, explain why a footnote that confirms or clarifies a treaty term or an applicable principle of international law lacks effectiveness. To the contrary, it serves an important purpose by helping to reduce potential uncertainty.

62. As for Claimant's suggestion that the USMCA Parties did not consistently use the phrase "for greater certainty" to confirm or clarify language in USMCA Chapter 14, Claimant's examples are misguided. Claimant focuses, in particular, on Paragraph 4 of Annex 14-C, arguing that it is not merely confirmatory because it excludes the application of NAFTA Article 1136(5) to awards

[97] U.S. Memorial ¶ 34 & n.42; *see also* Ascensio Reply Report ¶ 36 ("[I]t is quite obvious that NAFTA substantive provisions will apply to disputes arising out of its breach at a time it was in force. This is why the substantive provisions of NAFTA concerned are mentioned in footnote 20 'for greater certainty' only."). The confirmatory role of footnote 20 has also been affirmed by the other two USMCA Parties. *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 17 (Jan. 15, 2025); *TC Energy Corp. & TransCanada PipeLines Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA ¶ 12 (Sept. 11, 2023) (R-0013); *Ruby River Capital LLC v. Government of Canada*, NAFTA/ICSID Case No. ARB/23/5, Canada's Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 214 (July 15, 2024) (R-0017) (English translation).

[98] MERRIAM-WEBSTER DICTIONARY, *for* ("used as a function word to indicate purpose") (RL-0129), https://www.merriam-webster.com/dictionary/for (last accessed May 20, 2025). *See also TC Energy* Award ¶ 162 (RL-0060) ("The '*for greater certainty*' language included in footnote 20 can therefore not be understood to show an agreement to extend Section A that would purportedly result from Paragraph 1. . . . The ordinary meaning of these terms is to confirm the existence of a given rule. These terms therefore indicate that the provision in which they are included does not introduce new obligations; therefore, footnote 20 cannot be construed as an agreement to extend Section A.").

[99] Claimant's Counter-Memorial ¶ 58.

rendered by Annex 14-C tribunals.[100] On the contrary, Paragraph 4 offers a clear illustration of how "for greater certainty" can be used to confirm or clarify the effect of treaty language. NAFTA Article 1136(5) provided for State-to-State dispute settlement under NAFTA Article 2008 in the event that a respondent State "fail[ed] to abide by or comply with a final award."[101] NAFTA Chapter 20, which contained Article 2008, was terminated with the rest of the NAFTA upon the USMCA's entry into force. Accordingly, NAFTA Chapter 20's State-to-State dispute settlement provisions, referenced in NAFTA Article 1136(5), ceased to be an option as a result of the NAFTA's termination.[102] Annex 14-C, Paragraph 4, thus confirms this fact—something that would be true regardless of whether it was explicitly stated in Annex 14-C or not—only "for greater certainty."

63. *Second*, Claimant contends that "[t]he 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."[103] The statement in footnote 20 that the relevant NAFTA provisions "apply with respect to . . . a claim" submitted to arbitration under Paragraph 1 is not, however, equivalent to a statement that those provisions are "incorporated and extended by Annex 14-C paragraph 1." To the contrary, neither Paragraph 1 nor footnote 20 makes any reference to either the "incorporation" or "extension" of NAFTA Chapter 11, Section A.

[100] *Id.* ¶ 59.
[101] NAFTA art. 1136(5) (R-0004 *bis*).
[102] Claimant's other examples concerning the USMCA Parties' purportedly inconsistent use of "for greater certainty" (*see* Claimant's Counter-Memorial ¶ 58 n.80) merely reflect Claimant's disagreement with the clarifications offered. The "for greater certainty" provisions only "modify" the affected treaty terms insofar as one accepts that Claimant's interpretations of these terms are correct (which, to be clear, they are not).
[103] Claimant's Counter-Memorial ¶ 57.

64. *Third*, Claimant asserts that footnote 20 "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."[104] While footnote 20 does identify "relevant provisions" of the NAFTA that "apply with respect to . . . a claim" under Paragraph 1,[105] nothing in the footnote suggests that either the obligations in Section A of Chapter 11, or any of the other NAFTA provisions mentioned in the footnote, "remain operative." Again, the actual text of footnote 20 simply does not support Claimant's extrapolations.

65. This aspect of Claimant's argument also raises an inconsistency in Claimant's position. While Claimant contends that the reference in footnote 20 to Section A of NAFTA Chapter 11 ensures the survival of its obligations despite the NAFTA's termination, Claimant seems to be saying that the other NAFTA chapters referenced in footnote 20 do ***not*** have continued effect.[106] Claimant does not explain how this purported distinction is reflected in the text of footnote 20, nor could it: footnote 20 refers to all the "relevant provisions" of the various NAFTA chapters, including Chapter 11, in an undifferentiated sequence, as "applying" to a dispute under Paragraph 1.

66. Claimant's strained reading of footnote 20 is an attempt to avoid a clear problem with its interpretation, namely that if all the NAFTA chapters referenced in that footnote survived the NAFTA's termination, it would extend not just Chapter 11, but a large swath of the NAFTA, despite the express statement in the USMCA Protocol that the USMCA superseded the NAFTA.

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[104] *Id*.
[105] USMCA Annex 14-C ¶ 1 n.20 (R-0002 *bis*).
[106] *See, e.g.*, Claimant's Counter-Memorial ¶ 62 ("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.").

And it would lead to broad overlap (and potential clashes) with the new USMCA regime in a variety of areas, not just investment.[107]

67. In its Counter-Memorial, Claimant tries to minimize the problem of overlap by arguing that two of the NAFTA chapters referenced in footnote 20—Chapter 14 (Financial Services) and Chapter 17 (Intellectual Property)—"create exceptions to the potential for obligations in Section A"[108] of Chapter 11 and so would not, under Claimant's theory, need to be given any independent force after the NAFTA's termination. Claimant is wrong.

68. With respect to Chapter 14, both Paragraph 1 of Annex 14-C and NAFTA Articles 1116 and 1117 permit claims for breach not only of the obligations under Section A of NAFTA Chapter 11, but also NAFTA Article 1503(2), which required each NAFTA Party to "ensure . . . that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and *Fourteen (Financial Services)*" under certain circumstances.[109] Accordingly, an investor could attempt to assert a breach of this provision based on an inconsistency between the conduct of a state enterprise and a Party's obligations under either Chapter 11 *or* Chapter 14. Thus, under Claimant's theory, footnote 20 required the continued observance of both chapters in the circumstances covered by Article 1503(2) after the NAFTA's termination.

[107] U.S. Memorial ¶ 34 n.41.
[108] Claimant's Counter-Memorial ¶ 64.
[109] NAFTA Article 1503(2) (R-0004 *bis*) (emphasis added).

69. As for Chapter 17, it is referenced in a paragraph of NAFTA Article 1110 (Expropriation and Compensation), which provides:

> This 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).[110]

70. Article 1110(7) is a safe harbor provision, carving out certain measures related to intellectual property rights from the scope of Article 1110 to the extent they are "consistent with Chapter Seventeen." While Claimant asserts that this is a mere "exception" to the coverage of Article 1110, the exception is contingent on each Party's continued compliance with Chapter 17.[111] If a Party took one of the measures listed in Article 1110(7) in a manner not "consistent with Chapter Seventeen," that Party would be unable to rely on the safe harbor in defending such a measure under Article 1110. Accordingly, if Claimant were correct that Chapter 11, Section A, survived the NAFTA's termination, the USMCA Parties would likewise have been obligated to continue observing the provisions of Chapter 17 after NAFTA's termination in order to insulate themselves from claims under Article 1110 for measures related to intellectual property.[112]

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[110] NAFTA Article 1110(7) (R-0004 *bis*).

[111] MEG KINNEAR ET AL., *Article 1110 – Expropriations and Compensation*, *in* INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 1110-57 (2006) (RL-0130) ("The express wording of Article 1110(7) – 'to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen' – makes the application of the paragraph contingent on the host government acting consistently with Chapter 17 of the NAFTA.").

[112] Claimant's argument also ignores another point of overlap between NAFTA Chapter 11 and other NAFTA chapters, namely NAFTA Article 1112(1), which provides: "In the event of any inconsistency between this Chapter [*i.e.*, Chapter 11] and another Chapter, the other Chapter shall prevail to the extent of the inconsistency." NAFTA art. 1112(1) (R-0004 *bis*). This provision makes little sense if, as Claimant contends, only Chapter 11 survived the NAFTA's termination and the other chapters—which could have overridden Chapter 11 on specific subject matters—ceased to bind the NAFTA/USMCA Parties.

71. Claimant's reading of footnote 20 therefore requires that not only NAFTA Chapter 11, but Chapters 14, 17, and others remained in effect after the NAFTA was terminated. This is contrary to the ordinary meaning not only of Annex 14-C, but the USMCA Protocol as well. In sum, footnote 20 is entirely consistent with the U.S. interpretation of Annex 14-C and provides no support to Claimant's position.

(ii) Footnote 21

72. Claimant's arguments regarding footnote 21 are similarly unavailing. Footnote 21 excludes from the USMCA Parties' "*consent under paragraph 1* . . . 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)."[113] This footnote applies in a situation where an investor who meets the eligibility criteria set out in Annex 14-E has potential claims under both that annex and Annex 14-C, *e.g.*, based on an allegedly wrongful act by either the United States or Mexico that began while the NAFTA was in force and continued after its termination.[114]

73. Claimant argues that footnote 21 is instead intended to address the overlap between the substantive investment obligations in Section A of NAFTA Chapter 11 and USMCA Chapter 14 that would occur under Claimant's interpretation of Annex 14-C. According to Claimant, footnote 21 resolves this overlap by "clos[ing] 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."[115]

[113] Annex 14-C ¶ 1 n.21 (R-0002 *bis*) (emphasis added).
[114] U.S. Memorial ¶ 37.
[115] Claimant's Counter-Memorial ¶ 71.

74. There are multiple flaws in Claimant's argument. *First*, footnote 21 does not resolve the substantive overlap that Claimant's interpretation of Annex 14-C would produce. The text of footnote 21 is clear: it carves out certain investors from the scope of the *consent to arbitration* in Paragraph 1. It does not say anything about excluding these investors from the purported application of the NAFTA's substantive investment obligations for three years after the NAFTA's termination. Under Claimant's reading of Annex 14-C, the USMCA Parties bound themselves to abide by the substantive obligations of both USMCA Chapter 14 and NAFTA Chapter 11, Section A, regardless of whether a dispute would proceed under Annex 14-C or 14-E.

75. *Second*, even on Claimant's theory, footnote 21 leaves significant areas of overlap unresolved. This is because USMCA Chapter 14 includes two investor-State dispute settlement annexes for alleged breaches of its substantive investment obligations—Annexes 14-D and 14-E—but footnote 21 only addresses Annex 14-E. Footnote 21 says nothing about investors who are eligible to submit claims under both Annex 14-C and 14-D. Unlike Annex 14-E, Annex 14-D is not limited to investors that are parties to government contracts in specific areas, and thus covers a much broader category of potential claimants (albeit for a narrower set of potential claims).[116] And yet, according to Claimant's theory, these Annex 14-D investors would be subject to—and the USMCA Parties would be subject to perform—the substantive investment obligations under both Section A of NAFTA Chapter 11 and USMCA Chapter 14 for the period covered by Annex 14-C.

[116] *See* USMCA Annex 14-D, arts. 14.D.1 (definition of "claimant") and 14.D.3, and Annex 14-E ¶ 2 (R-0002 *bis*). Annex 14-D permits only national treatment (USMCA art. 14.4), most-favored-nation treatment (USMCA art. 14.5), and direct expropriation (USMCA art. 14.8) claims. USMCA Annex 14-D, art. 14.D.3(1) (R-0002 *bis*).

76. Claimant acknowledges this overlap in a footnote,[117] but seeks to minimize its importance on the basis that an investor must first pursue its claims "before a competent court or administrative tribunal of the respondent" until either it obtains "a final decision from a court of last resort of the respondent or 30 months have elapsed" (or if "recourse to domestic remedies was obviously futile") before submitting a claim to arbitration under Annex 14-D.[118] Claimant suggests that this requirement limits the time during which an investor would be able to submit both an Annex 14-C claim and an Annex 14-E claim to arbitration, given that the consent under Annex 14-C expires after three years. Claimant's argument misses the point because the local litigation requirement does not limit the time during which such overlapping claims could arise and does not, therefore, reduce the problem of overlapping investment regimes. Under Claimant's interpretation of Annex 14-C, an investor seeking to challenge a U.S. or Mexican measure occurring, *e.g.*, two years after the NAFTA's termination would be able to decide whether to submit that claim to arbitration under Annex 14-C, subject to the NAFTA's substantive investment obligations, or whether to pursue its claim before the respondent's courts (or take the position that "recourse to domestic remedies was obviously futile") and then submit it to arbitration under Annex 14-D, subject to the USMCA's substantive investment obligations. It is irrelevant whether those claims could be submitted to arbitration at the same time. What matters is that claims for the same measure could be submitted under two different investment and investor-State dispute settlement regimes. Nor does it matter that Annex 14-D does not permit claims for the full scope of protections under USMCA Chapter 14—the point is that if the USMCA Parties had intended footnote 21 to avoid substantive overlap,

[117] Claimant's Counter-Memorial ¶ 67 n.88.
[118] USMCA Annex 14-D, art. 14.D.5(1)(a)-(b) & n.25 (R-0002 *bis*).

they would have addressed both Annexes 14-D and 14-E. That they did not do so indicates that this was not their intent.

77. The more logical reading of footnote 21, consistent with Paragraph 1, is that it did exactly what it says, limiting consent for claimants who had both an Annex 14-C claim predating NAFTA's termination and an Annex 14-E claim postdating the USMCA's entry into force to only the latter claim.[119]

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

78. As addressed in the U.S. Memorial, USMCA Article 14.2(3) states that,

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

79. In its Counter-Memorial, Claimant admits that USMCA Article 14.2(3) is consistent with the ordinary meaning of Annex 14-C. As Claimant acknowledges, this provision makes clear that Annex 14-C is an exception to the presumption against retroactive effect in VCLT Article 28

[119] However one interprets footnote 21, it cannot justify adopting an interpretation of Paragraph 1 that is inconsistent with its ordinary meaning. This limitation flows both from the framing of the general rule in VCLT Article 31(1), which makes clear that a term's ordinary meaning is the touchstone for the interpretive process, and from the overarching principle of good faith. Good faith "sets limits to the interpretative exercise" because it requires that the interpreter stay true to the ordinary meaning of the treaty text. RICHARD GARDINER, TREATY INTERPRETATION 44 (2d ed. 2015) (RL-0058 *bis*). *See also id.* ¶ 167 ("Good faith has been considered as a constraining factor on the scope for implying terms into a treaty."). As the International Law Commission's commentary on the draft text of the Vienna Convention notes in its discussion of the ICJ's *Interpretation of Peace Treaties* Advisory Opinion, "to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty." International Law Commission, Draft Articles on the Law of Treaties with commentaries, [1966] 2 Y.B. INT'L L. COMM. 187, 219 (¶ 6), U.N. Doc. A/CN.4/SER.A/1966/Add.l (RL-0068). *See also* Gardiner Reply Report ¶ 27 ("Neither the context nor the object and purpose of the treaty may be used to read into its terms meanings or assumptions which are not consistent with the ordinary meaning of the words used.").

because it *does* apply to acts or facts that took place *before* the entry into force of the USMCA.[120] Article 14.2(3), however, says nothing about the application of Annex 14-C to acts or facts arising after the entry into force of the USMCA.[121]

80. In its Counter-Memorial, Claimant contends that pursuant to VCLT Article 28 "CUSMA should be read as creating obligations going forward unless another intention is manifest."[122] Claimant misconstrues the presumption against retroactive effect in VCLT Article 28 as a presumption in favor of prospective effect. Claimant seems to believe that the rule expressed in Article 28 requires the Tribunal to give Annex 14-C the specific forward-looking interpretation that it favors: namely, to allow for claims based on breaches allegedly occurring after the NAFTA's termination and the USMCA's entry into force. But that is a twisting of the principle embodied in Article 28.[123] The presumption against retroactive effect is just that: a presumption against the retroactive application of a treaty term to past conduct or events. It does not require a tribunal to identify a prospective effect for a provision that does not, based on the ordinary meaning of its terms, have one. This is especially true where, as here, the treaty parties have expressly overridden the presumption against retroactive effect in Article 14.2(3) of the USMCA, allowing for a provision to bind them with respect to acts or facts that took place before the treaty's entry into force. Article 14.2(3)'s clear statement that Annex 14-C applies to acts that took place before the

[120] Claimant's Counter-Memorial ¶ 77. *See also* Schreuer Report ¶ 57 ("Annex 14-C does apply to acts or facts that took place before USMCA's entry into force.").
[121] Ascensio Reply Report ¶ 14 (noting that there are no provisions in Chapter 14 or in any other chapter of the USMCA supporting Claimant's argument that Annex 14-C applies to future events).
[122] Claimant's Counter-Memorial ¶ 34; *see also id*. ¶ 77.
[123] VCLT art. 28 (RL-0017) ("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.").

USMCA's entry into force (which was simultaneous with NAFTA's termination) plainly coincides with the ordinary meaning of Annex 14-C, Paragraph 1.[124]

f. Claimant Misconstrues the U.S. Argument Relating to USMCA Article 34.1, Which Confirms That the USMCA Parties Did Not Extend the NAFTA's Substantive Investment Obligations

81. USMCA Article 34.1 also supports the ordinary meaning of Annex 14-C. Chapter 34 lists NAFTA provisions that have a continuing effect post-termination; the fact that Chapter 11 Section A is not listed confirms that the Parties did not intend it to have a continuing effect post-termination.[125]

82. As the *Crystalline Silicon* Panel emphasized, "[i]t would have been possible for the [USMCA] Parties to have inserted a provision in the USMCA providing for the continuation of all obligations under the NAFTA as obligations under the USMCA. But they did not do so."[126] The USMCA Parties created self-standing USMCA obligations, and where the Parties wanted to carry over specific NAFTA obligations, "they did so explicitly."[127] By way of example, in Article 34.1(4), the USMCA Parties expressly agreed that NAFTA Chapter 19 "shall continue to apply" to binational panel reviews. They used similar language in Article 34.1(6) with respect to certain provisions in NAFTA Chapter 5. By contrast, Article 34.1 makes no mention of NAFTA Chapter 11.

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[124] Obviously, although the allegations needed to support an arbitration under Annex 14-C relate to acts that predate NAFTA's termination, the ***consent to arbitration*** in Paragraph 1 is forward-looking: claimants may only submit claims under Annex 14-C after the USMCA's entry into force. But this plainly prospective application of Annex 14-C arises from the language of the annex itself, while the particular prospective effect that Claimant desires—the extension of the substantive obligations in NAFTA Chapter 11, Section A—does not.

[125] *Westmoreland Coal Company v. Government of Canada*, USMCA/ICSID Case No. UNCT/23/2, Award ¶ 163 (Dec. 17, 2024) (RL-0128) (noting that while USMCA Article 34.1 "concerns certain NAFTA chapters and provisions that continue to apply, it does not cover Chapter 11").

[126] *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report ¶ 41 (Feb. 1, 2022) (RL-0078).

[127] *Id*.

83. Claimant, like the complaining party in the *Crystalline Silicon* case, has been unable to point to a specific provision in the USMCA that carries over NAFTA obligations on which it relies post-termination.[128] Without a credible response, Claimant contends that the argument of the United States "appears to be that [USMCA] 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."[129] Claimant misconstrues the position of the United States. The U.S. argument does not turn on whether Chapter 34 addresses procedural or substantive obligations (although it does both). The point is that Chapter 34 was yet another opportunity for the USMCA Parties to expressly state that NAFTA Chapter 11, Section A, obligations would continue to apply, using clear language similar to that used with respect to NAFTA Chapter 19. The absence of such a statement in Chapter 34 further demonstrates that the USMCA Parties did not extend the NAFTA Chapter 11, Section A, obligations past NAFTA's termination.

2) Claimant Misapplies the USMCA's Object and Purpose

84. As the United States explained in its Memorial, the object and purpose of the USMCA—as stated in the Preamble and the USMCA Protocol—was to "replace" and "supersede" the NAFTA with a "high standard new agreement" to support trade and economic growth in the region.[130] Among other changes, the USMCA included updated investment obligations and a new investor-State dispute settlement regime in Chapter 14 that was different in scope than the one in

[128] Ascensio Reply Report ¶ 15 ("If the drafters of USMCA had wanted to extend the effect over time of the NAFTA's substantive provisions, this would be expressly stated in one of its clauses[.] . . . It would most probably appear in the transitional provision of USMCA (Article 34.1), where other provisions extending NAFTA obligations are located[.] . . . But it was not done, and it is completely implausible that a new survival clause would be included in an annex by implication, using obscure language supposed to have an equivalent effect. A treaty cannot extend the effects of the treaty it terminates beyond what is provided for by customary international law without express wording.") (internal citations omitted).
[129] Claimant's Counter-Memorial ¶ 81.
[130] U.S. Memorial ¶¶ 71-72.

the NAFTA.[131] The ordinary meaning of Annex 14-C is consistent with the USMCA's object and purpose because it guarantees that claims based on conduct occurring after the USMCA's replacement of the NAFTA will be governed by the substantive investment obligations and dispute settlement regime in USMCA Chapter 14.[132]

85. In its Counter-Memorial, Claimant contends that the object and purpose of the USMCA support its interpretation of Annex 14-C because it "contemplates continued investment protection."[133] In support, Claimant quotes a few general principles stated in the Preamble indicating a desire to establish (i) a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment; and (ii) an agreement to address future trade and investment challenges and opportunities. None of these broad, aspirational phrases remotely suggest an intent by the USMCA Parties to extend the substantive investment obligations of the NAFTA beyond its termination. To the contrary, the Preamble explicitly states that the USMCA was intended to replace the NAFTA, as Claimant acknowledges. In any event, it is the USMCA itself that fulfills the two general principles Claimant highlights: it provides a "clear, transparent, and predictable" legal framework for investment and addresses future trade and investment challenges and opportunities, both in Chapter 14.[134]

86. Claimant ignores the United States' argument in its Memorial that an overlap between the NAFTA and USMCA regimes would, in fact, be ***inconsistent*** with the USMCA Parties' stated object and purpose.[135] The USMCA addresses trade and investment challenges and opportunities

[131] *Id.*
[132] *See supra* ¶¶ 66-71.
[133] Claimant's Counter-Memorial ¶ 48 (section heading).
[134] Claimant's Counter-Memorial ¶ 48 ("There is no doubt that CUSMA was intended to replace NAFTA[.]").
[135] U.S. Memorial ¶ 73.

arising after its entry into force with substantive investment obligations that differ from those of the NAFTA, and provides a more restrictive investor-State dispute settlement regime.[136] Having just one set of substantive obligations apply to the Parties and investors after the USMCA's entry into force—rather than two differing sets of obligations for a period of three years, as Claimant proposes—provides far greater clarity, transparency, and predictability for States and investors alike.

87. Claimant's expert suggests that "[a]n abrupt transition from NAFTA to USMCA for existing investments could have created hardship and disruption and could have violated the investors' legitimate expectations," in contravention of the purported "object and purpose of Annex 14-C."[137] As an initial matter, it is "the object and purpose of the treaty itself rather than of provisions within it" that is relevant under VCLT Article 31(1).[138] In any event, in the absence of a survival clause in the NAFTA,[139] investors could have had no "legitimate expectation" that they would be able to bring investor-State arbitrations under Chapter 11 of the NAFTA following its termination.[140] Nor could they have expected much time to adjust to the NAFTA's termination: under Article 2205, the NAFTA itself required only six months' notice for a Party's withdrawal

[136] Schreuer Report ¶ 75 (acknowledging that the "USMCA contains substantive standards and procedural safeguards that differ from those of NAFTA").
[137] *Id*.
[138] Gardiner Reply Report ¶ 27 ("In the same way [as context], the object and purpose of the treaty – which refers to the object and purpose of the treaty itself rather than of provisions within it – may assist in identifying the relevant ordinary meaning. Neither the context nor the object and purpose of the treaty may be used to read into its terms meanings or assumptions which are not consistent with the ordinary meaning of the words used.").
[139] Claimant's expert cites to a passage from J.W. Salacuse on "continuing effects provisions." Schreuer Report ¶ 76. In that passage, Salacuse was referring to survival clauses, which the NAFTA lacks. *See* J.W. SALACUSE, THE LAW OF INVESTMENT TREATIES 129 (2010) (CS-66) (noting that the usual period of continued protection in continuing effects provisions is between fifteen and twenty years).
[140] *See* Crowell & Moring LLP Client Alert, *NAFTA on the Brink* (Jan. 27, 2017) (R-0008) ("The U.S.' exit from NAFTA would also mean certain investors would lose the Investor-State Dispute Settlement (ISDS) protections contained in Chapter 11 of the Agreement. . . . Once the withdrawal takes effect, U.S. investors would no longer be able to bring claims against Mexican and/or Canadian authorities resulting from government illegal expropriations, or arbitrary or discriminatory actions affecting investments.").

from the treaty to become effective.[141] As compared to the default scenario under the NAFTA, the USMCA provides a far smoother transition for investors. Not only did the USMCA Parties give investors more than 18 months between the USMCA's signature and its entry into force to prepare for the new investment regime, but in Annex 14-C they offered investors with claims that accrued while the NAFTA was in force—claims that, but for the NAFTA's termination, they might have expected to be able to resolve under the NAFTA's substantive investment obligations and investor-State dispute resolution mechanism—up to three more years to submit them to arbitration. Accordingly, there was no "hardship and disruption" for such investors.

88. Claimant's expert also suggests that "extending the substantive guarantees of Section A" would "facilitate a smooth transition from the old to the new system."[142] But as the Panel in *Crystalline Silicon* concluded, "a smooth transition" cannot be treated "as an implicit carryover of the NAFTA obligations into the USMCA when there are no other words in the USMCA doing that."[143] Rather, "[a] 'smooth transition' is facilitated by clarity in the obligations under the [USMCA] and clarity in how the Parties are to carry them out."[144] This is precisely what the USMCA Parties accomplished with respect to investment. They replaced NAFTA Chapter 11 with USMCA Chapter 14 and provided new dispute resolution provisions in the annexes to Chapter 14. The USMCA Parties agreed in Annex 14-C to allow holders of legacy investments to submit claims to arbitration based on breaches that occurred while the NAFTA was in force for three additional years following the NAFTA's termination. In so doing, there was not an abrupt cessation of an investor's rights to submit claims to arbitration under the NAFTA after its

[141] NAFTA art. 2205 (R-0004 *bis*).
[142] Schreuer Report ¶ 77.
[143] *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure,* USMCA Case No. USA-CDA-2021 31-01, Final Report ¶ 42 (Feb. 1, 2022) (RL-0078).
[144] *Id*.

termination, while ensuring that the USMCA parties were only bound by one set of investment obligations at a time.

89. Claimant's attempt to use the object and purpose of the USMCA to read assumptions into its terms that are not consistent with the ordinary meaning of Annex 14-C should therefore be rejected.

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

90. The three USMCA Parties all agree that Annex 14-C permits only claims based on conduct occurring while the NAFTA was in force. Each of the USMCA Parties has publicly, consistently and repeatedly affirmed this position on Annex 14-C in this case[145] as well as in other cases brought under Annex 14-C.[146] In its non-disputing party submission in this case, Canada noted the USMCA Parties' consensus on this issue:

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[145] *See* U.S. Memorial ¶ 66; *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128 n.6 (Jan. 15, 2025) and Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 31 (Jan. 15, 2025).

[146] United States: *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, United States of America's Memorial on its Preliminary Objection ¶¶ 15-32 (June 12, 2023) (R-0031); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Second Submission of the United States of America ¶¶ 8-12 (July 21, 2023) (R-0014); *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, United States of America's Reply on its Preliminary Objection ¶¶ 7-44 (Dec. 27, 2023) (R-0032); *Access Business Group LLC v. United Mexican States*, USMCA/ICSID Case No. ARB/23/15, Submission of the United States of America ¶¶ 2-13 (Mar. 28, 2025) (R-0033). Mexico: *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA ¶ 5 (Sept. 11, 2023) (R-0013) ("This consent [in Annex 14-C] is limited to the submission of a 'claim' alleging a 'breach of an obligation under … Section A of Chapter 11 (Investment) of NAFTA 1994.' A breach of a Treaty can only occur if that Treaty is in force. The NAFTA ceased to be in force as of July 1, 2020, and therefore a violation of Section A of Chapter 11 (Investment) of NAFTA was no longer possible as of that date."); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Mexico's Counter-Memorial on the Ancillary Claim ¶¶ 407-10 (Dec. 19, 2022) (R-0015); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Mexico's Rejoinder on the Ancillary Claim ¶¶ 258-87 (Apr. 21, 2023) (R-0016); *Cyrus Capital Partners, L.P. and Contrarian Capital Management v. United Mexican States*, USMCA/ICSID Case No. ARB/23/33, Mexico's Memorial on Jurisdiction ¶¶ 77–90 (June 4, 2024) (R-0034); *Access Business Group LLC v. United Mexican States*, USMCA/ICSID Case No. ARB/23/15, Respondent's Memorial on Objections to Jurisdiction ¶¶ 70-71 (Nov. 29, 2024) (R-0035). Canada: *Access Business Group LLC v. United Mexican States*, USMCA/ICSID Case No. ARB/23/15, Non-Disputing Party

> 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. A tribunal constituted under CUSMA Annex 14-C must take this subsequent practice and agreement into account.[147]

91. Similarly, Mexico stated in its non-disputing party submission before this Tribunal:

> [O]nly claims arising out of acts, facts or measures adopted while NAFTA was in force are eligible for submission to arbitration under Annex 14-C. The common position of the USMCA Parties constitutes a "subsequent practice" that must be taken into account for purposes of the interpretation of Annex 14-C.[148]

92. Claimant mistakenly argues that VCLT Article 31(3) "invites" subsequent agreement and subsequent practice of the Treaty Parties to be taken into account.[149] Once again, Claimant's argument reflects a misreading of the relevant text. In fact, VCLT Article 31(3) is framed in mandatory terms: it states that subsequent agreement and practice between the Parties "*shall* be taken into account."[150] As Professor Gardiner explains, the essence of Article 31(3) is that

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Submission of the Government of Canada Pursuant to NAFTA Article 1128 ¶¶ 4-16 (Mar. 28, 2025) (R-0036); *Ruby River Capital LLC v. Government of Canada*, USMCA/ICSID Case No. ARB/23/5, Contre-Mémoire Sur Le Fond Et Mémoire Sur La Compétence Du Canada ¶ 262 (July 15, 2024) (R-0017) ("to the consensus among the USMCA Parties") (English translation) (French original: "d'un consensus parmi les Parties à l'ACEUM"). *See also id.* ¶ 182 ("Annex 14-C of the USMCA . . . does not allow [Claimant] to submit to arbitration a claim relating to events giving rise to liability after June 30, 2020.") (English translation) (French original: "l'annexe 14-C de l'ACEUM . . . ne lui permet pas de soumettre à l'arbitrage une plainte portant sur des faits générateurs de responsabilité postérieurs au 30 juin 2020").

[147] *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128 ¶ 9 (Jan. 15, 2025).

[148] *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 31 (Jan. 15, 2025).

[149] Claimant's Counter-Memorial ¶ 83.

[150] VCLT, art. 31(3) (RL-0017) ("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;" and "(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.") (emphasis added).

"agreement among the parties to a treaty on the meaning of its terms is an element which must be taken into account in determining the proper interpretation of those terms."[151]

93. Claimant also contends that statements made or positions taken by States in the course of litigation should not be considered.[152] Claimant is wrong. It is well established that the common understanding of the treaty parties may be evidenced in a variety of ways, including through the positions they take in the course of litigations or arbitrations.[153] For example, the International Law Commission has stated specifically that subsequent practice under Article 31(3)(b) may include "statements in the course of a legal dispute."[154] The Commission has also noted that "[t]he value of subsequent practice varies . . . as it shows the common understanding of the parties as to

[151] Gardiner Reply Report ¶ 39. *See also*, *id.* ¶ 41 (noting that the International Law Commission endorsed inclusion of subsequent agreements and subsequent practice as authentic elements of interpretation).
[152] Claimant's Counter-Memorial ¶ 83. *See also* Schreuer Report ¶ 60.
[153] Claimant's expert cites several cases to support the argument that statements made during a legal dispute are of limited value and do not constitute subsequent practice or evidence of agreement, but these cases are distinguishable from the present case. Here, the three USMCA Parties have made multiple submissions regarding Annex 14-C and expressly acknowledged that there is collective agreement of the Parties on its interpretation. By contrast, the cases cited by Claimant's expert did not involve an expression of agreement between the treaty parties as to the relevant interpretation. *See, e.g., Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction n. 12 (June 17, 2005) (CS-58) (involving an argument presented by Spain as respondent in an arbitration and a similar argument made by Argentina in a separate arbitration five years later); *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award ¶¶ 332, 337-339 (May 22, 2007) (CS-56) (rejecting Argentina's interpretation of a treaty provision because it constituted an amendment to the text of the treaty and was inconsistent with its object and purpose); *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Award ¶¶ 267-272 (Aug. 22, 2012) (CS-30) (questioning Argentina's reliance on an exchange of diplomatic notes concerning the Panama-Argentina BIT, rather than the Germany-Argentina BIT, which the tribunal was required to interpret); *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award ¶¶ 307-308 (Aug. 6, 2019) (CS-57) (stating that "isolated facts," such as the objections to jurisdiction by certain EU member states, could not establish the "agreement of all ECT Contracting Parties" under VCLT Article 31(3)(b)); *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Jurisdiction ¶¶ 110-113 (May 25, 2006) (CS-59) (concluding that statements expressed separately by Spain and Argentina in their defensive briefs as respondents in distinct disputes were "not directed towards each other" and did not evidence "a meeting of their minds or intent" under VCLT Article 31(3)(b)); *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award (June 3, 2021) ¶¶ 338-339 (CS-61) (submissions made by Costa Rica and Canada in the arbitration "happen[ed] to coincide" but "do not reflect an *agreement*"); *Urbaser S.A. and others v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (Dec. 19, 2012) ¶ 51 (CS-62) (noting that Argentina's reference to Spain's position in a separate arbitration did not provide a broader understanding concerning an interpretation shared by Spain on the application of certain provisions of the treaty in question).
[154] International Law Commission, Report on Its Seventieth session, U.N. Doc. A/73/10, Ch. IV, at 32, § 18 (2018) (RL-0132).

the meaning of the terms."[155] The value is not dependent on the context in which the subsequent agreement or practice is expressed.[156] This makes perfect sense, especially in the context of a provision such as Annex 14-C that deals with the submission and resolution of claims and is most likely to be addressed by the treaty parties in the context of investment disputes. Investment tribunals have also agreed in the NAFTA context that submissions by the NAFTA Parties in Chapter Eleven arbitrations may serve to demonstrate a common understanding for purposes of Article 31(3).[157]

94. Finally, the USMCA Parties' interpretation is not an amendment to Annex 14-C, as Claimant suggests.[158] The USMCA Parties' common understanding is consistent with the ordinary meaning of Paragraph 1 of Annex 14-C and confirms that the annex permits only claims based on conduct occurring while the NAFTA was in force. In accordance with VCLT Article 31(3), the Tribunal must take into account the USMCA Parties' common understanding of Annex 14-C.[159]

[155] International Law Commission, Draft Articles on the Law of Treaties with commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 222 (¶ 15), U.N. Doc. A/CN.4/SER.A/1966/Add.l (RL-0068). *See also* Gardiner Reply Report ¶ 41.
[156] Gardiner Reply Report ¶ 41.
[157] *See* U.S. Memorial n. 88 (citing to *Alicia Grace et al. v. United Mexican States*, NAFTA/ICSID Case No. UNCT/18/4, Final Award ¶¶ 473-74 (Aug. 19, 2024) (RL-0079); *Mobil Investments Canada Inc. v. Government of Canada (II)*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶¶ 158-60 (July 13, 2018) (RL-0081); *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction, ¶¶ 188-89 (Jan. 28, 2008) (RL-0033)). *See also* Gardiner Reply Report ¶ 40 ("The requirement to take account of such concordant statements or positions taken in proceedings for settlement of disputes has been increasingly recognised both in investment arbitrations and in other international proceedings. Such material may include the concurring statements submitted by the non-disputing parties in the course of arbitration.") (internal citations omitted).
[158] Claimant's Counter-Memorial ¶ 86. Claimant's arguments related to VCLT Article 32 are addressed in Section II.D below.
[159] Gardiner Reply Report ¶ 42 ("[W]hen using the elements of the general rule in Article 31 of the 1969 Vienna Convention, an interpreter must take account of the agreement of the parties as manifested in their statements in proceedings as to the meaning of the Annex 14-C, particularly as such agreement confirms the clear language of paragraph 1 of the Annex.").

D. Resort to Supplementary Means of Interpretation Confirms the U.S. Position

95. As the United States has previously stated, the meaning of Annex 14-C, in context and in light of the USMCA's object and purpose, is clear. As a result, it is unnecessary for the Tribunal to have recourse to supplementary means of interpretation.[160]

96. Nevertheless, to the extent the Tribunal chooses to examine materials beyond the treaty text, they "confirm the meaning resulting from the application of article 31."[161] *First*, documents exchanged between the USMCA Parties during negotiations show, among other things, that the "breach of an obligation" requirement in Annex 14-C was an intentional part of the bargain that they struck. *Second*, the USMCA Parties' past treaty practice confirms that Annex 14-C was not intended to be a survival clause for the NAFTA's substantive investment obligations.

97. Finally, Claimant's continued reliance on statements by former negotiators, untethered to the text, are no more compelling now than they were at the bifurcation stage. The Tribunal should disregard them.

1) Documents Reflecting the USMCA Parties' Negotiations Confirm the U.S. Interpretation of Annex 14-C

98. The drafts of USMCA Chapter 14 exchanged between the Parties demonstrate that the language of Annex 14-C changed little during the negotiation.[162] The initial draft text was, essentially, the same as the final text, particularly with respect to Paragraph 1. This is notable in part because, as made clear by the various drafts exchanged, the USMCA negotiators spent considerable time and effort editing and negotiating other parts of Chapter 14, particularly the new substantive provisions that would replace NAFTA Chapter 11, Section A. The significant amount

[160] U.S. Memorial ¶ 75.
[161] VCLT, art. 32 (RL-0017).
[162] The United States has included as Annex A a timeline of the negotiations between the USMCA Parties, including the drafts exchanged between them.

of work done on Chapter 14's substantive provisions further demonstrates that the USMCA Parties sought fully to supersede NAFTA Chapter 11, Section A. In light of all the effort undertaken to replace NAFTA's substantive obligations, it would have been remarkable to extend them by three years, especially without clear text indicating an intention to do so. This is particularly true where, as here, the parties borrowed language from NAFTA Articles 1116 and 1117, which all of the Parties expressly understood as limiting jurisdiction *ratione temporis* to breaches that occurred while the NAFTA was in force.[163]

99. What is also remarkable about the exchanges is that at one point at least two of the USMCA Parties considered—and ultimately rejected—a version of Paragraph 1 of Annex 14-C that Claimant would have preferred, omitting the "breach of an obligation" requirement. But this was not the version of Annex 14-C to which the USMCA Parties agreed.[164]

100. The initial text of what became Annex 14-C was proposed on October 11, 2017.[165] The draft of Paragraph 1 did not change materially between that date and August 1, 2018. On August 1, the United States shared a version of Annex 14-C (then titled Annex 11-C) with Mexico that altered Paragraph 1 to read:

> Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration under Section B of Chapter 11 of NAFTA 1.0 in accordance with this Annex.[166]

[163] *See supra* ¶ 22.
[164] While the exchange between the United States and Mexico is informative as to how two of the USMCA Parties considered redrafting Annex 14-C, we note that documents that were not shared among all three USMCA Parties or do not otherwise reflect their "common understanding . . . as to the meaning attached to the terms of the treaty" do not comprise the preparatory work of Annex 14-C to the USMCA. Humphrey Waldock, Third Report on the Law of Treaties 58 (¶ 21), U.N. Doc. A/CN.4/167 (1964) (RL-0089).
[165] Investment (Section B Only) (uploaded to MAX.gov on or around October 11, 2017) (R-0037); *see also* Email from L. Mandell to M. Berdichevsky and G. Malpica (Oct. 11, 2017) (R-0038) (noting the upload to MAX.gov of "the U.S. proposed Section B text").
[166] Investment Chapter Text at 18, attached to email from L. Mandell to A. Lopez (Aug. 1, 2018) (R-0039).

101. This provision, if adopted, would not have included the "breach of an obligation" jurisdictional requirement. By August 11, however, the working draft had reverted to the original formulation, which, similar to the final text, once again incorporated the "breach of an obligation" requirement:

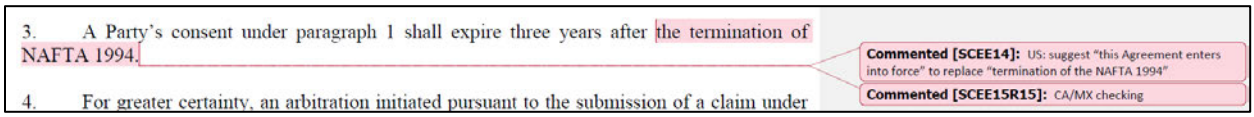
> Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration under Section B of Chapter 11 of NAFTA 1.0 in accordance with this Annex alleging breach of an obligation under . . . Section A of Chapter 11 of NAFTA 1.0;[167]

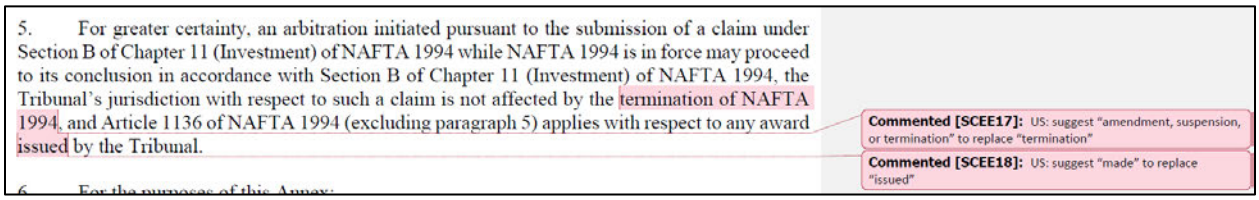
102. These exchanges show that at least two of the USMCA Parties had more than one potential formulation of the critical Paragraph 1 before them and chose the version that requires a claimant to allege the "breach of an obligation" under the specified NAFTA provisions. The interpretive process must respect this choice by giving the phrase "breach of an obligation" meaning. It cannot be ignored, as Claimant's interpretation requires.

103. The Tribunal may likewise weigh the circumstances of the USMCA Parties' decision to terminate the NAFTA. The decision to expressly terminate the NAFTA, as opposed to amending or suspending it, came relatively late in the negotiation process, after the text of Annex 14-C had largely been finalized. This is reflected in the drafts exchanged as part of the legal scrub process, which, with respect to Chapter 14, occurred during the weeks preceding the USMCA's signature on November 30, 2018. In a comment provided on or around November 13, 2018, the United States proposed changing the references to the NAFTA's termination in Annex 14-C to references instead to the USMCA's entry into force or to the "amendment, suspension, or termination" of the

[167] Investment Chapter Text at 18, attached to email from L. Mandell to A. Lopez and G. Malpica (Aug. 11, 2018) (R-0040).

NAFTA, demonstrating that just two weeks prior to the signature of the USMCA, it was still unclear whether or when the NAFTA might terminate:[168]





104. Canada and Mexico accepted these changes for the time being[169] and also accepted a similar proposed change to the references to the NAFTA's termination in the definition of "legacy investment" in Paragraph 6.[170]

105. After the decision to terminate the NAFTA, however, the USMCA Parties revisited the text of Annex 14-C and reverted to including the references to the NAFTA's termination. As the United States explained:

> In light of the agreement on the protocol this morning, it is clear enough to the US that "termination" is the proper term, and that the text can be explicit (and specific) as to the Parties' intention.[171]

106. The USMCA Parties also agreed on a Drafters' Note with respect to the three paragraphs of Annex 14-C that mention the NAFTA's termination, which states:

[168] Chapter 14, Investment, at 14-18, 14-19 (uploaded to MAX.gov on or around Nov. 13, 2018) (R-0041).
[169] Chapter 14, Investment, at 14-18, 14-19 (uploaded to MAX.gov on or around Nov. 21, 2018) (R-0042) (incorporating proposed change to Paragraph 3 and reflecting in a comment on Paragraph 5 that Canada was "okay" with the proposed change and that Mexico was "consulting"); Chapter 14, Investment, at 14-18, 14-19 (uploaded to MAX.gov on or around Nov. 23, 2018) (R-0043) (accepting proposed changes to both Paragraphs 3 and 5).
[170] Chapter 14, Investment, at 14-19 (uploaded to MAX.gov on or around Nov. 25, 2018) (R-0044) (comment noting that "This is another place that mentions 'termination' of [NAFTA] 1.0 that we missed. Consistent with the change we agreed to in para. 3, this provision should read 'date of EIF.'"); Chapter 14, Investment, at 14-19 (uploaded to MAX.gov on or around Nov. 26, 2018) (R-0045) (accepting change).
[171] Chapter 14, Investment, at 14-18 (uploaded to MAX.gov on or around Nov. 27, 2018) (R-0046).

> With respect to paragraphs 3, 5, and 6 of this Annex [14-C], the Parties understand that NAFTA 1994 is terminated as of this Agreement superseding NAFTA 1994 pursuant to paragraph 1 of the Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada.[172]

107. Had the USMCA Parties intended to extend the substantive obligations of the NAFTA despite its termination, this would have been an opportunity to revisit the text of Paragraph 1 to make that clear (including by, as discussed below, using a variation of the language in each of the USMCA Parties' Model BITs). That the USMCA Parties revisited Annex 14-C, reinserting references to the NAFTA's termination into several Annex 14-C paragraphs, but chose not to revise Paragraph 1 to address its continued applicability, only underlines that the USMCA Parties chose ***not*** to extend the NAFTA's applicability past its termination.

108. Finally, the "term sheet" that the U.S. Trade Representative, Ambassador Robert Lighthizer, sent to Gerald Butts, then Principal Secretary to Canada's Prime Minister, in September 2018 proposed that "Canada agree[] to 3-year grandfathering of ISDS."[173] While this language envisioned extending the period for investor-State dispute settlement (ISDS), there was no mention of any "grandfathering" with respect to the NAFTA's substantive investment obligations. This is in contrast, for example, to references in the same term sheet to (i) Chapter 19, stating that "Canada and US will maintain status quo from NAFTA"; (ii) wine, stating that "US to agree to maintain NAFTA status quo for Canada"; or (iii) culture, stating that "Canada retains NAFTA 1.0 cultural exception with the following edits."[174] Again, had the USMCA Parties intended to maintain the "status quo from NAFTA" for any period of time with respect to

[172] USMCA – List of Drafters' Notes, at RESP0001491 (R-0047).
[173] "US-Can Closing Term Sheet," at 1, attached to email from R. Lighthizer to G. Butts (Sept. 28, 2018) (R-0048).
[174] *Id.*

substantive investment obligations, they would have said so expressly, both in the term sheet and in Annex 14-C. They did not.

2) Claimant Disregards Relevant Past Treaty Practice in Favor of Irrelevant Practice Relating to Legacy Agreements with Survival Clauses

109. In its Memorial, the United States provided examples of how each of the USMCA Parties previously allowed for the post-termination survival of a treaty's substantive obligations for a set period, including obligations with respect to the settlement of disputes. That type of language can be found in the survival clauses present in *all* the USMCA Parties' model BITs. If the USMCA Parties had intended for the NAFTA's substantive investment obligations to continue to bind them after the NAFTA's termination, they could have included language in Annex 14-C providing that the obligations in Section A of NAFTA Chapter 11 "shall remain in force"[175] or "shall continue to apply"[176] or "shall continue to be effective"[177] for three years with respect to legacy investments, but they did not. The absence of this language from Paragraph 1 of Annex 14-C (or any other part of the USMCA) is further confirmation that Claimant's interpretation is incorrect.

110. Claimant's response on this point is that footnote 20 incorporates similar language to that found in the USMCA Parties' model survival clauses.[178] But Claimant ignores two critical distinctions between footnote 20 and the USMCA Parties' model language. *First*, as discussed above, footnote 20 is introduced with the phrase "for greater certainty," which indicates that it is meant to provide clarification, not to introduce new commitments or obligations not found elsewhere in the text.[179]

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[175] 2014 Canada Model Agreement for the Promotion and Protection of Investments, art. 42(4) (RL-0054).
[176] 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) (RL-0051).
[177] 2008 Mexican Model of Investment Promotion and Protection Agreement, art. 30(4) (RL-0056).
[178] Claimant's Counter-Memorial ¶ 93.
[179] *See supra* ¶ 61.

111. *Second*, footnote 20 specifies the "relevant provisions" of the NAFTA that "apply with respect to . . . a ***claim***" submitted under Paragraph 1,[180] whereas the model survival clauses specify the obligations that continue to bind the parties in their treatment of ***investments***, as reflected in the table below:

USMCA Party	Model Survival Clause
United States	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.[181]
Canada	*In respect of investments or commitments to invest* made prior to the date when the termination of this Agreement becomes effective, *Articles 1 to 41 inclusive, as well as paragraphs 1 and 2 of this Article, shall remain in force* for a period of 15 years.[182]
Mexico	*This Agreement shall continue to be effective* for a period of ten years from the date of termination only *with respect to investments* made prior to such date.[183]

112. What each of the model clauses has in common is that it clearly conveys a continued commitment by the parties to remain bound by the terminated treaty's obligations in their treatment

[180] Annex 14-C ¶ 1 n.20 (R-0002 *bis*) (emphasis added).
[181] 2012 U.S. Model BIT, art. 22(3) (RL-0051) (emphasis added). *See also* 2004 U.S. Model Bilateral Investment Treaty, art. 22(3) (RL-0052) ("For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.").
[182] 2014 Canada Model Agreement for the Promotion and Protection of Investments, art. 42(4) (RL-0054) (emphasis added). *See also* 2021 Canada Model Agreement for the Promotion and Protection of Investments, art. 57(4) (RL-0053) ("In respect of investments or commitments to invest made prior to the date of termination of this Agreement, Articles 1 through 56, as well as paragraphs 1 and 2 of this Article, shall remain in force for 15 years."); 2004 Canada Model Agreement for the Promotion and Protection of Investments, art. 52(3) (RL-0055) ("In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles 1 to 51 inclusive, as well as paragraphs (1) and (2) of this Article, shall remain in force for a period of fifteen years.").
[183] 2008 Mexican Model of Investment Promotion and Protection Agreement, art. 30(4) (RL-0056) (emphasis added).

of covered investments during the survival period. Footnote 20, on the other hand, indicates only the law that will apply to claims submitted to arbitration within the bounds of the consent specified in Paragraph 1. Nothing in footnote 20 speaks to ongoing obligations that the USMCA Parties have in their treatment of investments.

113. Apart from the survival clause language found in the USMCA Parties' model BITs, the only treaty examples in the record that are relevant to the present issue are the U.S. free trade agreements with Morocco and Panama and the exchange of letters between the United States and Honduras concerning the CAFTA-DR. In each of these cases, the United States and its counterparty had a preexisting BIT and chose to allow claimants with qualifying investments to assert claims under that BIT based on events occurring both before and for ten years ***after*** the free trade agreement's entry into force.[184] The parties accomplished this by ***not*** terminating the legacy BIT, leaving its substantive obligations in force. As a result, those obligations remained binding on—and could be breached by—the parties despite the entry into force of a new free trade agreement between them. After ten years, the new free trade agreements fully suspended each BIT's dispute resolution provisions, barring further claims based on breach of the BIT's obligations.

114. The Morocco, Panama, and Honduras examples demonstrate another way for treaty parties to permit investors to assert claims under a legacy agreement based on events occurring after the entry into force of a successor agreement. And, again, the USMCA Parties plainly did not adopt this approach: rather than leaving their legacy agreement in force, they expressly terminated the

[184] U.S. Memorial ¶ 86.

NAFTA with no exceptions to overcome the presumption under the rule stated in Article 70(1)(a) of the Vienna Convention associated with such a termination.[185]

115. Instead of examples in which the treaty parties allowed claims to be asserted under a legacy agreement based on events occurring after its termination/suspension and the entry into force of a new agreement—as Claimant contends the USMCA Parties did here—Claimant's few treaty practice examples address a different scenario. According to Claimant, it has provided examples that "explicitly stat[ed] in the transition text that the extension of the claims is relevant to acts prior to entry into force of the new treaty."[186] Claimant contends that because the USMCA Parties did not include in Annex 14-C the language found in its example treaties, this supports its interpretation of the annex.

116. As explained above, the USMCA Parties expressly limited claims under Annex 14-C to conduct occurring before the NAFTA's termination by consenting only to the submission of claims for breach of specified NAFTA obligations.[187] The absence of language comparable to that found in Claimant's examples is therefore irrelevant to the Tribunal's interpretation of Annex 14-C. The same goal was accomplished through the use of the language from NAFTA Articles 1116(1) and 1117(1), language that the USMCA Parties had previously negotiated and well understood.

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[185] Claimant attempts to turn these examples to its advantage by arguing that they show the United States is willing to tolerate a "double regime" for investments in some circumstances. Claimant's Counter-Memorial ¶ 102. There are, however, two key differences between the Morocco, Panama, and Honduras examples, on the one hand, and the USMCA, on the other. *First*, in the Morocco, Panama, and Honduras examples, the United States and its counterparts were clear that the legacy BIT would remain in force, despite the entry into force of the new free trade agreement, whereas here the USMCA Parties were just as clear that the legacy agreement (*i.e.*, the NAFTA) would terminate when the USMCA entered into force. Accordingly, regardless of whether the United States might allow two overlapping investment regimes in some circumstances, it plainly did not do so here. *Second*, in the case of Morocco, Panama, and Honduras, the legacy agreement was a BIT, dealing solely with investment issues, while the new agreement was a free trade agreement (respectively, the U.S.-Morocco Free Trade Agreement, the U.S.-Panama Trade Promotion Agreement, and the Dominican Republic-Central America Free Trade Agreement), dealing with a much wider range of subjects. By contrast, the USMCA replaced one free trade agreement with another. As a result, the potential overlap between regimes was much broader, as discussed above. *See supra* ¶¶ 66-71.
[186] Claimant's Counter-Memorial ¶ 95.
[187] *See supra* ¶ 12.

117. Claimant's examples are also flawed because they address different types of legacy agreements in a different context. *First*, each of Claimant's examples—the Canada-European Union Comprehensive Economic and Trade Agreement,[188] the Mexico-European Union "agreement in principle,"[189] the Free Trade Agreement Between Canada and the Republic of

[188] Agreement Between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments, Can.-Croat., art. XV(4), Feb. 3, 1997, 3087 U.N.T.S. 261 (RL-0133); Agreement Between the Government of Canada and the Czech Republic for the Promotion and Protection of Investments, Can.-Czech, art. XV(8), May 6, 2009, 3102 U.N.T.S. 29 (RL-0134); Agreement Between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, Can.-Hung., art. XIV(3), Oct. 3, 1991, 3068 U.N.T.S. 313 (RL-0135); Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, Can.-Lat., art. XVIII(7), May 5, 2009, 3119 U.N.T.S. 299 (RL-0136); Agreement Between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, Can.-Pol., art. XIV, Apr. 6, 1990, 3032 U.N.T.S. 195 (RL-0137); Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, Can.-Rom., art. XVIII(7), May 8, 2009, 3117 U.N.T.S. 337 (RL-0138); Agreement Between the Slovak Republic and Canada for the Promotion and Protection of Investments, Can.-Slovk., art. XV(7), July 20, 2010, 2817 U.N.T.S. 57 (RL-0139).

[189] Consistent with its preliminary character, the EU-Mexico agreement in principle does not include a list of legacy BITs to be terminated. However, the legacy BITs between Mexico and EU member states all have survival clauses. Agreement Between the United Mexican States and the Slovak Republic on the Promotion and Reciprocal Protection of Investments, Mex.-Slovk., art. 32(4), Oct. 26, 2007, 2625 U.N.T.S. 289 (RL-0140); Agreement on the Promotion and Reciprocal Protection of Investments Between the United Mexican States and the Kingdom of Spain, Mex.-Spain, art. XXIII, Oct. 10, 2006, 2553 U.N.T.S. 294 (RL-0141); Agreement Between the Czech Republic and the United Mexican States on the Promotion and Reciprocal Protection of Investments, Czech-Mex., art. 25(4), Apr. 4, 2002, 2449 U.N.T.S. 149 (RL-0142); Agreement Between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Mex.-Greece, art. 21(3), Nov. 30, 2000, 2449 U.N.T.S. 213 (RL-0143); Agreement Between the Government of the Kingdom of Sweden and the Government of the United Mexican States Concerning the Promotion and Reciprocal Protection of Investments, Swed.-Mex., art. 21(3), Oct. 3, 2000, 2160 U.N.T.S. 3 (RL-0144); Agreement Between the Government of the United Mexican States and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, Mex.-Den. art. 23(2), Apr. 13, 2000, 2453 U.N.T.S. 415 (RL-0145); Agreement Between the Government of the United Mexican States and the Government of the Italian Republic for the Promotion and Mutual Protection of Investments, Mex.-It., art. 12(2), Nov. 24, 1999, 2454 U.N.T.S. 285 (RL-0146); Agreement Between the Portuguese Republic and the United Mexican States on the Reciprocal Promotion and Protection of Investments, Port.-Mex., art. 21(3), Nov. 11, 1999, 2454 U.N.T.S. 83 (RL-0147); Agreement Between the Government of the Republic of Finland and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Fin.-Mex., art. 24(3), Feb. 22, 1999, 2122 U.N.T.S. 63 (RL-0148); Agreement Between the Government of the French Republic and the Government of the United Mexican States for the Reciprocal Promotion and Protection of Investments, Fr.-Mex., art. 13, Nov. 12, 1998, 2129 U.N.T.S. 175 (RL-0149); Agreement Between the Belgo-Luxemburg Economic Union and the United Mexican States on the Reciprocal Promotion and Protection of Investments, Bel.-Mex., art. 22, Aug. 27, 1998, 2223 U.N.T.S. 3 (RL-0150); Agreement Between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments, Mex.-Ger., art. 22(3), Aug. 25, 1998, 2140 U.N.T.S. 393 (RL-0151); Agreement between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments, Mex.-Austria, art. 30(3), June 29, 1998, 2160 U.N.T.S. 69 (RL-0152); Agreement on Promotion, Encouragement and Reciprocal Protection of Investments Between the United Mexican States and the Kingdom of the Netherlands, Mex.-Neth., art. 13(3), May 13, 1998, 2159 U.N.T.S. 393 (RL-0153).

Peru,[190] the Free Trade Agreement Between Canada and the Republic of Panama,[191] and the Mexico-Australia side letter[192]—involved an attempt by the parties to the new treaty to override a survival clause contained in the legacy agreement(s). Thus, the default position under the legacy BITs addressed in Claimant's examples was that they would continue to apply for a period between 10 and 20 years after termination and would allow claims based on events occurring during that post-termination period. In seeking to alter this outcome expressly, the parties agreed on the language highlighted by Claimant. These clauses were necessary to address a succession problem that was fundamentally different from the situation that confronted the USMCA Parties in terminating the NAFTA, which had no survival clause.

118. *Second*, Claimant ignores important textual differences in its examples, which further undercut their relevance. As demonstrated in the table below, the majority of Claimant's treaty examples include language expressly binding the parties to the continued application of the legacy agreement—language that is entirely absent from the USMCA. Moreover, this language appears *immediately before* the temporal limitation on which Claimant relies, as reflected in the table below. Given that the USMCA has no language providing for the survival of the NAFTA's substantive investment obligations, the absence of a temporal limitation like the ones found in Claimant's examples tells the Tribunal nothing about how to interpret Annex 14-C.[193]

[190] Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru, art. 52(3), Nov. 14, 2006, U.N.T.S. No. 55972 (RL-0154).
[191] Treaty Between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments, Can.-Pan., art. XVIII(2), Sept. 12, 1996, 3080 U.N.T.S. 379 (RL-0155).
[192] Agreement between the Government of the United Mexican States and the Government of Australia on the Promotion and Reciprocal Protection of Investments, art. 24(3), Aug. 23, 2005, 2483 U.N.T.S. 247 (RL-0156).
[193] Ascensio Reply Report ¶ 18 ("[I]n the treaties cited [by Claimant], the wording has characteristics that can be explained by the existence of a survival clause in the previous treaty or provisions providing for its continuity in the later treaty. Hence the need to clearly exclude disputes relating to facts occurring after the entry into force of the new treaty. Neither NAFTA nor USMCA contain such provisions.").

Agreement	Provision
Free Trade Agreement Between Canada and the Republic of Peru	[T]he [legacy BIT] *shall remain operative* for a period of fifteen years after the entry into force of this Agreement for the purpose of any breach of the obligations of the [legacy BIT] that occurred before the entry into force of this Agreement. . . . [194]
Free Trade Agreement Between Canada and the Republic of Panama	[T]he [legacy BIT] *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 [legacy BIT] that occurred before the entry into force of this Agreement. . . . [195]
Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments	The [legacy BIT] *shall continue to apply* for a period of three years from the date of termination to any investment . . . which was made before the entry into force of the Agreement . . . with respect to any act or fact that took place or any situation that existed before the date of termination.[196]

119. In sum, the Tribunal need not have recourse to any of the past treaty examples discussed in this section in interpreting Annex 14-C. But to the extent that the Tribunal chooses to consider them, Claimant's examples are simply not helpful—they involve legacy agreements that differ from the NAFTA in a critical respect and include language not found in the USMCA—or support the U.S. position by demonstrating the sort of language the USMCA Parties could have used if they sought to extend the NAFTA's applicability. The examples that the United States has offered,

[194] Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, art. 845(2), May 29, 2008, U.N.T.S. No. 58205 (CLA-072) (emphasis added).
[195] Free Trade Agreement Between Canada and the Republic of Panama, Can.-Pan., art. 9.38(2), May 14, 2010, U.N.T.S. No. 58577 (CLA-073) (emphasis added).
[196] Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (Mar. 8, 2018) (CLA-090) (emphasis added).

by contrast, provide insight into how the USMCA Parties have in the past either (1) crafted language to bind themselves to the continued application of obligations in a terminated treaty (the language found in their model BITs) or (2) chosen ***not*** to terminate a legacy agreement upon the entry into force of a new agreement in order to permit claims to be made under the legacy agreement on an ongoing basis. The USMCA Parties took neither approach here, which confirms the U.S. interpretation of Annex 14-C.

3) Claimant's Reliance on the Recollections of Former Negotiators Is Misplaced

120. Claimant relies on statements by two former negotiators in its Counter-Memorial, attempting to use them to contradict the clear meaning of Annex 14-C's terms. This is impermissible under the customary international law rules of treaty interpretation reflected in VCLT Articles 31 and 32. As Professor Gardiner explains in his second report: "it is the text which is to be taken as recording the agreement of the parties not the intentions of the negotiators as stated during the negotiations" or the "recollections of individual participants in negotiations."[197]

121. Claimant first returns to statements by Lauren Mandell, made after he left USTR. Claimant puts particular emphasis on a March 2021 email from Mr. Mandell that is quoted in Mr. Álvarez's dissenting opinion in *TC Energy*.[198] For the reasons already explained in the U.S. Memorial, the recollections of a former negotiator for one party are no use in the interpretive process.[199] This

[197] Gardiner Reply Report ¶ 54.
[198] Claimant's Counter-Memorial ¶ 106.
[199] U.S. Memorial ¶¶ 90-91 (discussing law firm marketing memos prepared by former negotiators). Claimant cites three past decisions as support for its attempted reliance on the recollections of former negotiators. These decisions do not support Claimant's position. *First*, while the *Churchill Mining* tribunal relied on notes and drafts from the files of one treaty party (the United Kingdom), it did so because the documents reflected not just the views of the United Kingdom but also the views expressed during negotiations by Indonesia, the other treaty party. *Churchill Mining Plc v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction ¶¶ 212, 225-

principle has even more resonance now that the United States has produced documents reflecting the exchanges between the USMCA Parties during the negotiations. These documents do not support Mr. Mandell's recollections and are a further reason to disregard them.

122. In any event, the content of Mr. Mandell's email is unhelpful to Claimant's position and, more generally, to the Tribunal's analysis. While Mr. Mandell asserts that "we intended the annex [*i.e.*, Annex 14-C] to cover measures in existence before AND after USMCA entry into force" he does not point to any text in Annex 14-C that memorializes this purported intention.[200] Instead, he suggests that the text "could probably be clearer" and offers "to think about the best textual argument" in support of his interpretation.[201]

123. This is damning for Claimant. Had the USMCA Parties in fact agreed to what Mr. Mandell claims, he should have had no difficulty identifying the text in Annex 14-C, Paragraph 1, reflecting this agreement. As for the "arguments" that he offers, they are all misguided and in any event they cannot make up for the absence in the USMCA of an agreement to the survival of the NAFTA's substantive obligations after its termination. Also notable is that, among Mr. Mandell's "arguments," he fails to endorse the main theories put forward by Claimant. He says nothing, for

229 (Feb. 24, 2014) (CLA-82) (discussing internal documents "mainly composed of internal notes and drafts of British officials and counter-drafts submitted by Indonesia" in seeking to discover the intentions of both the "British negotiators and of Indonesia"). *Second*, the *Sempra Energy* decision is too vague about the types of documents it considered to be helpful. *See, e.g.*, *Sempra Energy Int'l v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction ¶ 145 (May 11, 2005) (CLA-83). There is nothing in the decision to suggest that the tribunal was endorsing reliance on the post-hoc recollections of individual negotiators. *Third*, the Appellate Body's report in *Frozen Boneless Chicken Cuts* stated only that "'unilateral' acts, instruments, or statements of individual negotiating *parties*"—*i.e.*, the State Parties themselves—may be relevant, not the recollections of individual negotiators. *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, Appellate Body Report ¶ 289, WTO Doc. WT/DS269/AB/R and WT/DS286/AB/R (Sept. 12, 2005) (CLA-84) (emphasis added). Moreover, the Appellate Body made clear that, this observation notwithstanding, the ultimate goal remained "discerning the *common* intentions of the parties." *Id.* (emphasis added).

[200] Email from L. Mandell to K. Gharbieh (Mar. 2, 2021) (R-0049).

[201] *Id.*

example, about an implied extension of the obligations in Section A of NAFTA Chapter 11 or the applicable law under NAFTA Article 1131.

124. Turning to the points that Mr. Mandell makes in his email, the first reflects a misstatement of the NAFTA limitations period. Mr. Mandell contends that the three-year limitation on consent in Paragraph 3 of Annex 14-C is redundant for claims based on conduct occurring before the NAFTA's termination because the three-year limitations period in NAFTA Articles 1116(2) and 1117(2) would have been sufficient to bar older claims.[202] Accordingly, in Mr. Mandell's view, the USMCA Parties would not have included Paragraph 3 if their intent had been to restrict their consent to pre-termination conduct.

125. In fact, the two limitations periods are not redundant. NAFTA Articles 1116(2) and 1117(2) provide a three-year limitations period running from when "the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[203] While the limitations period has a set length, the time that may elapse between the date of the alleged breach and the expiration of the limitations period is unpredictable because it depends on the nature of the conduct at issue, specifically whether its impact on the investor and its alleged inconsistency with the NAFTA's obligations was (or should have been) immediately apparent. If the conduct alleged to constitute the breach was instead something that was concealed by the respondent State or otherwise would have been hard to detect, the time between the date of the breach and the expiration of the limitations period may have been significantly longer than three years.[204]

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[202] *Id.* *See also* Claimant's Counter-Memorial ¶ 45.
[203] NAFTA Articles 1116(2) and 1117(2) (R-0004 *bis*).
[204] *See, e.g.*, *Tennant Energy, LLC v. Government of Canada*, NAFTA/PCA Case No. 2018-54, Final Award ¶¶ 319-35 (Oct. 25, 2022) (RL-0157) (in connection with claims asserted under the NAFTA in June 2017 based on conduct

126. Paragraph 3 of Annex 14-C therefore had clear utility for the USMCA Parties with respect to claims based on conduct occurring while the NAFTA was in force. By specifying in Paragraph 3 of Annex 14-C that the consent to arbitration in Paragraph 1 would expire after three years, the USMCA Parties put a definite end point on the filing of claims under Annex 14-C.[205] Relying on the NAFTA Chapter 11 limitations period alone would have caused an indefinite and indeterminate extension of the USMCA Parties' consent under Annex 14-C, expiring only three years after the last investor affected by an alleged breach of the NAFTA had acquired, or should have acquired, knowledge of the loss or damage caused by the breach.

127. Mr. Mandell's email also focuses on the wrong triggering event. While Mr. Mandell addresses whether NAFTA's obligations would apply after "USMCA entry into force,"[206] in fact the relevant analysis is whether NAFTA's obligations survived the NAFTA's ***termination***. As discussed above, the evidentiary record shows that the USMCA Parties debated whether and when to terminate the NAFTA until very late in the negotiation.[207] Had the USMCA Parties chosen not to terminate the NAFTA, or to terminate the NAFTA some time after the USMCA's entry into force, NAFTA Chapter 11's substantive obligations would have survived past the "USMCA entry into force," as Mr. Mandell suggests. However, the USMCA Parties decided late in the process to

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that, according to respondent, occurred in July 2011, summarizing claimant's argument that claims were timely because claimant could not have known about the conduct until the public release of certain documents, which disclosed information that had allegedly been "kept secret and suppressed by the Respondent").

[205] *TC Energy* Award ¶ 158 (RL-0060) ("[I]n the absence of Paragraph 3, consent to arbitrate would have existed for such breaches as long as the limitation period provided by Articles 1116(2) and 1117(2) of NAFTA had not expired. 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. As the Respondent has convincingly explained in its closing, Paragraph 3 therefore limits that time and establishes certainty in this regard.").

[206] Email from L. Mandell to K. Gharbieh (Mar. 2, 2021) (R-0049).

[207] *See supra* ¶¶ 104-108.

terminate the NAFTA immediately upon the USMCA's entry into force, which meant that the obligations addressed in Annex 14-C terminated on that date.

128. Mr. Mandell's other "arguments," which relate to the title of the annex and footnote 21, are equally unhelpful. The United States has already dealt with footnote 21 above,[208] and has likewise explained why Annex 14-C's title in fact confirms the U.S. interpretation because it shows that the annex was intended solely to address the submission and resolution of certain claims, not the USMCA Parties' substantive obligations.[209]

129. Claimant also puts forward a portion of a witness statement by Kenneth Smith Ramos quoted in a submission made by other claimants in a case against Mexico.[210] According to Mr. Smith, the USMCA Parties intended 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."[211] Even more than Mr. Mandell's email, the quoted assertion by Mr. Smith is entirely untethered from the text of Annex 14-C. It is a statement about the purported intentions of the USMCA Parties, not the meaning of the terms they chose. As reflected in VCLT Article 31(1), the customary international law of treaty interpretation is "based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[212] Even when having recourse to supplementary means of

[208] *See supra* ¶¶ 73-78.
[209] *See supra* ¶ 21.
[210] Claimant's Counter-Memorial ¶ 111.
[211] Claimant's Counter-Memorial ¶ 111 (quoting Claimants' Counter-Memorial in *Cyrus Capital Partners, L.P. Contrarian Capital Management, LLC v. United Mexican States*, USMCA/ICSID Case No. ARB/23/33).
[212] International Law Commission, Draft Articles on the Law of Treaties with commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 220 (¶ 11), U.N. Doc. A/CN.4/SER.A/1966/Add.l (RL-0068); *id.* 223 (¶ 18). *See also* Gardiner Report ¶¶ A.9-A.10; *García Armas and others v. Venezuela (II)*, PCA Case No. 2016-08, Second Legal Opinion of Prof. Christoph Schreuer on Questions of Jurisdiction relating to Nationality ¶ 7 (May 31, 2018) (RL-0115) ("[T]he text

interpretation consistent with VCLT Article 32, the focus must remain on determining the meaning of the treaty text as the definitive embodiment of the parties' agreement. As Humphrey Waldock observed with respect to travaux préparatoires, their "cogency" must "depend[] on the extent to which they furnish proof of the common understanding of the parties *as to the meaning attached to the terms of the treaty*."[213] The same is true for other supplementary means of interpretation, including the recollections of negotiators provided years after the events. As Professor Gardiner states in his second expert report: "The fundamental basis of the rules of interpretation of treaties is that it is the text of the treaty which is to be taken as recording the agreement of the parties not the intentions of the parties or the negotiators of the treaty derived other than by proper application of the rules of the 1969 Vienna Convention."[214]

130. Mr. Smith's assertion provides no insight into the meaning of Annex 14-C's terms and, accordingly, it has no place in the Tribunal's analysis.

E. Conclusion on the *Ratione Temporis* Jurisdictional Objection

131. For the foregoing reasons, the Tribunal should reject Claimant's various theories regarding the interpretation of Annex 14-C. The text of Annex 14-C, read in good faith, in context, in light of the USMCA's object and purpose, and taking into account the UMSCA Parties' common understanding establishes that the USMCA Parties consented to the submission of claims for breach of an obligation under the specified NAFTA provisions for three years but did not agree to the extension of the NAFTA obligations themselves. Accordingly, claims that—like Claimant's

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of the treaty must be presumed to be the authentic expression of the intentions of the parties. The interpretation of a treaty should proceed from the elucidation of the meaning of its text. It should not investigate *ab initio* the supposed intentions of the parties.").

[213] Humphrey Waldock, Third Report on the Law of Treaties 58 (¶ 21), U.N. Doc. A/CN.4/167 (1964) (RL-0089) (emphasis added).

[214] Gardiner Reply Report ¶ 56.

claims here—are based on conduct postdating the NAFTA's termination are outside the scope of the Tribunal's jurisdiction *ratione temporis* and must be dismissed.

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

132. The Parties agree on most of the facts relevant to the United States' objection to the Tribunal's jurisdiction *ratione materiae*:

- The Parties agree that, under an Investment Agreement signed in March 2020, Claimant purchased Class A shares of the U.S. SPV, through a complicated structure of several pass-through corporations.[215]
- The Parties agree that Claimant's ownership of the Class A shares in the U.S. SPV was always intended to be temporary.[216]
- The Parties agree that on January 8, 2021, Claimant sold its Class A shares in the U.S. SPV, and that as a result, according to Claimant's expert, Claimant received "all of its money back plus a return."[217]
- The Parties agree that this money was repatriated to Canada.[218]
- The Parties agree that it was not until almost two weeks later, on January 20, 2021, that the United States revoked the Presidential Permit for the cross-border portion of the Keystone XL pipeline.[219]

[215] *See, e.g.*, Claimant's Memorial ¶¶ 67, 78 (noting that "[t]he exact structure of the joint venture for the Keystone XL Project is somewhat complex"); [redacted]; Claimant's Observations on the Request for Bifurcation ¶ 43 (relying on a supposed "network of circumstances").

[216] *See, e.g.*, Claimant's Counter-Memorial ¶ 125 [redacted]

[217] *See, e.g.*, [redacted] Claimant's Observations on the Request for Bifurcation ¶ 43 ("it is true that the Investment Agreement structure involved a buyback of APMC's US Class A interests on 8 January 2021"); [redacted] Investment Agreement, [redacted] (C-110).

[218] *See, e.g.*, Claimant's Memorial ¶ 81 (noting that "the equity contribution in the United States was returned to APMC with the accretion owed to date"); [redacted]

[219] Claimant's Memorial ¶ 2.

- The Parties agree that Claimant's sole financial commitments after the sale of Class A shares in the U.S. SPV were in the form of (1) a loan guarantee to repay TC Energy's loans should it default (the "Guarantee"), and (2) interests held in a Canadian SPV.[220]

- The Parties agree that neither the Guarantee nor the interests held in the Canadian SPV are themselves qualifying investments under the USMCA or NAFTA.[221]

Under this agreed factual scenario, it is apparent that Claimant did not have an "investment" in the United States on the date that the Keystone XL permit was revoked. The sale of the Class A shares in the U.S. SPV ended any financial commitment, expectation of gain or profit, or risk by Claimant in the United States.

133. Claimant nonetheless insists that it had such an investment, based on three flawed arguments, each of which is rebutted below. **(A)** *First*, Claimant relies on a definition of the word "investment" that is inconsistent with the ordinary meaning of the term. In fact, the NAFTA Parties nowhere deviated from the ordinary meaning of "investment," and the facts of this case demonstrate why: it would otherwise permit a party with no commitment of capital, expectation of gain or profit, assumption of risk, or duration in the host State to nonetheless claim to have an "investment" that was impaired by a NAFTA Party. The NAFTA Parties did not consent to arbitrate with entities which did not have an investment in their territory. **(B)** *Second*, Claimant suggests that the sale of the Class A shares in the U.S. SPV merely represented a "restructuring" that somehow did not remove its investment from the United States, even though it admits that it

[220] *Id.* ¶ 81 [redacted] *see also id.* ¶ 206 ("Thereafter, [Claimant] continued to guarantee against loans drawn by TC Energy, which loans were first used to execute a return of APMC's capital invested in the United States to APMC shortly before the Revocation."); *id.* ¶ 81 (noting that after "the equity contribution in the United States was returned to APMC with the accretion owed to date, the value of a continuing Class A accretion based on APMC's total equity contribution in the United States which had been bought back would thereafter be factored into the Canadian SPV Class A rights buy back price"); [redacted]

[221] Claimant's Rejoinder on the Request for Bifurcation ¶ 31 ("Claimant acknowledges the direct ownership of Canadian interests is not sufficient for Claimant to have an appropriate investment in this case."); *id.* ¶ 36 ("The loan guarantee is not an Article 1139 interest or investment.").

repatriated all of the money it had paid for the Class A shares, with interest, back to Canada. **(C)** *Third*, and finally, Claimant attempts to show how several of the remnants of its transaction after the sale of the Class A shares in the U.S. SPV might qualify as an "investment" in the United States under NAFTA Article 1139. For the reasons discussed below, each of these attempts fails.

A. The Ordinary Meaning of "Investment" Includes Several Hallmark Characteristics

134. Claimant attempts to avoid the consequence of its divestiture from the United States by relying on a definition of "investment" that ignores the word's ordinary meaning.[222] Claimant incorrectly argues that the ordinary meaning of "investment" was "displaced" by the specific reference in paragraph 6(b) of Annex 14-C to NAFTA Chapter 11, pointing to the list of qualifying "investments" in Article 1139.[223]

135. As detailed in Respondent's Memorial and amply recognized in arbitral decisions and academic journals, the ordinary meaning of "investment" denotes several hallmark characteristics.[224] As one such tribunal observed, the term "investment" "has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings)"

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[222] *See, e.g.*, VCLT, art. 31(1) (RL-0017) ("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.").
[223] USMCA, Annex 14-C ¶ 6(b) (R-0002 *bis*) (providing that "investment" has "the meaning[] accorded in Chapter 11 (Investment) of NAFTA 1994."); Claimant's Counter-Memorial ¶¶ 121-123. Claimant argues that the characteristics "were all present here in any case throughout Claimant's investment in the Keystone XL Project." *Id.* ¶ 124. As evidenced in the record and explained in Respondent's Memorial and below, Claimant's investment lost NAFTA protection when it transferred its equity financing from the United States to Canada before the alleged breach. At the relevant time, Claimant no longer had risk of loss of equity in the United States, had no investment fixed by a certain duration, and did not have an expectation of profit in the United States.
[224] *See, e.g.*, U.S. Memorial ¶ 103, n. 128, 129; *Patel Engineering Ltd. v. The Republic of Mozambique*, PCA Case No. 2020-21, Final Award ¶ 293 (Feb. 7, 2024) (RL-0093) ("[T]he asset must indeed qualify as an investment, by meeting the objective and inherent features which are shared by all investments."); *Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award ¶ 80 (Apr. 30, 2014) (RL-0092) ("No matter what the forum, the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment."); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 163-64 ¶ 340 (2009) (RL-0038 *bis*); CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 217, 229, 262 (2d ed. 2017) (RL-0028).

entailing a contribution that involves some risk.[225] In other words, the term "investment" as normally understood contains an inherent "economic aspect"—a commitment of resources—that must be present in the host State's territory to constitute a protected investment under a treaty, regardless of the additional specifications imposed by NAFTA Article 1139.[226]

136. Claimant's suggestion that NAFTA Chapter 11 deviated from the ordinary meaning of "investment" is untenable. Chapter 11 does not in any way exclude the inherent characteristics of the word "investment," even if, as the *Grand River* tribunal recognized, Article 1139 specifically provides an exhaustive list of the categories of "investment" that are protected by Chapter 11.[227] Indeed, the USMCA Parties later made this explicit, largely maintaining NAFTA Article 1139's exclusive list of covered "investments" in USMCA Article 14.1 but making clear that for the

[225] *Romak SA v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award ¶ 207 (Nov. 26, 2009) (RL-0097); *see also Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Award ¶ 155 (Aug 3, 2022) (RL-0098) ("[I]nherent in the act of 'investing' is an objective element: a requirement of a positive act that involves some sort of contribution to acquire the asset or enhance its value, coupled with an expectation or desire that the asset will produce a return over a period of time, with the possibility or risk that it may not do so (with the result that the contribution might be forfeited in part or in whole)."); *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award ¶ 472 (May 11, 2020) (RL-0158) ("The Arbitral Tribunal agrees with the position of a long line of investment awards, aptly formulated in the *Romak v. Uzbekistan* award, that the ordinary meaning of the term '*investment*' entails a contribution that extends over a certain period of time and involves some risk, which is more than a simple commercial risk.").

[226] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 262 ¶ 6.170 (2d ed. 2017) (RL-0028) ("In a non-ICSID case, the notion of 'investment' in a BIT still has two aspects: (a) *a legal aspect*—the asset belonging to the claimant, being an asset of the type listed in the BIT; and (b) *an economic aspect*—'a commitment of resources' or 'contributions that have created such . . . assets'. Both elements must be present to constitute an investment.") (internal citations omitted); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 163-64 ¶ 340 (2009) (RL-0038 *bis*) ("[A]n investment, in order to qualify for investment treaty protection, must incorporate certain legal and economic characteristics. . . . It is essential that an investment have *both* the requisite legal and economic characteristics.") (emphasis in original).

[227] See Claimant's Counter-Memorial ¶ 122 (citing *Grand River Enterprises Six Nationas, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 82 (Jan. 12, 2011) (RL-0029). The illustrative and non-exhaustive lists included in other treaties to which the United States is a party only provides further support in those instances of the inherent characteristics that serve as a benchmark for determining what is and is not an investment. *See, e.g.*, *Amulsar Investor Ventures LLC v. Republic of Armenia,*, PCA Case No. 2023-66, Non-Disputing Party Submission of the United States ¶ 5 (Sept. 23, 2024) (RL-0160); *BA Desarrollos v. Argentine Republic*, ICSID Case No. ARB/23/32, Non-Disputing Party Submission of the United States ¶ 5 (Mar. 21, 2025) (RL-0161). Here, the USMCA parties expressly agreed to give the term "investment" "the meaning[] accorded in Chapter 11," not only as referenced in Article 1139. *See also, Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela (II),* ICSID Case No. ARB(AF)/11/1, Award ¶ 80 (Apr. 30, 2014) (RL-0092) ("No matter what the forum, the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment.").

purposes of the treaty, an "investment" "has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[228]

137. The NAFTA/USMCA tribunal in *Finley v. Mexico* also recently wrote in its jurisdictional decision that:

> [T]he NAFTA and USMCA definitions of "investment" are similar, even if Article 14.1 of the USMCA adds as typical characteristics of an investment "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk". The definitions under both treaties are quite broad and do not differ essentially from Article 25 of the ICSID Convention, such that the *Salini* test developed in connection with the latter may reasonably be applied, if need be, to the former.[229]

138. In short, NAFTA Chapter 11 protected "investments" as that term is commonly understood under treaty and international investment law and practice. It did not protect temporary activities in the host State's territory for which the alleged investor lacked a commitment of resources or expectation of profit.[230] The hallmark characteristics of "investment" become all the more relevant in scenarios where, such as here, the "economic materialization" of the investment is absent as an agreed factual matter.[231]

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[228] USMCA ¶ 14.1 (R-0002 *bis*); *see also*, 2004 U.S. Model Bilateral Investment Treaty, art. 1 (RL-0052), which defines "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk"; 2012 U.S. Model Bilateral Investment Treaty, art. 1 (same) (RL-0051); Borzu Sabahi, Noah D. Rubins & Don Wallace, Jr., *Notion of Investment, in* INVESTOR-STATE ARBITRATION 342 ¶ 10.18 (2d ed. 2019) (RL-0159) (explaining that "[t]he US practice in this context is in harmony with the Salini test used in ICSID Convention disputes").

[229] *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/21/25, Decision on Jurisdiction and Liability ¶ 245 (Nov. 4, 2024) (RL-0162). While the *Finley* tribunal did not analyze the application of each characteristic, it clearly recognized their relevance for the meaning of "investment" under Chapter 11 of NAFTA.

[230] *See infra* Section III.C.

[231] *See, e.g.*, CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 262 ¶ 6.170 (b) (2d ed. 2017) (RL-0028) (explaining that "[t]he economic materialisation of an investment is

B. Claimant's Withdrawal of Its Class A Shares Ended Any Claim to an Investment in the United States

139. [redacted] TC Energy did obtain private funding and signed an agreement to that effect on January 4, 2021,[233] which triggered the repurchase of Claimant's Class A shares on January 8, 2021.[234] Consequently, by the critical date of the permit revocation on January 20, 2021,[235] Claimant had no investment in the United States, including any financial commitment, risk, or expectation of gain or profit in the U.S. SPV.[236]

140. Indeed, in its Counter-Memorial, Claimant states that "[t]he 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***."[237] As [redacted] Accordingly, when the repurchase occurred on January 8, 2021, the U.S. SPV bought APMC's Class A interests for USD

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concerned with an essentially factual question, namely whether the investor has in fact made a 'commitment of resources' in an economic venture in the host State").

[232] [redacted] *see* U.S. Memorial ¶ 109; [redacted]

[233] [redacted]

[234] [redacted]

[235] *See* U.S. Memorial ¶¶ 133-140.

[236] *See* [redacted] As noted in Respondent's briefs, the Investment Agreement contemplated that APMC would (1) fund a U.S. special purpose vehicle (SPV), (2) fund a Canadian SPV, and (3) provide a loan guarantee to TC Energy. Claimant has not asserted any direct investment in the United States aside from its interest in the U.S. SPV. *See also* Investment Agreement between TransCanada Pipelines Ltd. and APMC, [redacted] (C-110); U.S. Memorial on Preliminary Objections ¶ 106.

[237] Claimant's Counter-Memorial ¶ 134 (emphasis added).

[238] [redacted]

497.3 million, [redacted] The repurchase thus had the effect of realizing Claimant's expected benefit with respect to its U.S. Class A interests—Claimant received the full value as of January 8, 2021, for its financial contributions in the United States.[240]

141. Claimant argues in response that, even though [redacted] for purposes of a claim under NAFTA Chapter 11, the repurchase ***eliminated*** any U.S. investment. [redacted] Whether the repurchase is described as a restructuring, a buyout, or an exit from its U.S. shareholding, the fact remains that Claimant relinquished its shares

[239] [redacted]

[240] Claimant's Observations on the Request for Bifurcation ¶ 43 ("it is true that the Investment Agreement structure involved a buyback of APMC's US Class A interests on 8 January 2021"); Investment Agreement, [redacted]

[241] Claimant's Counter-Memorial ¶ 125 (emphasis added).

[242] [redacted]

in the U.S. SPV,[243] ending its status as a holder of equity with any financial value in the United States.[244]

142. [redacted]

143. Thereafter, [redacted] referring to the risk that TC Energy would default on its debt owed to the Royal Bank of Canada and that, under the Guarantee, Claimant would be required to pay the bank. [redacted] As discussed in Part C(2) below, the fact that

243 [redacted]

244 [redacted] this was true with respect to interests that Claimant held as a result of its loan guarantee, which is not a NAFTA Chapter 11 investment.

245 [redacted]

246 [redacted]

247 [redacted]

248 [redacted]

Claimant removed its financial commitment from the United States to Canada in order to avoid U.S. taxes only underscores that it did not maintain a U.S. investment. In any event, with respect to the [redacted] Claimant has expressly disclaimed that the Guarantee it provided to TC Energy constituted a covered investment[249] and has never claimed that a potential [redacted] to the Royal Bank of Canada could be an investment. Claimant's allegations regarding its contingent interest in Class C shares, which it could receive in return for the Cancellation Payments under the Guarantee, are discussed in more detail in Part C(4) below.

144. Faced with the conclusion that it withdrew its alleged U.S. investment before the permit revocation, Claimant repeats vague and unsupported assertions regarding its alleged investment—[redacted]—to create the aura of an investment in the United States at that time.[252] Claimant has not even attempted to show how these abstractions constituted an "investment" under NAFTA Article 1139, and indeed they do not appear to be a part of Claimant's formal argument. Claimant's reliance on these vague descriptions of its activities only serves to underscore that it cannot point to an actual "investment" in the United States to support its claim.[253]

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[249] Claimant's Rejoinder on the Request for Bifurcation ¶ 36.

[250] [redacted] *see also* Claimant's Counter-Memorial ¶ 124; U.S. Reply to Claimant's Observations on the Request for Bifurcation ¶ 34 (noting that Claimant relies on vague assertions of "interests" in a "network of circumstances" and "interconnections to U.S. enterprises and capital inputs"); Claimant's Observations on the Request for Bifurcation ¶¶ 43, 54.

[251] Claimant's Counter-Memorial ¶ 124.

[252] *See Carlos Sastre and others v. United Mexican States*, NAFTA/ICSID Case No. UNCT/20/2, Award on Jurisdiction ¶ 157 (Nov. 21, 2022) (RL-0163) ("generally the relevant dates for assessing issues of jurisdiction are: (i) the date when the alleged breach took place, and (ii) the date when the request for arbitration was lodged.").

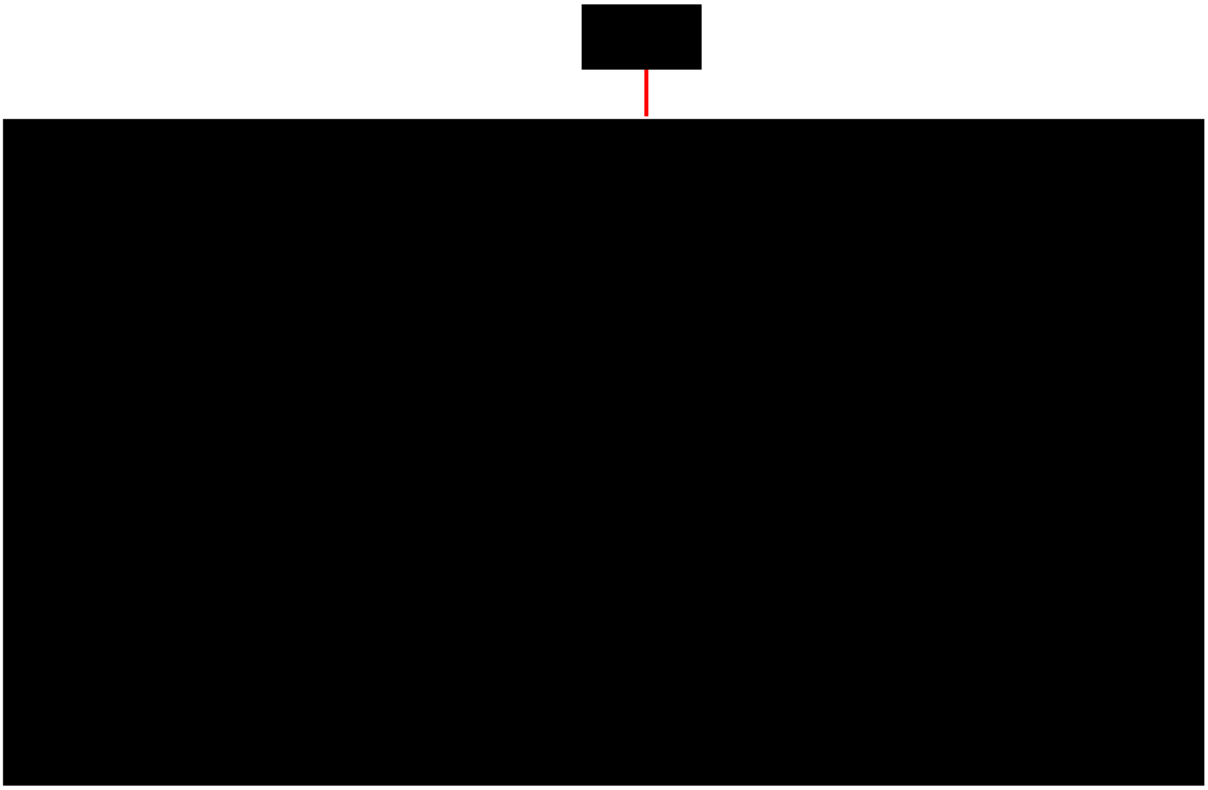
[253] [redacted]

C. Claimant's Specific Attempts to Fit Its Activities into NAFTA Article 1139 Fail

145. The remaining aspects of Claimant's alleged activities after the sale of the Class A shares in the U.S. SPV—including **(1)** its non-economic roles in various U.S. entities, **(2)** the calculation of Class A accretion as an aspect of the value of its investment in the Canadian SPV, **(3)** contingent Class B conversion rights, and **(4)** contingent Class C interests—either do not qualify as investments under USMCA Annex 14-C and NAFTA Article 1139, or were outside of the United States.

1) Claimant's Non-Economic Roles in Various U.S. Entities Did Not Constitute "Investments"

[redacted]



147. Claimant asserts that its ownership interests in the U.S. SPV, the Limited Partner [redacted] and the General Partner [redacted] constituted "enterprise" investments under Article 1139(a). Claimant argues, specifically, that **(a)** with respect to both the Limited Partner and the General Partner, it is sufficient that Claimant maintained technical ownership interests in them, even if it had not made any economic contribution; **(b)** its indirect, non-economic role in the "U.S. Carrier" and "U.S. Carrier GP" entities were "investments"; and **(c)** its unexplained *de minimis* [redacted] holding of Class A shares in the U.S. SPV constituted an "investment." Claimant's assertions only serve to highlight Claimant's lack of any financial commitment in the United States after the repurchase of the Class A shares in the U.S. SPV.

a. Claimant's Non-Economic Ownership Interests in the Limited Partner and General Partner Were Not "Investments"

148. While Claimant maintained technical ownership interests in the Limited Partner and General Partner, these were not "investments" under the NAFTA because Claimant lacked an economic interest in those entities. Claimant's sole financial contribution in the United States was for purchasing shares in the U.S. SPV, which had already been repurchased by the time of the alleged breach. It did not otherwise contribute capital, and would not recover any dividend or other remuneration, from the Limited Partner or General Partner. Claimant has thus not met its burden of showing that, at the relevant time, the Limited Partner and General Partner were characterized by a commitment of capital in the United States, an assumption of risk, or an expectation of gain or profit.[254]

[254] *See, e.g.*, U.S. Memorial ¶¶ 125-128.

b. Claimant's Non-Economic Roles in the U.S. Carrier and U.S. Carrier GP Were Not "Investments"

149. Claimant argues for the first time in its Counter-Memorial that two other U.S. companies in which Claimant had an indirect role, the "U.S. Carrier" and the "U.S. Carrier GP," are Article 1139(a) "enterprises" because they "set up managerial controls for the Project" and were part of Claimant's "enterprise network."[255] Claimant had no direct interest in either of these entities. The U.S. Carrier, which held the Presidential Permit, was owned by several general and limited partners including TC Energy subsidiaries, the U.S. SPV, and the U.S. SPV GP. U.S. Carrier GP, in turn, managed the U.S. Carrier.

150. Claimant concedes that the U.S. Carrier and the U.S. Carrier GP did "not provide direct economic benefits to Claimant,"[256] but argues that they nonetheless support a claim of "investment" in the United States. This argument fails for at least two reasons. *First*, Claimant had no financial commitment to the U.S. Carrier GP at any point. Claimant has not asserted that this entity had any function other than serving as a legal mechanism for managing the U.S. Carrier. *Second*, Claimant only played an indirect role in the U.S. Carrier, and in any event maintained no financial contribution in that entity at the time of the alleged breach.[257] Because the U.S. SPV was lacking any significant contributions from Claimant after the repurchase, the U.S. Carrier (which was partially funded by the U.S. SPV), therefore also lacked any funding by Claimant.

[255] Claimant's Counter-Memorial ¶¶ 131-132.
[256] Claimant's Counter-Memorial ¶ 131.
[257] *See, e.g.*, Investment Agreement, [redacted] (C-110); [redacted] Claimant's Memorial ¶ 81; [redacted]

151. Claimant therefore had no financial commitment in any U.S. entity at the time of the permit revocation. While Claimant maintained technical ownership interests or managerial roles in certain U.S. entities, the lack of any economic interest in those entities renders them outside the scope of an "investment" on the date of the permit revocation. After the sale of the Class A shares in the U.S. SPV, Claimant's non-economic role in the remaining U.S. entities no longer supported an investment in the United States, including because Claimant had no contribution or expectation of profit in those entities at the relevant time.

c. Claimant Has Nowhere Explained How a *De Minimis* Amount of Class A Shares in the U.S. SPV Constituted an "Investment"

152. It is uncontested that the Class A shares in the U.S. SPV, which were technically held by the Limited Partner, had virtually all been sold on January 8, 2021.[258] On the date of the Keystone XL permit revocation several weeks later, the Limited Partner was an empty vessel, containing neither money nor shares save for a *de minimis* amount.[259] In its Counter-Memorial, Claimant suggests for the first time that this remaining amount of [redacted] of Class A shares held by the Limited Partner constituted an "investment" under NAFTA Chapter 11, without further explanation as to the amount's purpose under the Investment Agreement, or any relation whatsoever to the Project.[260] In any event, such a *de minimis* amount does not create a protected investment under Chapter 11, because it does not reflect the generally understood hallmark characteristics of an investment, such as a financial commitment, the expectation of gain or profit,

[258] *See* U.S. Memorial ¶ 125; Claimant's Counter-Memorial ¶ 134.

[259] *See* [redacted]

[260] Claimant's Counter-Memorial ¶ 130 (stating that "APMC US Partner continued to own equity in the US SPV") [redacted]

and/or the assumption of risk. In the context of Claimant's initial [redacted] purchase of Class A shares in the U.S. SPV, which was fully refunded with interest on January 8, 2021, the remaining [redacted] in Class A shares held by the Limited Partner was a mere technicality, its relevance unexplained by Claimant.

2) Claimant Has Not Established That the Class A "Accretion Rights" Were an Investment "in the Territory" of the United States

153. In its Counter-Memorial, Claimant reasserts that its "US Class A Interest accretion rights (*i.e.* entitlement to payments)" constituted an investment under NAFTA Article 1139(h).[261] As explained in Respondent's Memorial, and as discussed again below, these "accretion rights" do not qualify as an investment under the NAFTA, because they are not located "in the territory" of the United States.[262] [redacted] Indeed, ensuring that the accretion on its Class A shares occurred solely in Canada was critical to Claimant. When negotiating the Investment Agreement and related agreements with TC Energy in March 2020, [redacted] In the final structure of the transactions, the accretion rights were fully shifted to the Canadian SPV. [redacted]

[261] Claimant's Counter-Memorial ¶ 118.
[262] U.S. Memorial ¶¶ 129-132.
[263] [redacted]
[264] [redacted]

[redacted]

154. Claimant does not contest that, following the repurchase, the accretion rights were located in Canada, but instead asserts that "[t]he interest described in category (h) is not conditioned on how the investor would recoup the benefits in the investment territorially."[266] NAFTA Article 1139(h) does, however, contain an explicit territoriality requirement: it provides that in order to qualify as an investment under the NAFTA, the relevant interest must "aris[e] from the commitment of capital or other resources in the territory of a Party"—here, the United States. Claimant cannot establish that, following the repurchase, the accretion rights arose from a commitment of capital in the United States, because Claimant had sold its equity in the United States.[267]

155. Once Claimant repatriated its funds to Canada, it continued to have Class A shares in the Canadian SPV, and its remuneration for those shares included a rate of interest that was equivalent to the rate of return that would have accrued on the Class A shares in the U.S. SPV, had APMC not already sold its interests back to TC Energy. The value of the Class A shares in the Canadian SPV plainly does not meet the territoriality requirement of Article 1139(h), as they do not arise from the commitment of capital in the United States, but rather in Canada. The fact that the value

[265] [redacted]

[266] Claimant's Counter-Memorial ¶ 138.

[267] *See Vito G. Gallo v. Government of Canada*, NAFTA/PCA Case No. 2008-03, Award ¶ 325 (Sept. 15, 2011) (RL-0164) ("[F]or Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained."); *id.* ¶ 328 (RL-0164) ("Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.").

of the Canadian Class A shares was based on the ***theoretical*** value of the U.S. Class A shares, had Claimant still held them, does not change this analysis. Under Claimant's theory, any financial instrument anywhere in the world that uses shares in a U.S. company as a reference asset could be considered an investment in the United States, even if the alleged "investor" had not spent a penny in the United States. This theory is not consistent with the text of NAFTA Article 1139(h).

156. Similar reasoning regarding territoriality applies with respect to Claimant's assertion that the accretion rights qualify as an investment under NAFTA Article 1139(e).[268] NAFTA Article 1139(e) defines an investment as "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise." Here, the accretion rights did not entitle APMC to "share in the income or profits" of the U.S. SPV. Instead, the value of the Class A shares in the U.S. SPV was used as a reference to calculate the value of the Class A shares in the Canadian SPV. The accretion was calculated at a flat rate of 6% per annum, and was not tied in any way to the income or profits of the U.S. SPV.[269]

157. Finally, it is notable that the accretion rights themselves are entirely regulated by Canadian law, further demonstrating that they do not meet Annex 14-C's territoriality requirement.[270] In considering whether an investment meets the territoriality requirement in the NAFTA, the *Bayview v. Mexico* tribunal stated that "it is evident that a salient characteristic will be that the investment is primarily regulated by the law of a State other than the State of the investor's nationality, and that this law is created and applied by that State which is not the State of the investor's

[268] Claimant's Counter-Memorial ¶ 143.
[269] [redacted]; Claimant's Memorial ¶ 79.
[270] *See* USMCA Annex 14-C ¶ 6(a) (defining "legacy investment" as "an investment of an investor of another Party ***in the territory of*** the Party . . . .") (emphasis added) (R-0002 *bis*).

nationality."[271] Zachary Douglas explains that this aspect of the territorial nexus requirement is consistent with the purpose of investment treaties, which is "to reduce the sovereign risk associated with a state's enforcement jurisdiction."[272] Douglas explains:

> Investments located in the territory of the host state are exposed to sovereign risk; investments located outside the territory are not. Investments located outside the territory of the host state may be exposed to commercial risk in the event, for instance, that the host state refuses to comply with an obligation to pay. But investment treaties, and international law more generally, are not concerned with commercial risk.[273]

158. Here, the accretion rights may have been subject to commercial risk, but they were not subject to sovereign risk associated with U.S. law or regulation. The accretion rights were not, for example, subject to the risk that U.S. regulation might render Claimant's Canadian contractual rights null or void—a sovereign risk that would exist only for investments located in the United States. The rights arising from Claimant's investment in the Canadian SPV were created by a Canadian contract—specifically, the Limited Partnership Agreement for the Canadian SPV.[274] This was a contract between Canadian companies (APMC and TransCanada Pipelines),[275]

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[271] *Bayview Irrigation District et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award ¶ 98 (June 19, 2007) (RL-0034). Claimant argues that the facts of *Bayview* are distinguishable from the facts of the case at hand, but does not disagree with the *Bayview* tribunal's interpretation of the territoriality requirement in the NAFTA. *See* Claimant's Counter-Memorial ¶ 135.

[272] Zachary Douglas, *Property, Investment and the Scope of Investment Protection Obligations*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 383 (Zachary Douglas *et al.* eds., 2014) (RL-0165).

[273] *Id.* at 386 (RL-0165); *see also Swissbourgh Diamond Mines (Pty) Limited and others v. Kingdom of Lesotho,* Judgment of the Singapore Court of Appeal ¶ 102 (Nov. 27, 2018) (RL-0166) ("[I]nvestors can only expect to enjoy guarantees of certain standards of treatment or protection in relation to investments that are made *within* that State because States generally have no extraterritorial enforcement jurisdiction and cannot purport to protect rights or property located *outside* their borders.") (emphasis in original).

[274] [redacted]

[275] *See generally* [redacted]

governed by Canadian law,[276] for a transaction undertaken in Canadian currency,[277] that established an entity registered and located in Canada.[278] The transaction was structured this way, *i.e.*, selling the shares in the U.S. SPV and concentrating Claimant's investment in the Canadian SPV, in order to ***avoid*** U.S. law—specifically U.S. tax regulations.[279] For this additional reason, it is clear that the accretion rights do not constitute an investment in the United States.

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

159. In its Counter-Memorial, Claimant again argues that its "right" to project-takeover through the potential issuance of Class B shares in the U.S. SPV is sufficient to support an investment under NAFTA Article 1139(e).[280] [redacted]

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276 [redacted]

277 [redacted]

278 [redacted]

279 [redacted]

280 Claimant's Counter-Memorial ¶ 143.

[redacted] It is undisputed that TC Energy never caused the U.S. SPV to issue, and Claimant never actually owned, any Class B shares. This unexercised contractual provision did not create an investment under NAFTA Article 1139(e).

160. Claimant entirely ignores the language of [redacted] of the Investment Agreement, [redacted] Even if Claimant wished to obtain Class B shares in the future, it is unclear whether it would have been permitted to do so.[283]

161. Claimant also ignores the fact that at the time of the challenged measure, [redacted]

[281] [redacted] However, at the time of the challenged measure, Claimant did not hold Class A shares or Class C shares to convert. U.S. Memorial ¶ 134; *see also infra* ¶ 162.

[282] U.S. Memorial ¶ 134; Investment Agreement, [redacted] (C-110).

[283] Claimant has presented no evidence that it ever seriously contemplated invoking [redacted] Indeed, Claimant produced no documents in response to the United States' Request No. 10, which sought documents addressing APMC's efforts to prepare for project takeover.

[284] [redacted]

[redacted] Each of these scenarios fails to support a claim that the potential for Claimant to receive Class B shares represented an "investment."

162. **No conversion of Class A or Class C Shares.** Contrary to the assertions of Claimant's expert, Claimant could ***not*** convert Class A or Class C shares to Class B shares. As noted previously, Claimant had sold all of its Class A shares, [redacted] prior to the date of the challenged measure. Claimant thus did not have Class A shares, and was not contemplated to receive Class A shares, [redacted] of Class B shares. With respect to Class C shares, [redacted] Thus, Claimant did not even have the ***possibility*** of converting Class C shares that might be issued in the future (and which it did not possess on the relevant date in any event) into Class B shares.

163. **No receipt of Class B interests** [redacted]

285 [redacted]
286 [redacted]
287 [redacted]
288 [redacted]

[redacted]

164. **Claimant never made additional capital contributions.** This leaves only one possibility for Claimant to have received Class B interests in the future if approved to do so: that Claimant would make an additional financial contribution to the SPVs.[290] But Claimant never did so. The option to one day make an investment is plainly not the same as actually making or having made an investment.[291]

165. The contingency of Claimant's interests in the Class B shares in the U.S. SPV renders them outside the scope of Article 1139. Article 1139(e) defines an investment as "an interest in an enterprise that ***entitles*** the owner to share in income or profits of the enterprise."[292] It does not include contingent interests that may, in the future and under the right conditions, transform into an entitlement to income or profits.[293] Claimant's potential Class B "conversion rights" did not

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[289] [redacted]

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

[291] *See Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award §§ 26(c), 48 (Mar. 26, 2008) (RL-0167) (finding that the claimant had not made an investment when it merely entered into a contract with a broker to acquire shares in a company, and stating that "[t]he fact that AMTO engaged the services of a broker for purposes of acquiring shares in [the company] is not by itself an investment in [the company], *i.e.*, the acquisition of shares therein.").

[292] NAFTA, art. 1139(e) (R-0004 *bis*) (emphasis added). The starting point for the analysis of Article 1139(e) is the text. VCLT, art. 31(1) (RL-0017) ("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."); *see also TC Energy* Award ¶ 143 (RL-0060) ("The starting point of the analysis should therefore, in accordance with [VCLT] Article 31(1), be to determine the ordinary meaning of the terms in their context.").

[293] *Cf. Apotex Inc. v. United States of America,* NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction ¶ 209 (June 14, 2013) (RL-0037) (finding that the investor's "tentatively approved" new drug applications "could not (yet) be characterised as 'property' for the purposes of NAFTA Article 1139(g)" and that its alleged right to sell drugs in the United States "was neither acquired nor enjoyed by virtue of tentatively approved [applications]."); *see also id.* ¶ 215 ("[T]he critical enquiry must be as to the nature of the alleged 'property' as at the date of the alleged breach –

entitle Claimant to share in the income or profits of the U.S. SPV; only actually holding Class B shares would have entitled Claimant to such income/profits.

4) The Potential to Acquire Class C Shares Did Not Constitute an Investment

166. The potential for Claimant to acquire Class C shares in the U.S. SPV in the future likewise does not support an argument that Claimant had an investment in the United States at the time of the permit revocation. This is because (1), like the Class B shares, the potential to obtain Class C shares was entirely contingent, and (2), such shares—available to Claimant only as a result of its Guarantee—is excluded from the definition of "investment" in NAFTA Article 1139(f).

167. ***First***, as with the Class B conversion rights, the Class C rights were merely contingent and non-realized at the relevant time of the alleged breach. Claimant was entitled to Class C shares in the U.S. SPV only upon TC Energy's default on its debt, thereby triggering the Guarantee provided by Claimant. These events did not occur until June 2021.[294] Claimant nonetheless argues that its [redacted] It is plain on the face

not at some future point."). While Claimant avers that the citation to *Apotex* is inapt because Apotex's claim arose under Article 1139(g) (Claimant's Counter-Memorial ¶ 144), the *Apotex* tribunal did not limit its analysis to that sub-article, but rather found that the claimant's contingent interests never "constituted 'investments' as contemplated more generally by NAFTA Chapter Eleven." *Apotex, Inc. v. United States of America,* NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction ¶ 224 (June 14, 2013) (RL-0037); *see also id.* ¶¶ 179-195 (rejecting the claimant's allegation that the activity of preparing each new drug application for filing in the United States constituted an investment under NAFTA Article 1139); *see also Lion Mexico Consolidated LP v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction ¶¶ 229-237 (July 30, 2018) (RL-0101) (finding that rights that (i) constituted intangible real estate under Mexican law and (ii) were acquired for economic benefit and with a business purpose met the definition of investment under Article 1139(g)).

[294] [redacted]

[295] Claimant's Counter-Memorial ¶¶ 143, 146.

of the treaty that Claimant is wrong as a textual matter, as Article 1139(f) is cast in the present tense ("entitles").

168. As Claimant did not hold the Class C shares at the time of the alleged breach, it was not "entitled" at that time to any share of the assets of the U.S. SPV. Moreover, to the extent that Claimant relies on the possibility that its Class A shares in the Canadian SPV could be converted to Class C shares in the U.S. SPV, those shares did not, at the time of the alleged breach, entitle Claimant to any assets upon dissolution.

169. In any event, as explained in the U.S. Memorial, Claimant was only eligible for Class C share issuance upon debt repayment, which had not occurred as of the date of the permit revocation. This fact is clear from the record,[296] and is recognized by [redacted]

170. ***Second***, the contingent potential for Class C shares as a result of payments under the Guarantee also fails to qualify as an interest under Article 1139(f) because of the exclusion contained in that paragraph. Article 1139(f) includes as an "investment" "an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, ***other than***

[296] *See* Investment Agreement, [redacted]

[297] [redacted]

a debt security or a loan excluded from subparagraph (c) or (d)."[298] Claimant has already conceded that the Guarantee does not constitute an investment under NAFTA Article 1139.[299]

[redacted] Claimant's argument that the Class C shares constitute an investment under NAFTA Article 1139(f) is thus nothing more than an attempt to assert that the Guarantee—which Claimant concedes is not an investment—somehow became an investment upon its activation. Both things cannot be true: if the Guarantee is not an investment, then the Class C shares that would have been provided to Claimant as a result of payment under the Guarantee cannot be an investment either.

D. Conclusion on the *Ratione Materiae* Jurisdictional Objection

171. Claimant has failed to establish jurisdiction because it cannot show that it had an "investment" in the United States within the meaning of Chapter 11 of NAFTA on the date of the permit revocation.[301] The agreed factual scenario shows why there cannot be an investment under Chapter 11 in this case: by the time of the alleged breach, Claimant's activities lacked any of the characteristics of an investment in the United States within that term's ordinary meaning. The

[298] NAFTA, art. 1139(f) (R-0004 *bis*) (emphasis added). To recall, Article 1139(c) provides that investment means "a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise." *Id.* Article 1139(d) provides that investment means "a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity date of the loan is at least three years, but does not include a loan, regardless of maturity, to a state enterprise." *Id.*

[299] Claimant's Rejoinder on Bifurcation ¶ 36.

[300] [redacted]

[301] The United States' bifurcated jurisdictional objections are without prejudice to other jurisdictional objections or defenses that the United States may raise in other phases of this arbitration. *See, e.g.*, U.S. Memorial ¶ 142 n.212.

documentary record and Claimant's written pleadings make clear that, at the relevant time, Claimant only had an investment in Canada, if at all.

IV. Conclusion

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

Respectfully submitted,

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