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

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

CLAIMANT'S REJOINDER ON PRELIMINARY OBJECTIONS

7 July 2025

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TABLE OF KEY DEFINED TERMS

APMC	Alberta Petroleum Marketing Commission
APMC US Partner	The United States based 2254746 Alberta Sub Ltd., the wholly-owned enterprise of APMC and also a limited partner of the US SPV
Class A Accretion	Class A Interests that the APMC Canadian Partner and the APMC US Partner were to receive for their capital contributions in the SPVs, which were to accrue with quarterly compounding until the date the Project was completed and in service
CUSMA (or USMCA)	Canada–United States–Mexico Agreement
Investment Agreement	Investment Agreement between TransCanada Pipelines Ltd. and the Alberta Petroleum Marketing Commission, dated 31 March 2020 (C-110)
Keystone XL (or Project)	Proposed expansion to the Keystone Pipeline System. Original proposal was to add a second pipeline from Alberta to an existing hub on the Keystone Pipeline System in Steele City, Nebraska, as well as connecting the southern portion of the Keystone Pipeline System to refineries on the U.S. Gulf Coast. Proposal was later amended to exclude the Gulf Coast portion
NAFTA	North American Free Trade Agreement
Presidential Permit	Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, granted by the United States on 29 March 2019 (C-68)
Project (or Keystone XL)	Proposed expansion to the Keystone Pipeline System. Original proposal was to add a second pipeline from Alberta to an existing hub on the Keystone Pipeline System in Steele City, Nebraska, as well as connecting the southern portion of the Keystone Pipeline System to refineries on the U.S. Gulf Coast. Proposal was later amended to exclude the Gulf Coast portion
Protocol (or CUSMA Protocol)	Protocol of Amendment to the CUSMA, dated 10 December 2019 (CLA-39)

Repurchase	8 January 2021 Repurchase of most of the APMC US Partner's Class A shares in the US SPV
Revocation	Executive Order 13990 "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," dated 20 January 2021, which, *inter alia,* revoked the March 2019 Presidential Permit for the Keystone XL Project (C-3)
SPVs	Special purpose vehicles
TC Energy	TC Energy Corporation and its subsidiaries (prior to May 2019 was known as TransCanada Corporation)
TCPL	TransCanada Pipelines Limited, parent organization of US Carrier
US Carrier GP	TC Keystone Pipeline G.P. LLC, a Delaware company and General Partner of US Carrier
US SPV	181531115 Limited Partnership, responsible for administering all of the costs, revenues and management related to the Keystone XL Project
US SPV GP	181531115 LLC, one of two members of the US Carrier GP
USTR	United States Trade Representative

DRAMATIS PERSONAE

Prof. Ascencio, Hervé	Professor of Law at the University Paris 1 Panthéon-Sorbonne; Author of Expert Report dated 11 October 2024 and Second Expert Report dated 20 May 2025
Begley, Adrian	Chief Executive Officer of the Alberta Petroleum Marketing Commission (2017- Present); Author of Witness Statement dated 16 April 2024
Berdichevsky, Maxim	Former Deputy Director of the Investment Trade Policy Division at Global Affairs Canada and leading negotiator for Canada regarding Chapter 14 of the CUSMA
Biden, Joseph R.	46th President of the United States (2021–2025)
Prof. Coleman, James Wilton Schwarz	Professor of Law at the Southern Methodist University, Dedman School of Law; Author of Expert Report dated 16 April 2024
Prof. Gardiner, Richard	Professor of Law at University College London, Faculty of Laws; Author of Expert Report dated 11 October 2024 and Supplementary Report dated 20 May 2025
Prof. Klausner, Michael	Professor of Business and Professor of Law at Stanford Law School; Author of Expert Report dated 15 October 2024 and Reply Expert Report dated 20 May 2025
Lopez Sanchez, Aristeo	Former Legal Counsel for International Trade and Investment for the Government of Mexico and lead negotiating official for the United Mexican States regarding Chapter 14 of CUSMA
Maguire, Patrick T.	Partner of Bennett Jones LLP; Author of Expert Report dated 13 April 2024; Supplemental Expert Report dated 16 December 2024; Second Supplemental Expert Report dated 5 July 2025.
Mandell, Lauren	Former Deputy Assistant U.S. Trade Representative for Investment and leading negotiator for the United States regarding Chapter 14 of the CUSMA
Prof. Prakash, Saikrishna B.	James Monroe Distinguished Professor and the Albert Clark Tate, Jr., Professor at the University of Virginia School of Law; Senior Fellow at the Miller Center for Public Policy, University of Virginia; Author of Expert Report dated 16 April 2024

Rosen, Howard N.	Managing Director of Secretariat; Chartered Accountant, Chartered Professional Accountant, and Chartered Business Valuator; Author of Expert Report dated 16 April 2024
Prof. Schreuer, Christoph	Independent Arbitrator and Expert; Author of Legal Opinion dated 16 December 2024 and Supplemental Legal Opinion dated 3 July 2024
Smith Ramos, Kenneth	Senior negotiator on behalf of the United Mexican States for CUSMA. Author of witness statement in *Cyrus Capital Partners, L.P. Contrarian Capital Management, LLC v. United Mexican States,* ICSID Case No. ARB/23/33
Prof. Sourgens, Frédéric G.	James McCulloch Chair in Energy Law at Tulane Law School and Director of Tulane Center for Energy Law; Author of Expert Report dated 9 April 2024
Trump, Donald J.	45th President of the United States (2018–2021), 47th President of the United States (2025–present)

I. INTRODUCTION

1. Claimant submits its Rejoinder in response to the United States of America's Reply on its Preliminary Objections dated 22 May 2025 ("**Respondent's Reply**" or "**Reply**") pursuant to the Tribunal's directions in Procedural Orders Nos. 1 and 4 and Annex B, as further amended.[1] As a responsive document to the Reply, this Rejoinder does not replicate all of Claimant's arguments or evidence from its prior submissions. This should not be understood as Claimant abandoning any of its claims and Claimant trusts the Tribunal will consider the wider scope of its case. That said, this Rejoinder remains a more extensive document than Claimant's Counter-Memorial owing to the breadth of issues arising from the documents produced under Procedural Orders Nos. 5 and 6, and Respondent's approach to these documents in the Reply.

2. As Claimant detailed in its Memorial dated 16 April 2024, this case stems from President Biden's 20 January 2021 Revocation of the Presidential Permit for the Keystone XL Project.[2] It is notable that Respondent's Reply makes no mention that President Trump, who came into office subsequent to Claimant's Memorial, vocally disagreed and objected to the Revocation and has since indicated his support to rebuild the Project, stating that *"The Trump Administration is very different (from the Biden administration)* [. . . .] *We want the Keystone XL Pipeline built*."[3] And indeed, one of President Trump's first acts was to issue Executive Order 14154, repealing, *inter alia*, President Biden's Revocation of the Project.[4]

3. Despite the current administration's full support of the idea of the Project, Claimant lost over US$ 1 billion of public money because of Respondent's conduct as a result of winding down the Project, whether anyone rebuilds it or not. Construction involving the placing of pipe and pump stations across the United States, as well as substantial building works and the

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[1] Claimant incorporates by reference the definitions of Claimant's Memorial dated 16 April 2024 ("**Claimant's Memorial**") and Claimant's Counter-Memorial dated 16 December 2024 ("**Claimant's Counter-Memorial**").

[2] Claimant's Memorial, sec. II.E.

[3] As repeated in numerous speeches during the 2024 election, for example: Eric Revell, *Trump slams Biden for conceling Keystone XL pipeline in freewheeling Musk interview*, FOX BUSINESS (12 August 2024) (C-306); Kanishka Singh, *Trump says he wants Keystone KXL oil Pipeline to be built*, REUTERS (25 February 2025) (C-307).

[4] Exec. Order No. 14154 (20 January 2025), 90 Fed. Reg. 8353 (29 January 2025) (C-308).

labour of U.S. citizens,[5] were all for nought and anything done now would be starting from scratch. Sadly, Respondent continues to defend itself through specious jurisdictional objections. These jurisdictional objections should be rejected by this Tribunal.

4. Specifically, as discussed below in **Section III**, Respondent has continued to present as part of its jurisdiction *ratione materiae* objection the false position that the January 2021 repurchase of most of APMC US Partner's Class A shares in the US SPV ("**Repurchase**") "*ended any financial commitment, expectation of gain or profit, or risk by Claimant in the United States*"[6] by the time of the Revocation. It pays no heed to the facts of:

a. Claimant's contribution in 2020 of US$ 500 million of capital towards the construction of pipeline and pump stations within the territory of the United States;

b. The obvious continuing risk to that capital contribution since Claimant had to pay out the amount it had received back over again as part of an overall US$ 1 billion guarantee payment after the Revocation, thus ensuring Claimant's prior US$ 500 million contribution to the economy of the United States could not be fully recovered;

c. Claimant's expected benefit from the Keystone XL Project being tied fundamentally to the Project becoming operational so that an American enterprise it indirectly owned, US Carrier, could exploit the Presidential Permit, and that the amount of that benefit was and remained a function of Claimant's US$ 500 million capital contribution to economic activity on U.S. territory; or

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[5] Witness Statement of Adrian Begley, dated 16 April 2024 ("**Begley Witness Statement**"), paras. 37, 42-45; TC Energy, Press Release, U.S./Canada border crossing completed, dated 25 May 2020, https://www.keystonexl.com/project-updates/updates-feed/2020/u.s.-canada-border-crossing-completed/ (C-112); [redacted]

[6] Respondent's Reply on its Preliminary Objection, dated 22 May 2025 ("**Respondent's Reply**"), para. 132.

d. That Claimant obviously still had a stake in the American entities involved in the Project at the point of Revocation because Claimant was at least able to recover tens of millions of dollars through the US SVP from the decommissioning of Project assets in 2021 and thereafter, even though it still suffered over US$ 1 billion of total losses as a result of Respondent's conduct.

5. The Tribunal will recall Claimant's resistance to unnecessarily burdensome document searches and production under Respondent's document requests relating to jurisdiction *ratione materiae* issues.[7] Claimant's considerable efforts have led to Respondent: using a handful of documents to make points openly discussed by Claimant and Mr. Maguire earlier, and otherwise misrepresenting implications of the Repurchase (including ignoring clearly pertinent evidence otherwise produced);[8] and, making little or no use of documents produced on other subjects of its requests.[9] Claimant was right from the outset that Respondent's production requests were tactical and wasteful.

6. As to the *ratione temporis* objection discussed below in **Section II**, at this stage it is striking that Respondent continues to stubbornly insist upon two inaccurate states of affairs:

a. That the positions espoused in Respondent's Memorial were the first presentation of a variety of fundamental points of agreement that were, in fact, first set out by Claimant's Memorial six months earlier;[10] and

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[7] Procedural Order No. 5, dated 1 April 2025, Annex B – Respondent's Requests, Claimant's general comments ("[F]*or each of the requested categories Respondent fails to state reasons that the requested category is material to resolving Respondent's objection pursuant to Article 3(b) of the IBA Rules* [. . .] *This is not merely a trivial failure; the requirements are intended to encourage a party to properly consider whether their requests are meaningful, and not speculative "fishing expeditions." Several of the categories of Respondent's requests are inherently broad, speculative, and disproportionate to the issues actually in dispute regarding Respondent's jurisdictional objections.*"). *See further* Claimant's V/B and R/M objections particularly with respect to Respondent's requests 5, 6, 8, 9 and 10.

[8] *See infra* sec. III.B.ii and III.B.iii.

[9] *See infra* n.313 (regarding irrelevant use of a U.S. enterprise financial record), n.314 (no use of documents arising from Respondent's requests 2 and 4). Meanwhile, Respondent draws on one document to make an inapposite point about Claimant's Article 1139 category (f) interests: *see infra* n.355.

[10] *See infra, e.g.*, paras. 12, 19.

b. That the context of CUSMA as a replacing treaty matters more than the inherent role of Annex 14-C to do something – whatever that might be – to maintain the vitality of the treaty being replaced: effectively, that context matters except when it does not.

7. Moreover, Respondent's approach to its *ratione temporis* objection in the Reply has fleshed out issues which Respondent could and should have brought to bear months ago by reference to the *travaux préparatoires* that it knew from the outset of these proceedings would inevitably be addressed. The Tribunal will recall that Respondent ultimately volunteered *travaux préparatoires* regarding the Protocol and Chapter 14 of CUSMA on 3 March 2025. That voluntary act does not deserve commendation. This disclosure should have occurred as far back as the time of the first procedural conference in November 2023 if Respondent wished to engage in these proceedings in good faith and with a view to efficiency. Meanwhile, the Reply's presentation of Respondent's own positions in the negotiations,[11] the competence of its own negotiators,[12] and the understanding of the Parties to CUSMA generally,[13] are all inaccurate. Claimant commends this history, and the – finally – revealed record, to the Tribunal when considering the matter of costs.

8. Respondent has also, having previously pronounced the *TC Energy* Award as "*well-reasoned*,"[14] almost entirely abandoned support for its argument from that award. While Respondent's Memorial relied upon multiple primary assertions and quotations from it, the award has now been relegated to a handful of footnote citations.[15] Respondent has even asserted that arguments which relied upon explicit determinations of the *TC Energy* majority are not actually the primary arguments, if at all, that Respondent was making in its Memorial.[16] There can be no suggestion this is a matter of economy. The Reply is:

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11 *See infra, e.g.*, sec. II.A.ii.

12 *See infra* sec. II.F.

13 *See infra, e.g.*, sec. II.B.iii, II.E.

14 Respondent's Memorial on Preliminary Objections, dated 15 October 2024, ("**Respondent's Memorial**"), para. 4.

15 Respondent's Reply, n.22, 97, 98, 205.

16 *See infra, e.g.*, sec. II.B.vi.

- extraordinarily repetitive of prior submissions, including repeated mischaracterizations of Claimant's positions that Claimant refuted a year ago;[17]

- longer than Respondent's Memorial despite its cursory discussion of CUSMA *travaux préparatoires* as the only truly "new" subject; and,

- heavily reliant upon other prior authorities.[18]

9. Respondent's resistance to further disclosure is regrettable, given the outcome of Procedural Order No. 6. Nevertheless, the revealed record[19] both: provides further context to Mr. Mandell's obvious value in explaining (for the benefit of this Tribunal and clearly also in the negotiations between the CUSMA Parties) the motives and function of the text of Annex 14-C;[20] and, undermines Respondent's VCLT Article 31(3) arguments.[21] Despite large portions of the *TC Energy* Award and Dissent remaining redacted following Procedural Order No. 6, the newly unredacted portions show a continuation of the majority's goal-directed misdescription of evidence.[22] Worst of all, issues revealed include a record, relied upon by the *TC Energy* tribunal, for the better understanding of the other CUSMA Parties. Respondent obviously knew this, and yet still resisted production of documents, without even suggesting a compromise of redaction.

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17 *See infra, e.g.,* para. 25, n.63, sec. II.B.i, III.B.iii.

18 For example, Respondent still devotes a paragraph of primary analysis to *Feldman*, and otherwise to rely upon it. *See* Respondent's Reply, para. 42, n.30. Respondent continues to misapply it, although no longer relying on the *TC Energy* majority in support of its approach: *see infra* para. 25. Respondent's submissions on jurisdiction *ratione materiae* are replete with retread authority analysis: *see infra, e.g.,* n.293.

19 *TC Energy* record exhibits are tabulated against their exhibit designation on the record of this proceeding in **Appendix 2**. *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Award dated 12 July 2024 ("***TC Energy* Award**") (RL-170) and *T.C. Energy Corp. and TransCanada Pipelines, Ltd. v. United States*, ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez, K.C., dated 12 July 2024 ("**Alvarez Dissent**" or "**Dissent**") (RL-171) are now a matter of record in their further unredacted form as produced under Procedural Order No. 6 by Respondent on 25 June 2025. The original public versions of the *TC Energy* Award and Dissent are found at RL-60 and CLA-64, submitted into the record with Respondent's Memorial and Claimant's Counter-Memorial on Preliminary Issues, dated 16 December 2024 ("**Claimant's Counter-Memorial**") respectively. Claimant reserves its position on whether all appropriate redaction removal has taken place with respect to the *TC Energy* Award and Dissent compared with the available exhibit record. Where relevant to discussion of evidence by the *TC Energy* Award or the Alvarez Dissent below, exhibit references will be provided with a *TC Energy* exhibit number also: *e.g.,* (C-309) [TC R-119].

20 *See infra* sec. II.A.ii, II.B.ii, II.B.iii, II.E, II.F.

21 *See infra* sec. II.C.

22 *See infra* paras. 47, S6.

Respondent's resistance was on the basis that the documents' value could only be found in showing internal U.S. deliberations when that was not how they had been used in the debate between the *TC Energy* Award majority and the Dissent.

10. Above all, Annex 14-C is a transitionary instrument designed to provide continuing protection for investors holding legacy investments. It offers for investors to make future claims for "*breach of an obligation under: Section A of Chapter 11 (Investment) of NAFTA 1994,*" not an historical breach of NAFTA itself. The CUSMA Parties knew they were doing this, and they knew exactly how to draft treaty terms that would *not* provide such continuing future protection.

11. This Rejoinder is accompanied by the second legal opinion of Prof. Christoph Schreuer on the meaning of Annex 14-C,[23] and the second supplemental opinion of Mr. Patrick Maguire K.C. on the structure of Claimant's investment in the Keystone XL Project.[24]

II. THE TRIBUNAL'S JURISDICTION *RATIONE TEMPORIS*

12. As Claimant, not Respondent, first set out, the interpretive issue under VCLT Article 31 has at its core a "*good faith interpretation of the plain meaning of the relevant CUSMA text . . .*"[25] That is also a matter of interpreting the text in context, a point which Respondent has repeatedly ignored throughout its submissions. Context includes, for the purposes of VCLT Article 31(2), "*any structure or scheme underlying a provision or the treaty as a whole.*"[26] The scheme Annex 14-C inherently addresses is a deviation from the broader goal of CUSMA to replace NAFTA. Respondent's relentless emphasis on replacement of NAFTA undermines the very point of agreeing to any aspect that deviates from it, such as Annex 14-C, and serves to undermine the good faith interpretive exercise.[27]

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23 Second Legal Opinion of Christoph Schreuer, dated 3 July 2025 ("**Second Schreuer Expert Report**").

24 Second Supplemental Expert Report of Patrick Maguire, K.C., dated 5 July 2025 ("**Second Supplemental Maguire Expert Report**").

25 Claimant's Memorial, para. 224, and generally paras. 224-25. *C.f.* Respondent's Reply, para. 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.*").

26 RICHARD GARDINER, TREATY INTERPRETATION ch. 5 (2d ed. 2015) at 4.2.3 (RL-58 *bis*).

27 It is ironic therefore that Respondent appeals itself to the limiting principle of good faith: Respondent's Reply, n.119.

13. Respondent also complains that Claimant has offered multiple "*jumbled*" theories.[28] It does this to disguise that it had made a *ratione voluntatis* argument which it has now abandoned regarding an unequivocal showing of consent.[29] The *ratione voluntatis* question was answered simply enough insofar as Claimant must allege breach of an obligation set out in NAFTA Chapter 11, Section A, which it has done.[30]

14. And to reiterate, there are no special rules of interpretation and "*jurisdictional provisions in investment treaties are to be interpreted neither liberally (i.e. pro-investor) nor restrictively (i.e. pro-State).*"[31] Claimant does not have a different set of arguments for jurisdiction *ratione temporis*. Rather, jurisdiction *ratione temparis* is satisfied because the plain text construction of Annex 14-C paragraph 1, in context, is that the instruction to "*alleg*[e] *breach of an obligation under*" is an incorporating reference to the standards contained in NAFTA Chapter 11, Section A without temporal restriction on the conduct at issue. It is not an instruction to allege a breach of NAFTA while it was itself in force, and the temporal restrictions of Annex 14-C are found elsewhere.

15. Although examination of evidence under VCLT Article 32 is a supplementary exercise to VCLT Article 31 analysis of text, various issues of the record regarding CUSMA negotiations are more easily raised below in relation to the specific text and context before moving on to the next subject. Such examination repeatedly demonstrates that the development of Annex 14-C, and other text in CUSMA upon which Respondent has relied, together with the views of the officials involved in the negotiations on those issues, support Claimant's ordinary meaning analysis under VCLT Article 31. It certainly does not support Respondent's analysis, nor

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28 Respondent's Reply, para. 13.

29 Respondent's Memorial, para. 9.

30 Claimant's Counter-Memorial, paras. 25-27; *see also* Expert Report of Christoph Schreuer, dated 16 December 2024 ("**First Schreuer Expert Report**"), paras. 27-32; Alvarez Dissent, paras. 3-7 (RL-171).

31 *Republic of Korea v Elliott Associates LP* [2024] EWHC 2037 (Comm), Foxton J at [22]-[23] (discussing *Swissbourgh v Lesotho* [2018] SGCA 81 at [61]-[63] (RL-166); *Methanex Corporation v United States of America*, UNCITRAL (NAFTA), Partial Award (Preliminary Award on Jurisdiction and Admissibility) dated 7 August 2002, para. 105; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award of 11 October 2002, para. 43; *c.f. ICS Inspection and Control Services Limited v Argentina*, PCA Case No 2010-9, Award on Jurisdiction dated 10 February 2012, paras. 280-81) (CLA-96); *see also* First Schreuer Expert Report, paras. 13-26; Second Schreuer Expert Report, paras. 37-41; *c.f.* Supplementary Report of Prof. Richard Gardiner, dated 20 May 2025 ("**Supplementary Gardiner Report**"), paras. 4-5.

has Respondent been able to point to anything that directly confirms its view of a common understanding by the Parties during the negotiation of CUSMA Chapter 14. And under any view of VCLT Article 32, Claimant's positive confirmation of its plain meaning interpretation established under VCLT Article 31 through examination of the *travaux préparatoires* of a treaty is acceptable.[32]

16. In the remainder of Section II, Claimant sets out:

a. In **Section II.A**, a plain meaning interpretation of Annex 14-C, paragraphs 1 and 3 establishes a fresh consent to continuation of aspects of NAFTA Chapter 11 chosen by the CUSMA Parties, which is also supported by the applicable law analysis (**II.A.i**) and an examination of the origins and drafting history of Annex 14-C (**II.A.ii**);

b. In **Section II.B**, Claimant demonstrates through an analysis of the context, object and purpose of Annex 14-C that it inherently derogates from the general purpose of CUSMA to replace NAFTA. Specifically, the continuing protection applying NAFTA Section A obligations is supported by the Preamble and Protocol (**II.B.i**), and the surrounding context of Annex 14-C in respect of: the definition of "*legacy investment*" (**II.B.ii**), and footnotes 20 and 21 of Annex 14-C (**II.B.iii**). Meanwhile, Respondent's reliance on Article 14.2(3) (**II.B.iv**), Annex 14-C's placement and Article 14.2(4) (**II.B.v**), and Article 34.1 (**II.B.vi**) is shown all the more by the drafting history and context to provide no support for its interpretation;

c. In **Section II.C**, Claimant shows that Respondent's attempt under VCLT Article 31(3) to modify Annex 14-C, rather than interpret it, should be rejected;

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[32] Respondent's Memorial, para. 76; Respondent's Reply, para. 96; Expert Report of Prof. Richard Gardiner, dated 11 October 2024 ("**First Gardiner Report**"), para. E.1; Supplementary Gardiner Report, para. 45.

d. In **Section II.D**, a review of the CUSMA Parties' contemporaneous comparative treaty practice reveals that the CUSMA Parties were fully capable and aware of the type of VCLT Article 28 exclusion that was required to support Respondent's interpretation of Annex 14-C;

e. In **Section II.E**, Respondent's discussion of further negotiation points concerning paragraphs 3, 5 and 6 of Annex 14-C provide no further support for its jurisdiction *ratione temporis* objection; and,

f. In **Section II.F**, Respondent's denunciations of its own chief negotiator of CUSMA Chapter 14, and the original author of Annex 14-C, are shown to lack credibility and do not undermine the significant weight that should be accorded his evidence in favour of Claimant's jurisdiction *rotione temporis* interpretation of Annex 14-C.

A. The Text of Annex 14-C Sustains Obligations of NAFTA Chapter 11

17. To repeat, Annex 14-C paragraphs 1 and 3 set out:

> *1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:*
>
> > *(a) Section A of Chapter 11 (Investment) of NAFTA 1994;*
> >
> > *(b) Article 1503(2) (State Enterprises) of NAFTA 1994; and*
> >
> > *(c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.*
>
> [. . .]

> *3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.*[33]

18. Respondent asserts without citation that the CUSMA Parties "*understood*" (at some unspecified time[34]) that "*breach*" of an "*obligation*" were terms "*to limit jurisdiction* ratione temporis."[35] First, there is plenty of evidence to show otherwise depending on the context.[36] It is of course trite law that an obligation can only be breached when it is in force.[37] The issue at hand is the interpretation of the phrase "*alleging breach of an obligation*," in context.

19. Respondent suggests Annex 14-C paragraph 1 read with paragraph 3 cannot be understood as a "*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.*"[38] Respondent also complains there is not "*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.*"[39] The latter is a circular point: there would be nothing incongruous, if that is the decision they had made. The function of Annex 14-C is a continuation of aspects of NAFTA chosen by the CUSMA Parties. It is incorrect to describe it as an expansion of the CUSMA Parties' consent to anything. It is their creation of consent, not an expansion of some consent elsewhere in CUSMA. As Respondent has said itself, it was their choice to do so.[40] In a scenario where Annex 14-C did not exist, then investor rights to arbitration regarding NAFTA Chapter 11 obligations would simply have ended by operation of the CUSMA Protocol and VCLT Article 70.[41] Claimant has always acknowledged the baseline application of VCLT Article 70,[42] another point

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33 Canada-United States-Mexico Agreement, 1 July 2020, Annex 14-C (CLA-40).

34 The best Claimant can infer is that Respondent is referring to its arguments regarding what the NAFTA Parties "*understood*" regarding Articles 1116/1117 of NAFTA through their litigation positions in NAFTA arbitrations (Respondent's Reply, paras. 21-22), which is a different matter. *See infra* paras. 24-25.

35 Respondent's Reply, para. 17.

36 *See infra* sec. II.D.

37 ILC Articles, art. 13 (CLA-49).

38 Respondent's Reply, para. 25 (emphasis in original).

39 *Id.*, para. 27.

40 Respondent's Memorial, para. 29 (" . . . *the USMCA Porties were free to limit their consent however they chose*."); Respondent's Reply, paras. 20, 27.

41 *E.g.*, Respondent's Reply, para. 27.

42 Claimant's Memorial, para. 222.

that the Reply claims Respondent raised in retort to Claimant's position.[43] There is nothing inherently implausible in interpreting the words of Annex 14-C to understand the goal of the CUSMA Parties in their new treaty to have extended the operation of all aspects of Chapter 11 of the prior treaty they were replacing.

20. More particularly, Respondent is keen to point out, inappropriately, the use of the present tense in NAFTA Article 1139's sub-definition (f) of "*investment*."[44] Here also, the context is that "[e]*ach* [CUSMA] *Party consents*" in the present tense now, for the future continued use of NAFTA Chapter 11 in certain defined circumstances to override the more general termination of NAFTA. And so, the presumption of VCLT Article 28 that treaties make obligations about future conduct, not past conduct, would need to be overridden by interpreting the text in context. Respondent's latest comments in that regard are limited to a reiterated misrepresentation of the import of CUSMA Article 14.2(3).[45]

21. Critically, Respondent asserts that "*obligation*" cannot mean the same thing as "*standard*" because to allege "*breach of an obligation*" requires that the obligation be in force to make sense.[46] But that argument slides the temporal component into the word "*obligation*" itself. In fact, "*obligation*" does not have an inherent temporal component and should be considered as synonymous with "*standard*."[47] The remaining context shapes the understanding of the word, and in Annex 14-C that context is an instruction to invoke an obligation from another treaty. It is not an instruction to invoke breach of NAFTA but to invoke breach of an obligation "*under*" Section A of Chapter 11 of NAFTA.

22. As Claimant stated before: "[t]*here is no distinction between 'in accordance with' and 'under' as incorporating references*."[48] Respondent's retort is that "*in accordance with*" is a

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43 Respondent's Reply, para. 19 (suggesting that Claimant "*accept*[ed]" in its Counter-Memorial that VCLT Article 70 provides a customary law default rule).

44 *See further infra* sec. III.B.iii.

45 *See infra* sec. II.B.iv.

46 Respondent's Reply, para. 16.

47 Second Schreuer Expert Report, paras. 3-12.

48 Claimant's Counter-Memorial, para. 29.

mandatory phrase, or instruction.[49] Even that much is not always true. In this case, it is inarguable that Annex 14-C paragraph 1 provides an instruction to use Section B of NAFTA Chapter 11 to make claims. That does not make "*in accordance with*" a phrase which inherently incorporates and sustains the operation of that which the addressee is instructed to use. For example, courts have at times had no choice but to find contract clauses void which refer to arbitration "*in accordance with*" rules of arbitral institutions which were not in operation.[50] The mandatory nature of the choice does not *ab initio* conjure the target. It must have independent existence for the instruction to make sense. Indeed, sometimes arbitration clauses are written as conferring arbitration "*under the rules of*" institutions, which use of "*under*" would clearly perform the same role as "*in accordance with*" in showing the agreement of the parties in how they have chosen to conduct their dispute resolution, and which clauses sometimes are unenforceable because the target rules or institution are no longer in force or do not exist.[51]

23. At best, swapping "*in accordance with*" for "*under*" as used in Annex 14-C to instruct referral to a breach of obligation under NAFTA Chapter 11, Section A would be awkward phrasing.[52] But the notion that it would be "*nonsensical*"[53] gets Respondent nowhere toward the point that "*in accordance with*" incorporated Chapter 11, Section B and "*alleging breach of an obligation under*" did not incorporate Chapter 11, Section A. It is an artefact of the grammar that one issue was an instruction to deploy something, while the other issue was a direction to declare fault in compliance with a set of standards.

24. As to the closeness of the language of Article 1116 and 1117 of NAFTA to Annex 14-C paragraph 1,[54] context is key and disregarded by Respondent. Exactly the same words and phrases, used in a different context, can have different meaning.[55] That is the essence of

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49 Respondent's Reply, para. 24.

50 *See, e.g., Sunland Logistics Solutions Inc. v. Zhejiang Wanfeng Auto Wheel Co., Ltd.*, No. 6:20-cv-1470-TMC, 2021 WL 5991085 (D.S.C. Apr. 30, 2021) (CLA-97).

51 *Flagg v. First Premier Bank*, 644 F. App'x 893 (11th Cir. 2016) (CLA-98); *Baker Hughes Saudi Arabia v. Dynamic Industries*, Case No. 2:23-cv-01396-GGG-KWR, Order (E.D. La 6 November 2023) (CLA-99).

52 Respondent's Reply, para. 24.

53 *Id.*

54 *Id*, para. 22.

55 *See generally* RICHARD GARDINER, TREATY INTERPRETATION ch 5 (2d ed. 2015) (RL-58 *bis*).

interpretation, and the context in which the words of paragraph 1 of Annex 14-C are to be interpreted is discussed further in **Section II.B.** Indeed, Articles 1116 and 1117 had already constrained a claim to one invoking the obligations of Chapter 11, Section A or the two Chapter 15 articles in the context of a claim under NAFTA. The very fact that Annex 14-C paragraph 1 spells out the obligations about which a claim may be brought in a new offer in a new treaty, rather than merely stating that the dispute resolution procedures of an old treaty being replaced may still be invoked, ought to be given *effet utile*.[56] Respondent does not appear to challenge that basic canon of treaty interpretation.[57] As discussed below, surrounding context in the drafting history also indicates there was a purpose behind this.[58] And the reference to the obligations is not reintroduced with an express restriction on the temporal scope of applicable conduct.[59]

25. Respondent claims it and the other CUSMA Parties "*expressly provided for continued compliance with the provisions of* [NAFTA Chapter 11, Section B] *in the submission and resolution of Paragraph 1 claims.*"[60] But they stated this no more for Section B than they did Section A. To suggest the phrasing of Annex 14-C cannot play a dual role of conferring jurisdiction and establishing the obligations to be respected and protected by that conferral of jurisdiction, Respondent buries in a footnote: "*Claimant's sole point of distinction remains that* Feldman *dealt with conduct before the NAFTA's entry into force, whereas this case deals with conduct after the NAFTA's termination. For the reasons explained in the U.S. Memorial, this is a distinction without a difference.*"[61] The Reply has advanced nothing: it is a distinction with a fundamental

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[56] Draft Articles on the Law of Treaties with Commentaries, II Y.B. OF THE INT'L LAW COMMISSION, draft articles 27 and 28, cmt (6) (CLA-43). Indeed, "[t]*he principle of* effet utile *mondates not just that treaty terms be given weight and effect, but alsa that they be accarded 'their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.'" Murphy Explorotion and Production Co. Int'l v. Republic of Ecuadar*, UNCITRAL, Partial Award on Jurisdiction, dated 13 November 2013, para. 180 (quoting RICHARD GARDINER, TREATY INTERPRETATION 64 (2008) (RL-58*bis*) (quoting Waldock, Third Report at 55)) (CLA-67).

[57] Although *see infra* para. 67 respecting Respondent's comment on *effet utile* regarding footnote 20 and the phrase "*for greater certainty*."

[58] *See infra* Section II.A.ii.

[59] Unlike in other examples of drafting of the CUSMA Parties: *see infra* sec. II.D.

[60] Respondent's Reply, para. 24.

[61] *Id.*, n.30.

difference.[62] *Feldman* confirmed that NAFTA Chapter 11, and Articles 1116 and 1117 in particular, did not displace the presumption of VCLT Article 28.[63] It cannot confirm whether CUSMA Annex 14-C displaced it, and if so, how, because it was not analyzing that text and its context, however similar the raw text may be to text in another treaty.[64]

26. The *TC Energy* tribunal's analysis, on which Respondent relied so heavily in its Memorial for that award's conclusory attempt at VCLT Article 31 analysis,[65] in the Reply is reduced to the majority's actual conclusion as supplementary support.[66] Respondent's critique of the *TC Energy* Dissent, without elaboration, is that the Dissent focuses on "*individual words*" rather than Annex 14-C paragraph 1 as a whole.[67]

27. The irony in Respondent's position is that, on the one hand, it must be obvious an instruction to follow NAFTA Chapter 11, Section B, borrowed from elsewhere, *sustains it*, rather than allowing a potentially defective reference to an inoperative set of obligations, which Claimant agrees is a reasonable interpretation in good faith in context. Meanwhile, on the other hand, an instruction to invoke substantive obligations from NAFTA Chapter 11, Section A, also borrowed from elsewhere, *must somehow be implied* to be limited in Respondent's view to historical conduct only.[68] This is all despite a presumption of treaty interpretation that Annex 14-C, like the rest of CUSMA, applies to obligations regarding future conduct "[u]*nless a different intention appears from the treaty or is otherwise established*[.]"[69]

28. Respondent seemingly ignores this starting point of analysis and its case hinges entirely on attempting to establish an intention from the word "*obligation*" as inherently

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62 The matter is advanced no further by *UPS v. Canada* (Respondent's Reply, para. 21 and *United Parcel Service of America, Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Award on Jurisdiction dated 22 November 2002 (RL-117)).

63 As Claimant has repeatedly addressed. *See* Claimant's Observations on the Request for Bifurcation, dated 17 June 2024 ("**Claimant's Observations**"), n.35; Claimant's Counter-Memorial, paras. 40-41.

64 *See also* Second Schreuer Expert Report, paras. 29-30.

65 Respondent's Memorial, n.11, paras. 16, 23, 29.

66 *See* Respondent's Reply, n.22.

67 *Id.*, n.36.

68 *See also* Second Schreuer Expert Report, paras. 13-16.

69 Vienna Convention on the Laws of Treaties, 8 I.L.M. 679 ("**VCLT**"), art. 28 (CLA-42).

meaning "*obligation* [while the treaty from which the obligation came from was in force]."[70] This is done instead of reading it in context as part of a whole structure granting a new category of consent by reference to obligations of both the procedures and standards from a past treaty that are being made available for use for future claims by a new treaty. And it was just such a narrow conception of that word over which the *TC Energy* Dissent critiqued the majority applying to Annex 14-C paragraph 1, instead of reading it as a whole:

> *In these circumstances, it is not logical to find that the general rule* [of VCLT Article 70] *prevails by separately considering the word "obligation" and imbuing it with the meaning ascribed by the majority. It is not disputed that NAFTA Chapter 11, Section A contains specific obligations. Grammatically, this provision must be read as a whole.*[71]

29. Respondent even makes a strange observation that "*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).*"[72] In general, whichever party's interpretation prevails in this proceeding, the first point was always true: Annex 14-C paragraph 1 is not the same as Annex 14-C, paragraph 4 (addressing specifically the situation of NAFTA arbitrations which were already commenced before the NAFTA's termination). The identity of claimants making paragraph 1 claims was an inherent uncertainty of any voluntary extension of liability, but certainly not impossible to anticipate. As to Respondent's parenthetical, it here denounces the reason it set up footnote 21 in the first place.[73]

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[70] *C.f.* Respondent's Reply, para. 26 ("[T]*he U.S. interpretatian daes not rely on giving the word 'obligation' a special meaning*[.]"); *see, e.g.,* Respondent's Reply, paras. 15, 25. *See also* Second Schreuer Expert Report, para. 24 ("*That argument seeks to read the words 'while NAFTA was still in force' into the text. A reference to a set of rules is volid irrespective of whether these rules are in force independently.*").

[71] Alvarez Dissent, para. 8 (RL-171).

[72] Respondent's Reply, para. 32.

[73] *See infra* paras. 74-78.

30. There are of course temporal restrictions to the claims possible under Annex 14-C:

a. Investors must act to commence a claim under a hard deadline within a three-year period under Annex 14-C, paragraph 3;

b. They must act according to the temporal restrictions incorporated from Articles 1116(2) and 1117(2) in NAFTA Chapter 11, Section B; and

c. They may only make complaints about conduct involving legacy investments, *i.e.*, those defined under Annex 14-C, paragraph 6(a) as "*established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of* [CUSMA]."

31. On a fair construction of the text, that the impugned conduct being addressed must have occurred before CUSMA was in force is not one of them.

i. Applicable Law Analysis Supports Claimant's Argument

32. The point of Claimant's reference to applicable law was that:

> *The reference to the Chapter 11 obligations in Article 1116 of Section B is now in the context of the offer to use NAFTA Chapter 11, Section B for claims by the new treaty, CUSMA. NAFTA is not in force, but Section B is retained in force for the specific purpose of the claims under Annex 14-C, using the NAFTA Chapter 11, Section A obligations as the governing law by instruction of the integrated Article 1131. In this new context, Article 1116(1) simply overlaps with the statement of the type of claim offered in paragraph 1 of Annex 14-C itself.*[74]

[74] Claimant's Counter-Memorial, para. 43 (emphasis added).

It is not a separate theory;[75] rather, it is an extension of the interpretation regarding the integration of continued applicability of NAFTA Chapter 11, Section B by CUSMA despite the termination of NAFTA, which all parties agree Annex 14-C paragraph 1 performs.[76]

33. In response, Respondent merely rehashes its suggestion that Annex 14-C paragraph 1 makes an offer which can only be accepted by alleging breach of Chapter 11 Section A obligations regarding historical conduct and reiterates its overbroad interpretation of the implications of *Feldman*.[77] That is simply to recycle its treatment of the Annex 14-C paragraph 1 text generally.

ii. The Origins of Annex 14-C Support the Intent According to Claimant's Reading of the Text

34. The history of the text of what ultimately became Annex 14-C indicates that the United States proposed a scheme whereby NAFTA Chapter 11 would survive generally for those investments existing when CUSMA came into force, and which could then be replaced in favour of arbitration under the newly negotiated standards of CUSMA Chapter 14. The other CUSMA Parties, having shown interest in the continued use of investor-State arbitration in Chapter 14, embraced the notion generally of continued NAFTA Chapter 11 protection. Notably, while other aspects of Annex 14-C evolved, the phrase Respondent insists is naturally interpreted as backward-looking, "*alleging breach of an obligation under*" was the same when the proposal of the Annex was that either NAFTA obligations would remain arbitrable or that they would be replaced by Chapter 14 standards, and in the final form of Annex 14-C.

35. In August 2017, Mexico and Canada both proposed that CUSMA's investment chapter include investor dispute resolution provisions with their own specific proposals for a

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75 *C.f.* Respondent's Reply, para. 34.

76 *See also* Second Schreuer Expert Report, paras. 13-25.

77 Respondent's Reply, paras. 36-37, 42-43; *compare* Respondent's Memorial, para. 26.

Section B to the chapter (Mexico similar to the TransPacific Partnership Agreement and Canada to the CETA agreement with the EU).[78]

36. On 11 October 2017, Mr. Lauren Mandell, the investment chapter chief negotiator for the United States, circulated a proposed Section B to the investment chapter (then draft chapter 11 of CUSMA) on dispute resolution.[79] This draft was simpler than the Canadian proposal of investor arbitration procedures, and provided that each party would give notification to activate the investor arbitration provisions allowing eligible investors to make claims regarding the obligations set out in the investment chapter in its then-article 11.18(1).[80] These provisions would not operate as a matter of course. In this first draft, the United States also provided an Annex 11-D proposal that is the origin of what ultimately became Annex 14-C.[81] There are various notable points to compare about this draft annex and how it interacted with the U.S. opt-in proposal for investor arbitration of CUSMA protections in the proposed Section B.

37. The title of draft Annex 11-D is "*Legacy Investments*."[82] This indicates the subject is the class of legacy investments rather than a class of legacy claims, reinforcing a point of plain interpretation understanding Claimant has asserted throughout these proceedings.[83] The evolution of this title toward "*Legacy Investment Claims and Pending Claims*" in Annex 14-C appears therefore most clearly about the fact this draft does not have paragraphs 4 and 5 of the final form, which confirmed the status of pending NAFTA claims and continuation of claims made under Annex 14-C using the NAFTA regime. Once those topics were introduced later, also

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78 Draft of Investment Chapter uploaded to MAX.gov, 14 August 2017 (R-60); Draft of Investment Chapter uploaded to MAX.gov, pre-18 August 2017 (R-61); *compare* TransPacific Partnership Agreement, Ch. 9 (Investment) (CLA-100); Comprehensive Economic and Trade Agreement (CLA-89).

79 Investment (Section B Only) (uploaded to MAX.gov on or around October 11, 2017) (R-37); *see also* Series of emails between Lauren Mandell, Maxim Berdichevsky, Guillermo Malpica, Aristeo Lopez Sanchez, and others, dated 10-11 Oct. 2017 (R-38) (noting the upload to MAX.gov of "*the U.S. proposed Section B text*[.]").

80 Investment (Section B Only) (uploaded to MAX.gov on or around 11 October 2017) (R-37).

81 *Id.*

82 *Id.*

83 *See* in particular, Claimant's Memorial, paras. 224, 246; Claimant's Counter-Memorial, para. 30. *See also* Second Schreuer Expert Report, paras. 21-22.

apparently by the United States,[84] the evolution of the title made sense. But the original drafting of paragraphs 1, 3, and 4 of the Annex 11-D draft indicates a proposal for general continuing protection of legacy investments until an opt-in was triggered. Given this drafting history, as well as the fact that "*legacy investment*" is a defined term about which claims can be made, Respondent's focus on the interpretation of the title of Annex 14-C as referring to a category of legacy claims[85] is overwrought.

38. Paragraph 1 in this original Annex 11-D proposal reads close to its final form in Annex 14-C but it is not, as Respondent claims, "*essentially, the same*":[86]

> *1. Each Party consents, with respect to a legacy investment, to the submission of o claim to arbitration under Section B in accordance with this Annex alleging breach of an obligation under:*
>
> *(a) Section A of Chapter 11 of [NAFTA 1.0];*
>
> *(b) Article 1503(2) (State Enterprises) of [NAFTA 1.0]; and*
>
> *(c) Article 1502(3)(a) (Monopolies and State Enterprises) of [NAFTA 1.01 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 of [NAFTA 1.0].*[87]

39. There is a distinction from the final form of Annex 14-C that works with other differences in the text. This draft states that the procedure would be in accordance with Section B of the new chapter of CUSMA, not Section B of NAFTA. This Annex 11-D draft then continues with a paragraph 3 proposed as:

> *3. A Party's consent under paragraph 1 shall expire:*

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84 *E.g.*, [redacted]; Mr. Mandell for the U.S. delegation also discussed the matter in April 2018: "*I'd like to find a time in the middle of our discussions, potentially, Wednesday, to discuss the USTR non-paper from Round 7 regarding ISDS pending claims etc. I will follow up with you on specific timing.*" Series of emails between Lauren Mandell, Aristeo Lopez Sanchez, Maxim Berdichevsky, Guillermo Malpica Soto, and Rodney Neufeld, dated 16 April 2018 (C-310).

85 Respondent's Reply, paras. 20, 22, 29.

86 *Id.*, para. 98.

87 Investment (Section B Only) (uploaded to MAX.gov on or around 11 October 2017) (R-37) (emphasis added).

> *(a) three years after [the date of entry into force of NAFTA 2.0]; or*
>
> *(b) when the Party provides a notification of consent under Article 11.18.1 within three years of [the date of entry inta force of NAFTA 2.0]*[88]

With a footnote stating:

> *Notwithstanding paragraph 3(b), if a Party provides a notification of consent under Article 11.18.1 but withdraws or terminates its consent before three years have elapsed from [the date af entry into force of NAFTA 2.0], the Party shall be deemed to consent under paragraph 1 for the remainder of the three-year period.*[89]

40. Further, the draft defines "*legacy investment*" essentially as in the final Annex 14-C paragraph 6(a): requiring an investment to exist when CUSMA entered into force.

41. This is to say that this Section B proposal with Annex 11-D was originally intended that there not be overlap of any kind between NAFTA obligation protection and new obligation protection through investor arbitration regimes; whenever a CUSMA Party triggered the application of Section B to the new Chapter 14 provisions the consent to legacy investment claims arbitration from Annex 11-D would end. Yet also, by virtue of the footnote proposal, the Annex 11-D provision could be restored for any remaining period within the 3 years if the notification to swap was later withdrawn.

42. The meaning of paragraph 3 in this original proposal combined with Respondent's reading of "*alleging a breach of an obligation under*" in paragraph 1 now, which remained unchanged between this Annex 11-D draft and the final Annex 14-C, would amount to:

a. Backward-looking NAFTA investor claim rights for three years;

b. to be terminated in favour of forward-looking CUSMA rights for investors from each State by notice; but

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88 *Id.*

89 *Id.*

c. with NAFTA backward-looking rights restored by the State Party rescinding such notice again if still inside the three-year period.

43. This would specifically retain, remove, then restore backward-looking NAFTA claims for legacy investments, exchanging out for forward-looking CUSMA claims for CUSMA Chapter 14 covered investments, on a State-by-State choice basis. This would result in a, quite frankly, nonsensical regime. It is much more rational and coherent that the intention was to retain NAFTA obligations for legacy investments for up to three years – *i.e.* to continue to generally protect extant investments with the NAFTA Chapter 11 regime in the first instance for a transitionary period – and for the CUSMA Parties to each switch to CUSMA protections and claims for existing and new investments on an opt-in basis.

44. That understanding is also consistent with what [redacted], now available to Claimant thanks to Procedural Order No. 6:

[redacted][90]

45. The [redacted] is clear here: as noted above, the original draft proposal involved an offer and instruction to investors with legacy investments to make claims "*under Section B in accordance with this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 of [NAFTA 1.0].*"[91] [redacted]

[90] [redacted]

[91] Investment (Section B Only) (uploaded to MAX.gov on or around 11 October 2017) (R-37). Another draft for discussion had been uploaded to MAX.gov in November 2017 containing an Annex 11-D proposal, which proposal was unchanged: *See* NAFTA Renegotiation, Consolidated Section B Text, dated 15 November 2017, at 11-3 (R-74).

[redacted] is clearly referring to the NAFTA substantive standards as the [redacted] while indeed the proposal had called for using the CUSMA draft investment chapter [redacted] in the proposed chapter's Section B. [redacted]

46. Although matters evolved such that the U.S. and Mexico agreed to Annex 14-D and Annex 14-E investor arbitration, no tripartite agreement on CUSMA investor arbitration was reached. And in Annex 14-C, later during the negotiations, a change in the text of draft paragraph 1 from Section B of a CUSMA investment chapter to Section B of NAFTA Chapter 11, and therefore to [redacted] is exactly what happened in August 2018, as discussed further below.

47. The *TC Energy* majority's treatment of this passage is of a piece with its generally pretextual analysis.[92] The majority claims that [redacted] "*distinction between 'rules' and 'procedures' is ambiguous.*"[93] It is plainly not. Indeed, the majority speculates "*rules*" might have meant Article 1117 or Article 1136 in Chapter 11, Section B of NAFTA, which on this draft is simply not in issue. The Dissent, by contrast, understood [redacted] intention.[94]

48. [redacted]

92 *See, e.g.,* Claimant's Counter-Memorial. paras. 38, 110-11, 113, n.78, n.106.

93 *TC Energy* Award, para. 192 (RL-170) discussing (C-309) [TC R-119].

94 Alvarez Dissent, para. 18 ("*In my view,* [redacted]

[redacted][95] And the CUSMA Parties gravitated toward the American approach of creating a transition of continued NAFTA protection while haggling over how the CUSMA Chapter 14 obligations could be relied upon by investors in arbitration. The discussion topics for Round 7 of the CUSMA negotiations in February 2018 were described as: *"With respect to ISDS, discussed (a) the U.S. opt-in approach; (b) reciprocal ISDS as between Canada and Mexico; and (c) potential annex addressing transition from NAFTA 1.0 to 2.0."*[96]

49. It appears that, as early as November 2017, tension had developed between Canada on the one had and the United States and Mexico on the other regarding which rights were to be granted to investors with respect to Chapter 14 substantive obligations (with Canada seeking a wider scope of application).[97] This seems to have led Canada to entirely withdraw its interest in trilateral investor arbitration protection for Chapter 14 obligations; although this of course did not involve abandonment of Annex 14-C.

50. Indeed, [redacted][98]

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[95] [redacted]; *see also* Alvarez Dissent, para. 18.

[96] Joint Report on the Round, dated 24 February 2018 (emphasis added) (R-83).

[97] Competing versions of scope drafting emerged for a proposed Section B of the investment chapter at this time, with Canada's proposal for the scope of complaints allowable for an investor to submit to arbitration to be any obligation in the CUSMA chapter Section A except market access, environmental measures and corporate social responsibility, while the US and Mexico proposed wide-ranging exclusions for national treatment, most favoured nation, performance requirements regarding establishment of investment, minimum standards of treatment and indirect expropriation. *See, e.g.,* NAFTA Renegotiation, Consolidated Section B Text, dated 15 November 2017, at 11-3 (R-74).

[98] [redacted]

[redacted].[99] There is no evidence this ever happened.

51. Instead, in August 2018 the United States and Mexico embarked on their own discussion for what would become Annexes 14-D and 14-E. At the commencement of those discussions on 1 August 2018, the United States and Mexico exchanged a draft investment chapter including a version of what would become Annex 14-C.[100] Respondent rightly notes that it was truncated to state:

> *Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitratian under Section B of Chapter 11 of NAFTA 1.0 in accordance with this Annex.*[101]

52. First, it is odd that Respondent says now of this draft that "*at one point at least two of the USMCA Parties considered*"[102] – as if Respondent is a disinterested third party to the events rather than perfectly capable of confirming or denying the actual negotiating history (and under a continuing obligation to produce any relevant documents).

53. [redacted][103] But in any event, the fact that "*alleging a breach of an obligation under*" the NAFTA obligation terms was no longer in paragraph 1 cannot have the import Respondent places on it now,[104] since the phrase was present in the original draft which could make no sense interpreted as a whole as having backward-only intent. Moreover, as Respondent also rightly notes, the language of "*alleging a*

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99 [redacted]

100 Email from Lauren Mandell to Aristeo Lopez Sanchez, dated 1 August 2018, attaching Investment Chapter Text (R-39).

101 *Id.*, at 18 (R-39).

102 Respondent's Reply, para. 99.

103 [redacted]; Joint Report on the Round, dated 24 February 2018 (R-83).

104 Respondent's Reply, para. 99.

breach of an obligation under" was restored in the next draft circulated between the United States and Mexico on 11 August 2018, without commentary.[105]

54. Perhaps there was simply a mistake in the process of editing paragraph 1 to refer to Section B of NAFTA, corrected in the next draft. The first draft of Annex 11-D, as then was, contained a forebear of footnote 20 which did not refer to NAFTA Section A but only to other NAFTA Chapters (and incorporating those provisions makes sense as discussed previously[106] and further below). Reference to Chapter 11 Section A had been added to footnote 20 in the 1 August 2018 draft,[107] and remained in the 11 August draft.[108] It could simply have been decided to revert to the original expression regarding the nature of claims the investor could bring under paragraph 1 while retaining the confirmation in the footnote.

55. After these exchanges between the United States and Mexico, in September 2018, Canada confirmed with the United States that it accepted a "*3-year grandfathering of ISDS*,"[109] while the Canada delegation was involved in edits to paragraphs 3, 5, and 6 of Annex 14-C in November 2018, discussed below,[110] thus confirming its acceptance of the rest of the text.

56. As to Canada's position in August 2018, the *TC Energy* majority thinks it had not accepted (or later changed its mind on) the grandfathering of Chapter 11, Section A obligations. First, [redacted][111] second, [redacted] but on the issue of paragraph 1 Annex 14-C drafting there was ultimately no change

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105 Email from Lauren Mandell to Aristeo Lopez Sanchez and Guillermo Malpica, dated 11 August 2018, attaching Investment Chapter Text, at 18 (R-40).

106 Claimant's Counter-Memorial, paras. 55-66.

107 Email from Lauren Mandell to Aristeo Lopez Sanchez, dated 1 August 2018, attaching Investment Chapter Text, at 18 (R-39).

108 Email from Lauren Mandell to Aristeo Lopez Sanchez and Guillermo Malpica, dated 11 August 2018, attaching Investment Chapter Text, at 18 (R-40).

109 Email from Robert Lighthizer to Gerald Butts, dated 28 September 2018, attaching US-Can Closing Term Sheet, point 10 (R-48). *See also* [redacted]

110 *See infra* sec. II.E.

111 *TC Energy* Award, para. 195 (RL-170) discussing (C-309) [TC R-119].

other than the switch to Section B of NAFTA;[112] and third, the majority simply speculates, just as it did on a number of other subjects,[113] that Canada could simply have changed its mind on its understanding.[114] Claimant agrees with the Dissent: Respondent has produced no evidence of this [redacted][115] Indeed, also on this third point, the majority otherwise relies for its analysis about *Canada's* position on yet another document which Respondent refuses to provide here, on the grounds of attorney-client privilege.[116] And as will be discussed below, if Canada did change its mind and wanted to ensure an alternative approach, it knew exactly what kind of language to add.[117]

57. There is no doubt that a "*significant amount of work* [was] *done on Chapter 14's substantive provisions . . . .*"[118] But it cannot "*demonstrate*[] *that the USMCA Parties sought fully to supersede NAFTA Chapter 11, Section A.*"[119] If they wanted to do that, Mexico and Canada would have rejected the American draft proposal for what became Annex 14-C entirely and that would have settled the matter. Instead, they were obviously interested in it as a transitionary measure of some kind. Maintaining paragraph 1 of the annex at all inevitably defeated the possibility of fully superseding NAFTA Chapter 11, Section A. It tells certain investors they can in fact continue to rely on its obligations.

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112 *TC Energy* Award, para. 195 (RL-170).

113 *See, e.g.*, Claimant's Counter-Memorial, paras. 73-74 (discussing *TC Energy* Award paras. 167-169), n.155 (discussing *TC Energy* Award para. 197).

114 *TC Energy* Award, para. 195 (RL-170).

115 Alvarez Dissent, paras. 19-23 (RL-171); [redacted]
The reference to C-143 in footnote 8 is a typographical error for TC R-143).

116 *TC Energy* Award , n.173 (*citing* [TC C-143]) (RL-170).

117 *See infra* sec. II.D.

118 Respondent's Reply, para. 98.

119 *Id.*, para. 98.

B. The Context, Object and Purpose of Annex 14-C Inherently Derogates from the General Purpose of CUSMA

58. The rest of the context of Annex 14-C, Chapter 14, and other aspects of CUSMA which Respondent has raised are discussed below. As noted earlier, many of the issues here can also be contextualized by *travaux préparatoires*, which repeatedly support Claimant's understanding of those provisions, or at least the origins show no trace of the motives Respondent now avers.

i. The Preamble and Protocol Acknowledge Continuing Protection

59. Respondent once again claims "*Claimant also admits that the 'without prejudice' phrase in paragraph 1 of the Protocol does not mean that Section A of NAFTA Chapter 11 is extended to cover claims arising after NAFTA's termination.*"[120] Over a year ago, reiterating Claimant's Memorial, Claimant noted of Respondent's position:

> *Respondent, even while quoting the CUSMA Protocol in a footnote, disingenuously misrepresents its own negotiated treaty text and Claimant's position, stating: "By the protocol that accompanied the [CUSMA], the entry into force of that treaty terminated and superseded the NAFTA. In its Memoriol, Claimant acknowledges that the [CUSMA] superseded the NAFTA." However, Respondent conveniently ignores that CUSMA did not simply supersede NAFTA; rather, as the Protocol also states, it did so "without prejudice to those provisions set forth in the [CUSMA] that refer to provisions of the NAFTA."*[121]

60. Nothing has changed regarding Respondent's arguments. No more does the Preamble to CUSMA undermine Claimant's interpretations,[122] particularly when one considers the requirement of the "*legacy investment*" definition and the framework of Annex 14-C.[123] Respondent insists the only context that matters is that Annex 14-C is found in a treaty replacing NAFTA. All that has changed is the available record, from which it is increasingly apparent that

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120 Respondent's Reply, para. 47.

121 Claimant's Observations, para. 23 (quoting Respondent's Request for Bifurcation, dated 16 May 2024, para. 11 and Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States, dated 30 November 2018, para. 1 (CLA-39)).

122 Respondent's Reply, paras. 84-89.

123 *See infra* Section II.B.ii.

the more important context was Annex 14-C's role as a derogation from that general goal of replacement.[124] As to the Protocol's language itself: after Canada first introduced a draft Protocol text on 16 November 2018,[125] its paragraph 1 was amended to include the "*without prejudice*" passage. As will be discussed further below in more detail with respect to Respondent's arguments on CUSMA Article 34.1,[126] the CUSMA Parties' negotiators were perfectly aware that "*transitional provisions can appear anywhere in the text, not just necessarily in the Final Provisions.*"[127]

ii. The Purpose of the Definition of "*Legacy Investment*" Is Continuing Protection

61. At one point Respondent calls Claimant's understanding of Annex 14-C a "*radical*"[128] proposition. This is apparently because Respondent relegates Annex 14-C to merely a "*procedural fix for a procedural problem.*"[129] Yet Annex 14-C contains a demand that has nothing to do with a "*procedural problem*" – the definition of a "*legacy investment.*" Allowing those with claims as of the date of the termination of NAFTA to be able to continue to make them did not require the definition of "*legacy investment*" that Respondent included from the very beginning of its proposal, which it had proposed by its very title to be about "*Legacy Investments*" (not legacy claims).[130] There was no procedural problem. There was a series of choices.

62. The drafting history of "*legacy investment*" is otherwise discussed in the context of the *ratione materiae* objection.[131] Its essentially final form was there from the outset of the United States' proposal for Annex 11-D.[132] But the import of its inclusion is significant. It does more than "*signal*[] *the USMCA Parties' preference for permitting claims by investors who*

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124 *See supra* sec. II.A.ii; *see infra* sec. II.B.ii, II.B.iii, II.B.vi.

125 Series of emails between Robert Brookfield, Maria Pagan, and others, dated 9-16 November 2018, attaching Comments to the Protocol (C-315).

126 *See infra* sec. II.B.vi.

127 Series of emails between Robert Brookfield, Maria Pagan, Samantha Atayde Arellano, and others, dated 9-26 November 2018, attaching Comments to the Protocol, cmt. A6R6 (C-316)

128 Respondent's Reply, para. 31.

129 *Id.*

130 Investment (Section B Only) (uploaded to MAX.gov on or around 11 October 2017) (R-37).

131 *See infra* sec. III.A.

132 *Compare* Investment (Section B Only) (uploaded to MAX.gov on or around 11 October 2017) (R-37) *with* Canada-United States-Mexico Agreement, *entered into force* 1 July 2020, Annex 14-C (CLA-40).

maintained their investments as of the USMCA's entry into force."[133] It requires investors to maintain their investments until CUSMA enters into force in order to enjoy the protections of Annex 14-C. And it is precisely because "*the USMCA Parties were entitled to subject their consent to arbitration in Annex 14-C to whatever conditions they saw fit*"[134] and 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'*"[135] that a good faith interpretation of what they were doing was exchanging continued investment encouragement for sustaining an existing form of investment protection in a transitionary period before definitively moving on to a new model. In that regard, gratuitously exposing a treaty party to purely historical claims is not about an ongoing interest in the future investment environment.

[redacted]

[redacted][136]

133 Respondent's Reply, para. 55.

134 *Id.*

135 *Westmoreland Caal Co. v. Government of Conoda*, ICSID Case No. UNCT/23/2, Award dated 17 December 2024, para. 164 (RL-128).

136 [redacted]

64. [redacted] is notable when connected with the definition of "*legacy investment*" set out in the draft from the beginning. Those legacy investment investors are required to maintain their investments to keep the protection offered in the Annex. It gains them little to nothing to do so if the purpose of the Annex was simply to allow them to rely on investor arbitration for old claims they could bring while NAFTA remained in force, and gains the treaty parties nothing to do so. But if the available claims are for the future, it does motivate sustaining investments on the same [redacted] and the continued creation of investments on such [redacted] between signature of CUSMA and its entry into force, just as in the case of Claimant.[137]

65. And Respondent has nothing new to argue on the law that the nature of expropriation is that an investment has been deprived, and the distinction between direct and indirect expropriation is the modality of State conduct to that outcome.[138] Either way, an historical claim about an expropriation does not sit rationally with a requirement to maintain an investment until a later time.[139]

iii. Footnotes 20 and 21 Clarify and Hone Continuing Protection

66. As previously set out, footnote 20's list of chapters and annexes of NAFTA is obviously intended to allow the obligations under Chapter 11, Section A of NAFTA to operate and be interpreted in the same manner as they would have been under NAFTA.[140] That does not

[redacted]

137 *See also* Claimant's Observations, para. 34; Claimant's Counter-Memorial, para. 51.

138 *See* Claimant's Counter-Memorial, para. 52; Claimant's Memorial, n.410 and citations therein.

139 Respondent is disingenuous in suggesting Claimant's analysis in "*inapt*" even though it admits that the point of an expropriation claim is that the value of an investment has been "*taken by the State.*" Respondent's Reply, n.93. That still means it would not be "*in existence*" at a later time to qualify under Annex 14-C paragraph 6(a) if that taking occurred before CUSMA entered into force.

140 Claimant's Counter-Memorial, paras. 55-66.

mean that the footnote, in beginning with "*for greater certainty*," has not actually added to the operation of Annex 14-C.[141]

67. The main reason Claimant "*takes issue*"[142] with Respondent's definition of "*for greater certainty*" is that if it is true that the phrase has a uniform meaning of merely reiterating that which was already established, then the CUSMA Parties misused the phrase multiple times in Chapter 14 alone, including in footnote 20. Unnecessarily, Respondent has resorted to a dictionary definition of the word "*for*."[143] Greater certainty to what kind of purpose is the point. Respondent asserts that "*a footnote that confirms or clarifies a treaty term or an applicable principle of international law . . . serves an important purpose by helping to reduce potential uncertainty.*"[144] Footnotes or other text may indeed clarify, and thereby provide greater certainty, insofar as they provide nuance with specific details or express exceptions to narrow the interpretation or implications of a term which could bear a potentially broader understanding. They thereby ensure one interpretation over another. Claimant provided examples where articles and footnotes which begin "*for greater certainty*" are doing this kind of clarification work in Annex 14-C and elsewhere in Chapter 14.[145] Or they may provide greater certainty by adding elements to round out an obligation, as does footnote 20. But a footnote

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141 That the other CUSMA Parties have copied Respondent's position subsequently in litigation (Respondent's Reply, n.97) adds nothing. *See further infra* sec. II.C.

142 Respondent's Reply, para. 61.

143 *Id.*

144 *Id.*

145 *See* Claimant's Counter-Memorial, para. 59, n.80. Respondent's responses in this regard are not credible (Respondent's Reply, para. 62 and n.102). Respondent appears to claim that Chapter 14, Annex 14-B is generally functionless because it simply regurgitates inevitable correct interpretation points rather than adding any specificity. The point is not that Claimant offered any interpretation of its own regarding what constitutes "*reasonable investment-backed expectations*" discussed in Annex 14-B and footnote 19, but that there is a history of interpretation of such issues such that, "*for greater certainty*", the CUSMA Parties evidently wished to control against disfavored interpretations with further narrowing language. It is also interesting to note Respondent's view that Annex 14-C paragraph 4 stating "*Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal*" was not adding any controlling function to the inevitable operation of customary law. Elsewhere Respondent has noted that the termination of NAFTA would not disturb accrued rights under NAFTA Chapter 11 under VCLT Article 70(1)(b) (Respondent's Reply, para. 27). It seems incongruous that the NAFTA Parties' rights to respond to a failure to comply with an award arising from an arbitration commenced before NAFTA was terminated would not also accrue as much as the other rights to performance of the arbitration under Section B to ensure the arbitration proceeds to conclusion, absent an agreement to extinguish them. The explicit exclusion of paragraph 5 of Article 1136 would appear directly intended to overturn that position. Indeed, that point appears to be the primary reason to have included Annex 14-C, paragraph 4 at all.

that baldly declares a principle of law or regurgitates another treaty term does not reduce potential uncertainty. If anything, it has the potential to create uncertainty for an interpreter trying to find a way to give it an actual purpose alongside the other treaty text, even though, according to this principle Respondent offers, the good faith interpretation of the footnote would be that the treaty would function identically if the footnote did not exist. That runs counter to the principle of *effet utile*.[146]

68. On one issue, it is Respondent, rather than Claimant, that has certainly missed the point. Claimant's argument is not that some chapters of NAFTA referenced in footnote 20 do not have continued effect at all despite being so referenced. They have continued effect, insofar as the "*relevant provisions* [of the Chapters] . . . *apply*"[147] for Chapter 11, Section A claims to have proper effect. Or, as Claimant put it before, they 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.*"[148] This cross reference to keep the relevant parts of NAFTA operative and thereby the Chapter 11, Section A obligations functioning as they would before is not a "*problem.*"[149] Indeed, the alternative that the chapters not be mentioned would have been the problem, since definitions and issues arise in Chapter 11 which need the other chapters to be applied in order for the Chapter 11 obligations to have their originally intended effect.

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146 *C.f.* Respondent's Reply, para. 61 ("*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.*"); Draft Articles on the Law of Treaties with Commentaries, II Y.B. OF THE INTL LAW COMMISSION, draft articles 27 and 28, cmt (6) (CLA-43). Indeed, "[t]*he principle of* effet utile *mandates not just that treaty terms be given weight and effect, but also that they be accorded 'their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.'*" *Murphy Exploration and Production Co. Int'l v. Republic of Ecuador*, UNCITRAL, Partial Award on Jurisdiction, dated 13 November 2013, para. 180 (quoting RICHARD GARDINER, TREATY INTERPRETATION 64 (2008) (RL-58*bis*) (quoting Waldock, Third Report at 55)) (CLA-67).

147 Canada-United States-Mexico Agreement, *entered into force* 1 July 2020, Annex 14-C, n.20 (emphasis added) (CLA-40).

148 Claimant's Counter-Memorial, para. 62 (emphasis added).

149 Respondent's Reply, para. 31.

69. Article 1110(7) is a safe harbor provision.[150] Which is indeed the point. Ensuring that the "*relevant provisions* [of Chapter 17] *apply*"[151] to the incorporation of Chapter 11 obligations in paragraph 1 of Annex 14-C allows the safe harbour to operate. But any claim is still about breach of Article 1110 standards and whether there has been an expropriation in violation of the obligations stated there. There is no continuing obligation incorporated to follow Chapter 17, just that anything which would have escaped liability from Article 1110 because it conformed with relevant provisions of Chapter 17 would continue to apply. The NAFTA Parties have not "*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.*"[152]

70. Having decided to continue to expose themselves to the overall obligations of Article 1110, the CUSMA Parties were of course free to not expropriate investors' relevant intellectual property (and as far as Claimant is aware no investor has sought to claim as much regarding the conduct of any of the CUSMA Parties since that agreement came into force).[153] But having made that choice, ensuring Chapter 17 continued to apply for this specific purpose alone in turn ensured that they could indeed continue to excuse their conduct on the basis of relevant provisions of Chapter 17 if they would otherwise have violated Article 1110. That is an example of how fundamentally footnote 20 has a purpose on Claimant's interpretation, while it does not on Respondent's characterization.

71. The continuation of Article 1503(2) claims is a parallel regime in NAFTA for a particular class of investors, and no more a concern. In the first instance, Claimant was correct that, as far as the continuation of Chapter 11 obligations is concerned, confirmation that Chapter

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150 Respondent's Reply, para. 70.

151 Canada-United States-Mexico Agreement, *entered into force* 1 July 2020, Annex 14-C, n.20 (emphasis added) (CLA-40).

152 Respondent's Reply, para. 70.

153 Thus Respondent apparently declares its disappointment it was on this understanding agreeing to be constrained for three years from taking existing relevant intellectual property rights except when respecting that it did so "*(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) an payment af compensatian in accordance with paragraphs 2 through 6.*" NAFTA art. 1110(1)(a)-(d) (CLA-38).

14 on financial services applies in footnote 20 is nothing more than again an exclusion from Chapter 11 application.[154] Article 1503(2) operates to provide that the conduct of state enterprises (as defined in NAFTA) be explicitly covered by Chapter 11 protections, and for NAFTA Chapter 14 obligations to apply as related to a class of claims for investors invested in financial institutions carved out from Chapter 11. But the actual obligations involved implicating investors in NAFTA Chapter 14 are similar to the Chapter 11 obligations.[155]

72. As to overlap with CUSMA: its Chapter 17 on financial services provides claims for breach of Chapter 14 or 17 obligations in an annex itself applying Annex 14-D. How Annex 14-D operates is discussed further below. Annex 14-C does not provide for the continuation of NAFTA Chapter 20 State-State dispute resolution regarding obligations found in NAFTA.[156] There is therefore no meaningful double regime overlap in footnote 20 ensuring NAFTA Chapter 14 applies as needed for the appropriate application of Chapter 11, Section A obligations or Article 1503(2) for investors with legacy investments to make claims during the Annex 14-C transition period.

73. Turning to footnote 21, Respondent baldly states that the clear purpose of the footnote is to force the use of Annex 14-E for claims "*based on an allegedly wrongful act* [. . .] *that began while the NAFTA was in force and continued after its termination.*"[157] It makes no attempt to point to *travaux préparatoires* to support its position (for good reason, as will be discussed below). This also does not make sense, since such continuing breaches would simply be dated from their beginning,[158] and an Annex 14-C claim would be appropriate.[159]

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154 Claimant's Counter-Memorial, para. 63; *see also* Alvarez Dissent, para. 11 (RL-171).

155 NAFTA Article 1403 (Establishment), Article 1405 (National Treatment), Article 1406 (Most-Favored Nation Treatment), Article 1410 (Exceptions to the treatment of the other articles), Article 1411(4) (Transparency).

156 And nor does CUSMA Article 34.1 for that matter beyond a specific application of NAFTA Article 2022 in Article 34.1(3).

157 Respondent's Reply, para. 72.

158 ILC Articles, art. 14 (CLA-49).

159 *See further* Claimant's Counter-Memorial, para. 73.

74. As to Annex 14-D, Claimant did not "*minimize*"[160] it; rather, it is of minimal importance. As Claimant has previously noted,[161] Annex 14-C and footnote 20 did not sustain the State-State dispute provisions of NAFTA, and thus the possibility of the CUSMA Parties continuing to answer to each other for breach of the obligations of Chapter 11. Therefore, the overlap that matters could only be if an investor would be able to bring a claim under both sets of standards. Claimant cannot miss the point[162] regarding the local litigation restrictions of Annex 14-D: regardless of the overlap of the period of conduct that two obligations may cover, if the right to a remedy for one ends essentially before the right to a remedy for the other begins, that overlap is effectively meaningless. Finally, the extent of any overlap possible is for investments already extant when CUSMA came into force. Any investments formed since CUSMA came into force can only be covered by the CUSMA regime.

75. As Claimant has previously shown, the United States has unequivocally created double regimes for investor arbitration rights.[163] The Reply now agrees.[164] The suggestion that an Annex 14-D double regime is a problem for Claimant's understanding of Annex 14-C and footnote 21 did not even enter into Respondent's analysis regarding footnote 21 in its Memorial.[165] This is at least the third theory of footnote 21 Respondent has offered, and the recently disclosed negotiating history reveals why.

76. In mid-August 2018, Mr. Mandell first proposed to his Mexican counterpart a footnote addition to the legacy investment claims annex to exclude from paragraph 1 claims that "*Mexico and the United States do not consent with respect to a legacy investment owned or controlled directly or indirectly by [a keyhole investor] of the other Party.*"[166] Although clearly understood by the negotiators at the time, this reference to a keyhole investor was contextualized for an outsider in an email from Mr. Mandell with subject line "*ISDS keyhole*

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160 Respondent's Reply, para. 76.
161 Claimant's Counter-Memorial, para. 65.
162 Respondent's Reply, para. 76.
163 *See* Claimant's Counter-Memorial, paras. 99-103.
164 Respondent's Reply, para. 113.
165 Respondent's Memorial, paras. 35-37.
166 Email from Lauren Mandell to Aristeo Lopez Sanchez and Guillermo Malpica Soto, dated 11 August 2018, attaching Investment Chapter Text (R-40).

provisions" and comment in the email that "*U.S. proposal to narrow the ISDS keyhole provision to cover (a) companies that have a covered government contract; and (b) affiliated companies in the same sector (rather than all affiliates).*"[167] This confirms that the footnote 21 language above is meant to refer to investors that ultimately became Annex 14-E investors with a right to claims regarding all new provisions of Chapter 14. The original proposed language clearly tied the right to where the investor held a legacy investment over which it had claims regarding future events under the CUSMA US-Mexico investor-State arbitration annex being negotiated. That inherently requires Annex 14-C claims regarding legacy investments to overlap.

77. By the end of August 2018, the language of the footnote had evolved to: "*Mexico and the United States do not consent with respect to an investor of the other Party that is eligible to submit claims to arbitration under Article 3.1(a)(i)(C) or Article 3.1(b)(i)(C) of Annex 11-D (Mexico-United States Investment Disputes).*"[168] This was a reference to the specific sub-clauses of what was then a combined annex granting the specific keyhole investor right to bring claims. In late September, this had become the final form of footnote 21 in Annex 14-C, by which time the draft Article 3.1(a)(i)(C) or Article 3.1(b)(i)(C) claim routes had been shifted to Annex 14-E.[169] The language had therefore changed to refer to an investor eligible to submit claims under what would become the U.S.-Mexico Annex 14-E, but nothing had indicated a change of purpose of the footnote and the other aspects of Annex 14-D simply do not register as a concern in the correspondence. The origin of footnote 21 was evidently to tie future claims about an investment which both satisfied the Annex 14-C legacy investment definition and the Annex 14-E eligibility scope to a claim to that negotiated Annex 14-E and CUSMA Chapter 14 obligations, rather than Annex 14-C and NAFTA Chapter 11 obligations. The language evolved as it could more expressly point to the alternative mechanism as the drafting of the other annexes was concluded. Nothing

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[167] Email from Lauren Mandell to Aristeo Lopez Sanchez, Guillermo Malpica Soto, and Samantha Atayde Arellano dated 15 August 2018 (R-99).

[168] Email from Lauren Mandell to Aristeo Lopez Sanchez and Guillermo Malpica Soto, dated 23 August 2018, attaching Investment Chapter Text (R-100).

[169] *See, e.g.,* Email from Lauren Mandell to Aristeo Lopez Sanchez, dated 27 September 2018, attaching Investment Chapter Text (R-118).

about this history suggests that the negotiators were trying to fend off complex parallel proceedings, or that they considered a serious overlap with Annex 14-D to be possible or matter.

78. Instead, as the original author of the footnote 21 proposal for Respondent, Mr. Mandell, would later say to a USTR official in March 2021:

> *The whole point of the footnote was to require keyhole investors to arbitrate under the "new and improved" USMCA rules and procedures (there was no reason to give them the option of arbitrating under NAFTA rules and procedures under 14-C instead). If 14-C only applied to preexisting measures, there'd be no reason to say that. We'd just be punishing keyhole investors, which is contrary to the clear intentions of the whole keyhole fromework.*[170]

iv. Article 14.2(3) Is Consistent with Continuing Protection[171]

79. Respondent claims without citation that Claimant "*admits that USMCA Article 14.2(3) is consistent with the ordinary meaning of Annex 14-C.*"[172] What Claimant actually stated is that "*Article 14.2(3) does not exclude Annex 14-C's application to future events*[.]"[173] The Article confirms that in some respects Annex 14-C departs from the presumption of VCLT Article 28, and that the rest of Chapter 14 does not. That is all. That is indeed a presumption that the Tribunal is required to hold to, "[u]*less a different intention appears from the treaty or is otherwise established*[.]"[174] There is nothing to "*twist*[]."[175] The entire debate occurring here is nothing more than competing submissions on whether "*a different intention appears from [Annex 14-C and CUSMA generally] or is otherwise established*" and Respondent's submissions lack decorum.

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170 Series of emails between Lauren Mandell and Khalil Gharbieh, dated 2 March 2021 (emphasis added) (R-49).

171 In the section titled, "*Scope*", CUSMA art. 14(2)(3) states: "*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*" (CLA-40).

172 Respondent's Reply, para. 79.

173 Claimant's Counter-Memorial, para. 77.

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

175 Respondent's Reply, para. 80.

v. Annex 14-C Placement and Article 14.2(4) Are Consistent with Continuing Protection[176]

80. Respondent continues to state nonsensically that Annex 14-C is consistent with Article 14.2(4) and the rest of Chapter 14, because Chapter 14 broadly follows the structure of Chapter 11 of NAFTA, alleging: they contain a section of substantive obligations (Section A of Chapter 11 and the body before Annexes in Chapter 14), and a section regarding investor dispute resolution (Section B of Chapter 11 and Annexes 14-C, 14-D and 14-E).[177] Of course, there are also Annexes 14-A and 14-B, which are designed to control the substantive obligations of Chapter 14 in certain regards. Annexes therefore do not definitionally hold a certain role in Chapter 14. Second, Annex 14-C by its very purpose has nothing to do with the substantive obligations of the body of Chapter 14. Annex 14-C's role is to set out what further application obligations previously set out in NAFTA would continue to have.

81. Article 14.2(4) simply does not change that. Claimant stands by its position that on a plain reading of this article, it adds little to the context and analysis of Annex 14-C.[178] Respondent claims that Claimant was "*flatly wrong*" when Claimant had said "[w]*ithout the annexes, there are no obligations to investors*,"[179] relying curiously on *United Parcel Service* to allegedly contradict Claimant.[180] That tribunal said of a point of NAFTA Chapter 15 obligations: "[a]*n essential purpose of the two particular paragraphs is to ensure that a State Party does not avoid its own obligations under the Agreement* [. . . but] *they are not subject to investor initiated arbitration under articles 1116 and 1117*."[181] This is precisely the point Claimant was making. The obligations of CUSMA Chapter 14 are towards each of the CUSMA Parties subject to Chapter 31 dispute resolution, except to the extent that the obligations are subject to investor rights as

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176 CUSMA art. 14.2(4) states: "*For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)*" (CLA-40).

177 Respondent's Reply, paras. 49-52.

178 Claimant's Counter-Memorial, para. 79.

179 Respondent's Reply, para. 50.

180 *Id.*, (citing *United Parcel Service of America, Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, dated 24 May 2007, para. 70 (RL-127)).

181 *United Parcel Service of America, Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, dated 24 May 2007, paras. 70, 73 (RL-127).

well to claim breach thereof under Annex 14-D and Annex 14-E and seek a direct remedy for itself.

82. Respondent raises the fact that it has a free trade agreement with a third State that contains an investment chapter, with no provisions for investors to make claims on their own behalf.[182] Again, its promise and obligation is thus towards that third State regarding treatment of the investors. Respondent has nothing to say, by comparison on the issue of placement of Annex 14-C, about the diversity of placement in which transitionary provisions have been dealt with by all the CUSMA Parties in other circumstances.[183] How Respondent otherwise erroneously treats comparative treaty practice is dealt elsewhere.[184]

83. The negotiating history supports that little is to be inferred from Article 14.2(4). In early August 2018, shortly after Annex 14-C appeared to have been largely settled, it was also clear that Canada had withdrawn interest in on-going investor arbitration for Chapter 14. The United States and Mexico were embarking on their side negotiations for what would ultimately become Annexes 14-D and 14-E. Mr. Mandell for the United States proposed to Mexico that a note appear in the investment chapter in some regard that "[f]*or greater certainty, an investor of Mexico or the United States may only submit a claim to arbitration under this Agreement as provided under Annex 11-C (Legacy Investment Claims and Pending Claims) or Annex 11-D (Mexico-United States Investment Disputes).*"[185] Shortly thereafter, Mr. Mandell circulated a draft Chapter 14 to his Mexican colleagues containing an Article 11.2(4) in nearly the same form as Article 14.2(4) would settle,[186] other than its eventual modification to account for two U.S.-

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182 Respondent's Reply, para. 50.

183 *See* Claimant's Counter-Memorial, para. 80 (discussing how such matters have been dealt with in separate instruments, annexes and main body provisions) (*citing* Letter from Shaun Donnelly, U.S. State Department, to Norman Garcia, Honduras Ministry of Industry and Commerce Regarding Relationship of CAFTA-DR to U.S.-Honduras BIT, 5 August 2004 (RL-87); United States-Republic of Panama Trade Promotion Agreement, signed 28 June 2007, ch. 1 (RL-86); European Commission, EU-Mexico agreement: The Agreement in Principle, announced 21 April 2018 (CLA-68)).

184 *See infra* sec. II.D.

185 Email from Lauren Mandell to Guillermo Malpica Soto, Samantha Atayde Arellano, Fernando Mayer de Leeuw, and Aristeo Lopez Sanchez dated 11 August 2018, attaching New Draft ISDS Annex Text (R-96).

186 Series of emails between Lauren Mandell, Guillermo Malpica Soto, Samantha Atayde Arellano, Fernando Mayer de Leeuw, and Aristeo Lopez Sanchez dated 11-12 August 2018, attaching Investment Chapter Text (R-98).

Mexico dispute annexes being agreed *i.e.*, dropping the phrase "*of Mexico or the United States*." No further commentary appears to have taken place on this point between the CUSMA Parties.

84. While it is obvious that Article 14.2(4) discusses the dispute resolution function of the annexes,[187] the context indicates nothing else, and was evidently motivated by the particular negotiations on how U.S. and Mexican investors would enjoy rights to make claims regarding CUSMA Chapter 14 obligations. In this context, the already largely settled Annex 14-C and its function regarding continuing rights of investors holding legacy investments is clearly an afterthought. Annex 14-C remains functionally a continuation of NAFTA investor dispute rights and NAFTA Party obligations. Article 14.2(4) does not explain that any further on its face, and there is no suggestion that it was intended to do so.

vi. The Afterthought of CUSMA Article 34.1 Did Not Need to Mention Annex 14-C's Continued Protection

85. Claimant's position in response to Respondent's Memorial was that "[n]*o inference can be drawn regarding the continued application of Chapter 11 substantive standards from the declaration regarding the continued application of procedural points from NAFTA in Article 34.1.*"[188] Respondent claims this "*misconstrues*" the point, and Respondent's position was not:

> *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.*[189]

86. But Respondent specifically and primarily relied upon the *TC Energy* Award to assert that Article 34.1 "'*did in fact agree on transitional provisions extending the life of other substantive provisions of NAFTA in Article 34.1 of USMCA,' but '[c]ritically, there is no language in Chapter 34, or anywhere else in [USMCA], indicating that the parties intended to maintain the*

187 Respondent's Reply, para. 52.
188 Claimant's Counter-Memorial, para. 81.
189 Respondent's Reply para. 83.

substantive provisions of Section A of Chapter 11 in respect of legacy investments.'"[190] This is simply wrong.[191] Which is why Respondent has dropped its claim that was the function of Article 34.1, nor does it rely upon the TC Energy majority for its position in the Reply.

87. Instead, Respondent again futilely repeats "*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*,"[192] and that as a matter of transition from NAFTA to CUSMA it would have been natural for it to appear in Article 34 of CUSMA if anywhere.[193] Stating repeatedly that Annex 14-C paragraph 1 carries over NAFTA obligations post-termination for a specific purpose, particularly in the interpretive context of Annex 14-C paragraph 3 and footnote 20 among other provisions,[194] has failed to garner Respondent's basic acknowledgment that it is Claimant's position those provisions, when properly interpreted, perform that role. Whether they achieve that is a separate question.

88. Indeed, it is now clear that Article 34.1 contained transitionary provisions for on-going work of existing NAFTA bodies because Canada suggested as much on 16 November 2018. Its proposal for Article 34.1 on that day discusses the same topics as in the final form it took.[195] Moreover, Canada stated at the time "[t]*he idea here is that by default the listed issues would continue*."[196]

89. Annex 14-C had been previously negotiated, and the chief negotiators between Canada and the United States had exchanged a term sheet on 28 September 2018 stating:

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190 Respondent's Memorial, para. 62 (quoting *TC Energy* Award, para. 153 (RL-60) [(RL-170)]) (emphasis added).

191 Claimant's Counter-Memorial, para. 81 and n.105.

192 Respondent's Reply, para. 83. Respondent has made virtually identical complaints: Respondent's Reply on Bifurcation, dated 8 July 2024, para. 19; Respondent's Memorial, paras. 62-63.

193 Respondent's Reply, para. 83.

194 Claimant's Memorial, paras. 223, 226-27; Claimant's Observations, paras. 26, 29, 31; Claimant's Rejoinder on the Request for Bifurcation, dated 29 July 2024 ("**Bifurcation Rejoinder**"), paras. 12-13; Claimant's Counter-Memorial, paras. 28-41, 46-47, 55-74.

195 Series of emails between Robert Brookfield, Maria Pagan, and others, dated 9-16 November 2018, attaching Comments to the Protocol (C-315).

196 *Id.*

"Canada agrees to 3-year grandfathering of ISDS."[197] The function and intention of Canada's proposal for Article 34.1 in November 2018 was to sustain dispute resolution bodies and administrative procedures created by NAFTA with on-going work. Investment arbitration tribunals are specifically bilateral creations between a State party and an investor. The on-going work of any of those investment arbitration tribunals created under the auspices of NAFTA Chapter 11 had already been dealt with by the insertion of paragraph 5 of Annex 14-C at least by April 2018 (to the extent that was even necessary).[198] Anything in the future regarding those arbitration bodies and its own scope was already addressed by Annex 14-C. There was no reason in mid-November 2018 for the issues dealt with in Annex 14-C months prior to receive alternative attention. To the extent there was, it is therefore Respondent's position now that it failed to address something it should have raised during the negotiations in response to the Canadian proposal. That is not credible.

90. Moreover, the history of the drafting of the Protocol also shows the treaty Parties did not understand that Article 34 had special status as a necessary place to discuss the continuation of any aspects of NAFTA. Canada circulated a draft Protocol text on 16 November 2018, the same day as its proposed Article 34.1 text.[199] This proposed an initial draft form of paragraph 1 of the Protocol which essentially had the text of CUSMA replace the text of NAFTA, rather than terminating NAFTA and approving a new treaty.

91. The United States then proposed nearly the form of what became paragraph 1 of the Protocol: *"Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those transitional provisions set forth in the USMCA that refer to provisions of the NAFTA."*[200] Mexico then proposed that *"transitional"* was unnecessary, with a comment: *"we propose to delete 'transitional' as there will be other*

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197 Email from Robert Lighthizer to Gerald Butts, dated 28 September 2018, attaching US-CAN Closing Term Sheet, at point 10 (R-48).

198 Email from Aristeo Lopez Sanchez to Maxim Berdichevsky, Lauren Mandell and others, dated 27 April 2018, attaching NAFTA claims draft text (C-321).

199 Series of correspondence between Robert Brookfield, Maria Pagan, and others, dated 9-16 November 2018, attaching Comments to the Protocol (C-315).

200 Series of emails between Robert Brookfield, Maria Pagan, and others, dated 9-20 November 2018, attaching Comments to the Protocol (C-322).

references to the NAFTA 94, for example Annex 2-C in Chapter 2."[201] A further circulated version of the Protocol from the United States delegation then included an approving comment from Canada and one apparently from the United States stating: "*I think it is clearer, and transitional provisions can appear anywhere in the text, not just necessarily in the Final Provisions*."[202]

92. Respondent's position of Article 34.1 is ahistorical and does not conform to plain meaning.

C. Treaty Parties Cannot Apply VCLT Article 31(3) to Modify Their Obligations Out of Regret

93. What the CUSMA Parties have done on the issue of the scope of Annex 14-C is to take positions in formal dispute resolution proceedings brought by investors, led by the United States, and not even "*consistently and repeatedly*."[203] Notwithstanding the initiation of NAFTA legacy investment claims against it in March 2023, Canada did not even affirmatively take a position until July 2024, immediately after the *TC Energy* Award was made public.[204] Respondent makes no attempt to point to any other record.

94. Ironically, having claimed that the *Feldman* interpretation of a separate treaty and temporal relationships between the treaty and the claims at issue was a "*distinction without a difference*,"[205] Respondent considers that Claimant's characterization that VCLT Article 31(3) "*invites*" subsequent agreements and practice to be "*taken into account*" as misleading.[206] Respondent itself notes that VCLT Article 31 gives "*primacy*" to the treaty text; and so while Article 31 as a general rule is a "*combined operation*,"[207] accounting for subsequent agreement

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201 Series of emails between Robert Brookfield, Maria Pagan, Samantha Atayde Arellano, and others, dated 9-21 November 2018, attaching Comments to the Protocol, cmt. A7 (C-323).

202 Series of emails between Robert Brookfield, Maria Pagan, Samantha Atayde Arellano, and others, dated 9-26 November 2018, attaching Comments to the Protocol, cmt. A6R6 (C-316).

203 Respondent's Reply, para. 90.

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

205 Respondent's Reply, n.30.

206 *Id.*, para. 92.

207 Draft Articles on the Law of Treaties with Commentaries, II Y.B. OF THE INT'L LAW COMMISSION, arts. 27 and 28, cmt. 8 (CLA-43).

and practice is not a licence to override text otherwise already understood in context. Challenging Claimant's characterisation in this regard is needlessly overwrought.

95. As to what actually is a meaningful agreement or practice, the submissions of disputing parties in the course of litigation are indeed of limited significance and do not qualify as subsequent practice for purposes of Article 31(3)(b) of the VCLT.[208] Respondent seeks to distinguish the cases in which tribunals have dismissed arguments made by parties in ongoing proceedings as irrelevant for purposes of Article 31(3)(b) of the VCLT.[209] The distinctions made by the Respondent are unconvincing, and indeed the circumstances of several cases are the same or very similar to the present.[210]

96. Tribunals have not merely dismissed these party arguments as unauthoritative under the particular circumstances of the cases before them but have also made general statements about the limited relevance of party arguments. For example:

> *We do not believe, however, that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.*[211]

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208 First Schreuer Expert Report, paras. 58-73.

209 Respondent's Reply, para. 93, n.153.

210 Respondent suggests there is a difference between Argentina pointing out that Spain took the same interpretive view as itself on the same treaty in another proceeding from Respondent here and the other CUSMA Parties making litigation submissions in these proceedings. There is nothing meaningfully different in that. *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction dated 17 June 2005, para. 47, n.12 (CS-58). Other examples were similar: *Urbaser S.A. and others v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, dated 19 December 2012, para. 51 (C5-62). In another case, the tribunal's description of "*isolated facts*" was nevertheless that EU states had consistently resisted intra-EU jurisdiction under the ECT and no ECT Contracting Party had ever intervened in favor of ECT jurisdiction in those arbitrations. The pattern was essentially the same as here and not considered meaningful under VCLT Article 31(3): *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, dated 6 August 2019, paras. 307-08(CS-57). Another tribunal did not consider submissions in a "*defensive brief*" as showing subsequent agreement or practice, and therefore the only way in which matters could be distinguished here is that the CUSMA Parties have submitted *amicus* briefs. But the CUSMA Parties never sought to actually prepare interpretive statements outside the context of defending against specific proceedings brought by investors, and did not act in a manner "*directed towards eoch other*." *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Jurisdiction, dated 25 May 2006, paras. 110-13 (CS-S9).

211 *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction dated 17 June 200S, para. 47, n.12 (CS-S8).

97. And that may even be so in an investment arbitration where the other treaty party to a bilateral instrument intervenes, as recently found:

> *The submissions made by Costa Rica and Canada in this arbitration reflect legal arguments put forward in the context of this dispute to advance their respective interests. Although they happen to coincide, they do not reflect an* agreement *as just described over the interpretation of the BIT. Even if the Tribunal could infer an "agreement" from the Contracting States' submissions, quod non, this agreement would postdate the commencement of this arbitration and the Tribunal could not take it into consideration in favour of one litigant to the detriment of the other without incurring the risk of breaching the latter's due process rights.*[212]

98. Others have cautioned against understanding even an acknowledged change of mind by the treaty parties as functional for purposes of interpreting the original treaty form, rather than modifying it:

> *Not even if this was the interpretation given to the clause today by the United States would this necessarily mean that such interpretation governs the Treaty. What is relevant is the intention the parties had in signing the Treaty and this does not confirm the self-judging interpretation. Even if this interpretation were shared today by both parties to the Treaty, it would still not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries.*[213]

99. The submissions of the NAFTA Parties[214] in this proceeding are not additive. They do not show a prior agreement.

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212 *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award, dated 3 June 2021, para. 339 (CS-61).

213 *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, dated 22 May 2007, para. 337 (CS-56).

214 Strictly, these submissions are not in compliance with NAFTA Article 1128 insofar as they discuss Annex 14-C and CUSMA generally, not NAFTA. They technically also therefore do not comply with paragraph 21.1 of Procedural Order No. 1. Nevertheless, consideration on whether the submissions should have been admitted according to paragraph 22.1 of Procedural Order No. 1 would be an unnecessary distraction, particularly as the NAFTA Parties are otherwise entitled to attend any hearings and receive the record. Claimant has therefore chosen not to object to those submissions on a technicality.

100. Indeed, the Mexico submission makes similar dismissive remarks regarding the Protocol's acknowledgment of the continuation of NAFTA obligations when it was its own delegation that sought to revise the text of the Protocol because transitionary aspects could be anywhere in CUSMA.[215] Mexico also even goes so far as to claim, without providing any *travaux préparatoires* or other evidence with its submission, that the "*NAFTA Parties were conscious*" of VCLT Article 59(1) and 70, and that they would therefore have included some further language which confirmed Claimant's interpretation of Annex 14-C.[216] Mexico makes no comment on its EU Agreement in Principle or Side Letter with Australia which it was negotiating at the same time as CUSMA and which explicitly contained language not in Annex 14-C which would have resolved this interpretive dispute in its favour now; for example "*the claim arises from an alleged breach of that agreement that took place prior to the date . . . the agreement ceases to have effect pursuant to paragraph 1 prior to the date of entry into force of this Agreement*."[217] And of course footnote 20 does say that Chapter 11, Section A "*shall apply*" to claims under paragraph 1. Mexico also, being aware as it should of the negotiating history of footnote 21,[218] does not comment on it and even offers theories of the footnote Respondent does not.[219]

101. Canada's submission forgets that it started the process of establishing the Protocol and its own agreement to the fact that survival of NAFTA provisions was contemplated by the Protocol's final form and could be anywhere in CUSMA,[220] and that Article 34.1 was its late proposed addition to deal with certain institutional matters arising from NAFTA standing bodies long after it had agreed to Annex 14-C.[221] Canada's position on Article 14.2(3) is convoluted even though it acknowledges that it has no stake in CUSMA Chapter 14 investor

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215 *See* Non-Disputing State Party Submission of the United Mexican States pursuant to NAFTA Article 1128, dated 15 January 2024, para. 8; Series of emails between Robert Brookfield, Maria Pagan, Samantha Atayde Arellano, and others, dated 9-21 November 2018, attaching Comments to the Protocol, cmt. A7 (C-323).

216 *Id.* paras. 11-12.

217 European Commission, EU-Mexico agreement: The Agreement in Principle, announced 21 April 2018, art. 22(3)(a) (CLA-68); *see further infra* sec. II.D.

218 *See supra* paras. 76-78.

219 Non-Disputing State Party Submission of the United Mexican States pursuant to NAFTA Article 1128, dated 15 January 2024, para. 25 (C-323).

220 *Id.*, paras. 5, 8; *compare* sec. II.B.vi.

221 *Id.* para. 6; *compare* sec. II.B.vi.

arbitration in any event.[222] It complains that Claimant's interpretation would "*run counter to the core object and purpose of CUSMA: to supersede the NAFTA*"[223] even though it knows perfectly well it agreed to "*3-year grandfathering of ISDS*"[224] and to not entirely supersede NAFTA in that regard. Canada no more than Mexico acknowledges its comparative treaty drafting.[225]

102. Neither submission points to a single public declaration that Claimant's Annex 14-C interpretation is wrong outside litigation pleadings any more than Respondent does.

103. By comparison to the submissions offered here, [redacted] that Annex 14-C would have, at least for Mexico, exactly the consequences Mr. Mandell publicly asserted after he left USTR:[226]

[redacted][227]

222 Non-Disputing State Party Submission of the Government of Canada pursuant to NAFTA Article 1128, dated 15 January 2024, para. 16(C-323).

223 *Id.*

224 Email from Robert Lighthizer to Gerald Butts, dated 28 September 2018, attaching US-Can Closing Term Sheet, point 10 (R-48); *see* also Alvarez Dissent, paras. 21-23 (RL-171).

225 *See infra* sec. II.D.

226 WilmerHale Alert, Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims, dated 18 March 2021 (C-251).

227 [redacted]

104. At root, the CUSMA Parties' conduct is manifestly a series of decisions to try to amend Annex 14-C and avoid liability, not an exercise in joint interpretation. And it is too late to modify the provisions for on-foot proceedings such as the present – whatever rights for Claimant and obligations for Respondent to honour under Annex 14-C had already accrued under VCLT Article 70. It is also too late and redundant for the future of any further claims since the operation of Annex 14-C paragraph 3 has long since closed the deadline for claims for breach of NAFTA Chapter 11 obligations regarding harms to investors relating to legacy investments.

105. In this regard, Claimant recalls the caution of Sir Franklin Berman:

> [A tribunal] *can clearly not discount assertions put forward in argument by the Respondent as to the intentions behind the BIT and its negotiation (since that is authentic information which may be of importance), but it must at the same time treat them with all due caution, in the interests of its overriding duty to treat the parties to the arbitration on a basis of complete equality (since it is also possible that assertions by the Respondent may be incomplete, misleading or even self-serving). In other words, it must be very rarely indeed that an ICSID Tribunal, confronted with a disputed issue of interpretation of a BIT, will accept at its face value the assertions of the Respondent as to its meaning without some sufficient objective evidence to back them up.*[228]

106. The Tribunal will recall that Respondent and the CUSMA Parties have had ample opportunity to be candid. The CUSMA Parties offer nothing objective to avoid jurisdiction and potential liability on a good faith understanding of their Annex 14-C commitment.

D. Respondent's Position on Comparative Treaty Practice is Disingenuous

107. Respondent continues to primarily rely upon survival clauses in bilateral investment treaties.[229] It remains the case that language is needed to deviate from the default

[redacted]

[228] *Empresas Lucchetti, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment: Dissenting Opinion of Sir Frankin Berman, dated 13 August 2007, para. 9 (emphasis added) (CLA-101).

[229] Respondent's Reply, paras. 109-12.

provisions of VCLT Article 70 within a treaty itself.[230] It is also true that NAFTA had no survival clause, and there was nothing that the CUSMA Parties needed to say to let NAFTA Chapter 11 investor arbitration naturally lapse by wholesale termination and replacement of NAFTA, points which Claimant has not contested. Nevertheless, the CUSMA Parties chose to include Annex 14-C. They chose to include footnote 20. In that circumstance, if they wanted to ensure that Annex 14-C paragraph 1 did not create obligations regarding the CUSMA Parties' future conduct, as Claimant has said since its Memorial the primary VCLT rule they needed to bear in mind was Article 28:[231] that placed the onus on including language expressing that paragraph 1 could only refer to past conduct. They chose to include a paragraph which fundamentally extended the life of Chapter 11 of NAFTA, and two of them at least had given thought to primary text to limit the scope of a continuation of investor-State dispute resolution from a prior treaty to past conduct alone (as will be discussed further below).

108. Curiously, Respondent claims that other than its continued inappropriate comparison to survival clauses, "*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.*"[232] These are distinguished from the Canada and Mexico agreements Claimant raised because Respondent has now admitted the U.S. examples create double regimes, and given the other treaties do not, they are irrelevant.[233] But the relevance of all of the treaties is the same: how they treat the continued application of obligations and dispute resolution procedures for investors under a prior treaty while creating new such obligations and dispute resolution procedures, which all of them do.

109. As to its own treaties, Respondent notes that they take a different approach from Annex 14-C, and seeks to prove up its position by the fact the Protocol superseded NAFTA with

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230 VCLT, art. 70 ("*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: (a) releases the parties from any obligation further to perform the treaty;*") (emphasis added) (CLA-42).

231 Claimant's Memorial, paras. 224-25.

232 Respondent's Reply, para. 113.

233 *Id.*, para. 115.

CUSMA.[234] Of course, as discussed above,[235] the text of Annex 14-C was all but settled by November 2018 when the Protocol and the exact mechanics of "swapping out" CUSMA for NAFTA were being discussed.

110. More particularly, Respondent suggests that Claimant "*argu*[ed these free trade agreements] *show the United States is willing to tolerate a 'double regime' for investments in some circumstances.*"[236] Claimant did not attempt to argue anything. Respondent made an argument, repeatedly,[237] that Claimant's interpretation of Annex 14-C leads to an unacceptable policy outcome of double regimes. No qualification was offered that was unacceptable particularly in the circumstances of the replacement of NAFTA with CUSMA, or that it could be distinguished. Claimant pointed out the fact that Respondent has created such double regimes at least three times in recent history around the time of negotiating CUSMA in the very treaties Respondent had raised.[238] That undermines Respondent's argument on double regimes as a matter of fact.

111. Respondent's defense of its position now is to make two arguments purportedly justifying those treaties making double regimes while it is unacceptable to interpret CUSMA to do so (even though, as discussed,[239] Claimant's interpretation does not lead to that outcome in any meaningful way in any event). The arguments are mere assertion – no further evidence of *travaux préparatoires* about any of the treaties is offered to explain differential behaviour or motive.

112. Respondent's first excuse is inherently circular in any event: because the instruments are drafted to state that the bilateral treaties specifically have their dispute resolution provisions suspended except in specific ways for ten years but the prior treaties otherwise remained in force "*whereas here the USMCA Parties were just as clear that the legacy*

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234 *Id.*, para. 114.
235 *See supra* sec. II.B.vi.
236 Respondent's Reply, n.185.
237 Respondent's Memorial, n.41 and paras. 49, 73, 78.
238 Claimant's Counter-Memorial, paras. 100-03.
239 *See supra* sec. II.B.iii.

agreement (i.e., the NAFTA) would terminate when the USMCA entered into force"[240] that supports its interpretation of paragraph 1 of Annex 14-C. This is just Respondent's endlessly repeated notion that the Protocol gave no room for NAFTA provisions to have continued force, which is wrong and, as discussed above,[241] is obviously contrary to the understanding of negotiators drafting its text.

113. The second notion is now to introduce an actual claimed distinction between those free trade agreements and CUSMA: that a double regime was acceptable in those cases because the other treaties were overlaying obligations from an investment chapter in a wider free trade agreement onto obligations from a bilateral investment treaty, and "*the potential overlap between regimes was much broader*"[242] for CUSMA. This is essentially Respondent's Annex 14-C footnote 20 argument, which is again just disingenuous.

114. As to the Canada and Mexico free trade agreements, Respondent introduces a new point of their alleged irrelevancy by noting that the agreements Claimant has raised replaced bilateral investment treaties which habitually involved survival clauses.[243]

115. The distinction is misguided. Take the EU-Mexico Agreement in Principle. One example of a survival clause that would be affected by the agreement is the Mexico-Spain bilateral investment treaty, which at Article XXIII states:

> *This Agreement shall remain in force for 10 years. Thereafter, it shall continue to remain in force for 12 months from the date when either of the Contracting Parties has notified the other in writing of its intention to terminate it. The provisions of this Agreement shall remain in force with regard to investments made while it was in force for a period of 10 years from the date of termination and without prejudice to the subsequent application of the general rules of international law.*[244]

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240 Respondent's Reply, n.185; *see also id.*, para. 113.

241 *See supra* sec. II.B.vi.

242 Respondent's Reply, n.185.

243 *Id.*, para. 117.

244 Agreement on the Promotion and Reciprocal Protection of Investments Between the United Mexican States and the Kingdom of Spain, 10 October 2006, 2553 U.N.T.S. 304 (RL-141).

116. This clause acknowledges a point of general application: "*the general rules of international law*" which may subsequently apply. That naturally includes application of VCLT Articles 39, 54, and 70 which broadly acknowledge treaty parties' right to agree to modify treaties and mutually consent to end them otherwise than in accordance with their terms.[245] This was a standing survival clause with consequences for unilateral notification of termination of treaty by one party, and which acknowledged on its face under general principles of international law its consequences could subsequently be altered by the parties. And that was the goal of the Agreement in Principle. They could quite simply have left the matter at:

> *On the date of entry into force of this Agreement, the agreements between Member States of the European Union and Mexico listed in Annex YY (Agreements between the Member States of the European Union and Mexico) including the rights and obligations derived therefrom shall cease to have effect and shall be replaced and superseded by this Agreement.*[246]

117. In this example, that overrode Article XXIII as much as the rest of the treaty since:

a. the termination of a treaty may happen "*at any time by consent of all the parties after consultation with the other contracting States*"[247] as well as by its own terms, and

b. "[u]*nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention*" disposes of treaty obligations.[248]

118. Although the treaty had originally provided otherwise, the parties had now consented to modify that aspect of the agreement itself by mutual agreement that the whole treaty "*shall cease to have effect and shall be replaced and superseded*" by another, which made Article XXIII irrelevant as its consequences responded to a unilateral

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245 VCLT (CLA-42).

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

247 VCLT, art. 54 (CLA-42).

248 *Id.*, art. 70.

notification.[249] The parties then chose to sustain the application of the treaties they were terminating *en masse* in a particular way whenever it may have been relevant to their original terms:

> *3. Notwithstanding paragraphs 1 and 2, a claim may be submitted pursuant to an agreement listed in Annex Y (Agreements between the Member States of the European Union and Mexico), in accordance with the rules and procedures established in that agreement, provided that:*
>
> *(a) the claim arises from an alleged breach of that agreement that took place prior to the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement ceases to have effect pursuant to paragraph 1 prior to the date of entry into force of this Agreement . . .* [250]

119. The function and purpose of paragraph 1 included extinguishing survival clauses by replacing and superseding the treaties, as was the treaty parties' right to do as an alternative to termination of treaty obligations on their own the terms of, for example, Article XXIII of the Mexico-Spain bilateral investment treaty. Thus "*the claim arises from an alleged breach of that agreement*" above must be doing the same work as "*alleging breach of an obligation under: (o) Section A of Chapter 11 (Investment) of NAFTA 1994*" in paragraph 1 of Annex 14-C. Yet, the treaty parties added specific language "*that took place prior to the dote* [...] *the agreement ceases to have effect pursuant to paragraph 1 prior to the date of entry into force of this Agreement*." According to Respondent's alleged natural reading of Annex 14-C paragraph 1, in the context here "*the claim arises from an alleged breach of that agreement*" could not have meant anything else but "*took place prior to the date* [...] *the ogreement ceases to have effect pursuant to paragraph 1 prior to the date of entry into force of this Agreement*." The extra phrasing was not "*necessary to address a succession problem that was fundamentally different from the situation*

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[249] Other forms of survival clause will operate to end a treaty other than a survival period unless one of the parties acts.

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

that confronted the USMCA Parties in terminating the NAFTA."[251] Paragraph 1 had already dealt with any succession issue in predecessor treaties by entirely overriding them.

120. And this is not to be dismissed as peculiar to Mexican drafting. CETA Article 30.8 paragraph 1 also stated that agreements would be "*replaced and superseded*" by its entry into force,[252] and:

> *Notwithstanding paragraph 1, a claim may be submitted under an agreement listed in Annex 30-A in accordance with the rules and procedures established in the agreement if:*
>
> *(a) the treatment that is object of the claim was accorded when the agreement was not terminated; and*
>
> *(b) no more than three years have elapsed since the date of termination of the agreement.*[253]

121. Again, according to Respondent's interpretation of paragraphs 1 and 3 of Annex 14-C, if one were to strike sub-paragraph (a) of the above, it must have the same meaning, since "*a claim* [...] *submitted under an agreement listed in Annex 30-A in accordance with the rules and procedures established in the agreement*" could inherently only validly be regarding "*treatment* [. . .] *accorded when the ogreement was not terminated.*" Any treaty survival clauses had been "*replaced and superseded*" in their termination as much as the rest of the treaties.

122. Respondent simply ignores the above two instruments for its argument entirely. Instead, it focuses on the other three examples Claimant raised. The Canada-Peru free trade agreement states:

> *1. The Agreement Between Canada and the Republic of Peru for the Promotion and Protection af Investments done in Hanoi on 14 November 2006 (the "FIPA") shall be suspended from the date of entry into force of this Agreement and until such time as this Agreement is no longer in force.*

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251 Respondent's Reply, para. 117.

252 Canada's Comprehensive Economic and Trade Agreement (CLA-89).

253 *Id.*

> *2. Notwithstanding paragraph 1, the FIPA shall remain operative for a period of fifteen years after the entry into force of this Agreement for the purpose of any breach of the obligations of the FIPA that occurred before the entry into force of this Agreement. During this period the right of an investor of a Party to submit a claim to arbitration concerning such a breach shall be governed by the relevant provisions of the FIPA.*[254]

123. Respondent is correct that this is cast in slightly different terms from the EU-Mexico Agreement in Principle and CETA, in that paragraph 2 states the FIPA "*shall remain operative*" for a purpose.[255] But it remains instructive that Canada and Peru cast the following language as "*any breach of the obligations of the FIPA that occurred before the entry into force of this Agreement*." Given the suspension of the FIPA agreed in paragraph 1 here, on Respondent's interpretation of paragraph 1 of Annex 14-C it remains the case "*that occurred before the entry into force of this Agreement*" is redundant language and paragraph 2 would have been more simply rendered as "*Notwithstanding paragraph 1, the FIPA shall remain operative for a period of fifteen years after the entry into force of this Agreement for the purpose of an investor of a Party to submit a claim to arbitration concerning a breach of the obligations of the FIPA*." Yet a longer and explicitly backward-looking formulation was used just as in Canada's approach with CETA.

124. Ultimately, Canada and Mexico included language in these transitionary instruments to explicitly ensure the continuation of the investor arbitration rights and substantive obligations of the prior treaties was specifically backward-looking: references to "*breach of that agreement*" or "*breach of the obligations*" occurring "*prior to*" or "*before*" entry into force of a replacing treaty, or regarding treatment "*when the agreement was not terminated*." In two cases they used language which was otherwise very close to Annex 14-C. This is all entirely understandable given VCLT Article 28.

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254 Free Trade Agreement Between Canada and the Republic of Peru, signed 29, March 2008 entered into force 1 August 2009 (CLA-72) (emphasis added).

255 Respondent's Reply, para. 118.

125. Moreover:

a. CETA was signed on 30 October 2016;[256]

b. The EU-Mexico Agreement in Principle was settled on 21 April 2018;[257] and

c. The other three instruments Claimant has raised were finalised in 2008 and 2010 (for Canada) and 2018 (for Mexico).[258]

126. In short, when the United States proffered the original Annex 11-D draft (the precursor version to Annex 14-C) in October 2017 and discussed it with the other CUSMA Parties through mid-2018, one of the other two CUSMA Parties was in the midst of similar treaty re-negotiation considerations and the other had concluded similar ones in recent years. There is no evidence either of them sought to make the same clarification to the text as they did five times between them in these other cases while repeatedly speaking of grandfathering and transitioning NAFTA investor arbitration[259] and ultimately agreeing to CUSMA Annex 14-C. It would have been very easily done, and unequivocally resolved this issue in their and Respondent's favour now. As noted above, the other CUSMA Parties' submissions in these proceedings are generic and offer no explanation in this regard, and even contradict the negotiation record, despite their opportunity to comment on **Section II.F.i** of Claimant's Counter-Memorial.

127. These absences of effort in the CUSMA negotiations, and comment in these proceedings, speak volumes in favour of Claimant's position.

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256 Canada and EU sign historic trade agreement during EU-Canada Summit - Prime Minister of Canada (C-319).

257 Modernisation of the EU-Mexico Global Agreement (C-320).

258 Free Trade Agreement Between Canada and the Republic of Panama, signed 14 May 2010, *entered into force* 1 April 2013 (CLA-73); Free Trade Agreement Between Government of Canada and the Republic of Peru, signed 29 May 2008, *entered into force* 1 August 2009 (CLA-72); Mexico-Australia side letter dated 8 March 2018 in connection with the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CLA-90).

259 *See, e.g.,* Joint Report on the Round, dated 24 February 2018 (R-83); Email from Vincent Boulanger to Aristeo Lopez, Lauren Mandell, and Guillermo Malpica, dated 3 May 2018, attaching Consolidated Investment Chapter Draft Texts (C-343); Email from Robert Lighthizer to Gerald Butts, dated 28 September 2018, attaching US-Can Closing Term Sheet, point 10 (R-48).

E. Other Negotiation Points Get Respondent Nowhere

128. The drafting history of paragraphs 3, 5, and 6 of Annex 14-C late in the negotiations in November 2018 does not represent an opportunity for other aspects of Annex 14-C to be clarified one way or another.[260] There was an ever-present opportunity for any of the CUSMA Parties to revisit any of its draft text until it was concluded. The discussion regarding these paragraphs of Annex 14-C in November 2018 was a result of discussions on the Protocol, which was only introduced in the middle of November 2018. Annex 14-C paragraph 3 in particular was always written as a 3 year cut off, originally contemplated as "*after [the date of entry into force of NAFTA 2.0],*"[261] but how it should be described would be dependent on how CUSMA would override NAFTA (whether, as in Canada's original proposal for the Protocol it would essentially sustain NAFTA as a treaty but entirely replace its text[262] or, as in the Protocol's final form, CUSMA would "*replace*" and "*supersede*" it). It was possible while such decisions were underway about those mechanics, for paragraph 3 to become pathological if not freshly scrutinized. That the CUSMA Parties therefore revisited it at this time makes sense.

129. Respondent stretches any distinction between comments in the US-Canada term sheet from September 2018.[263] Certain issues were indeed referred to with the phrase "*maintain status quo from NAFTA*." Another was "*retain NAFTA 1.0 cultural exception with the following edits*." This is compared to a pithy "*3-year grandfathering of ISDS*." These are all formulations that something about NAFTA was agreed to continue. The pertinent one in short form is easily understood as the entire system of NAFTA Chapter 11 being continued, since it refers to the general concept of investor-State dispute settlement. It does not say for which claims; nor does it say for what investments (which of course was circumscribed by the "*legacy investment*" definition). It was the American original position after all that the Annex be titled as regarding a grandfathered class of legacy investments, not claims. And that original annex text proposal was

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260 Respondent's Reply, paras. 103-07.

261 Investment (Section B Only) (uploaded to MAX.gov on or around October 11, 2017) (R-37).

262 Series of emails between Robert Brookfield, Maria Pagan, and others, dated 9-16 November 2018, attaching Comments to the Protocol (C-315).

263 Respondent's Reply, para. 108 (citing US-Can Closing Term Sheet, attached to Email from Robert Lighthizer to G Butts, dated 28 September 2018 (R-48)).

tied to an opt-in system for investor arbitration protection for Chapter 14 obligations that only made sense of the annex if it was fully grandfathered NAFTA Chapter 11 protection for legacy investments. The pertinent language of the annex did not change while the Parties' thinking developed on whether and how to include investor arbitration protection for Chapter 14 obligations. The subsequent changes in Annex 14-C explain the change in the title as new issues were addressed in the Annex. As discussed above,[264] there is no evidence Canada understood Annex 14-C as anything other than a general grandfather clause for Chapter 11 regarding legacy investments.

F. Respondent's Denunciation of CUSMA's Actual Negotiators Lacks Credibility

130. Almost universally the record of the CUSMA Chapter 14 negotiations demonstrates that where someone speaks for the United States it is Mr. Lauren Mandell. Indeed, other negotiators for the United States were rarely even copied on communications regarding Chapter 14 drafting progress and negotiation in communications between the CUSMA Parties. Mr. Mandell forwarded, discussed, and edited Annex 14-C. He answered internal queries about it. He is clearly its author. Accordingly, significant weight should be accorded by this Tribunal in considering his evidence.

131. Claimant has previously noted Mr. Mandell's March 2021 unequivocal comments on Annex 14-C's function and purpose in favour of Claimant's interpretation of CUSMA Annex 14-C.[265] Mr. Mandell was not giving just his recollections,[266] or even recollections intended to reflect Respondent's negotiating team as Respondent appears to now concede,[267] but recollections of the negotiated position "*we*" reached and registered concern that "*Are [sic] friends across the border oren't questioning this, are they?*"[268] Respondent does not address those framing remarks.

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264 *See supra* para. 56.

265 Claimant's Memorial, paras. 239-44; Claimant's Counter-Memorial, sec. II.F.ii.

266 *C.f.* Respondent's Memorial, paras. 90-91.

267 Respondent's Reply, para. 121.

268 Series of emails between Lauren Mandell and Khalil Gharbieh, dated 2 March 2021 (R-49).

132. Mr. Mandell may have thought that Annex 14-C paragraph 1 was not perfectly drafted. According to Respondent that is no great surprise since clarifications "*for greater certainty*" are replete in Chapter 14 and allegedly are there merely to stave off confusion regarding other drafting. But Mr. Mandell is entirely clear about the goal of Annex 14-C paragraph 1. He also unequivocally raises multiple points of interpretation and context regarding its text and surrounding text – interpretations that arose naturally to Claimant as well before it was aware of the email[269] which was only revealed when it was reproduced in the public version of the *TC Energy* Dissent.

133. Respondent's criticism of Mr. Mandell's comments on paragraph 3 of Annex 14-C as compared to the NAFTA Article 1116(2)/1117(2) limitations relies again on the *TC Energy* majority that was incorrect.[270] Regarding prior conduct, NAFTA Chapter 11, Section B had not left an entirely open-ended limitation period, and Respondent relies upon an example of a claimant alleging difficulties of knowledge which the relevant tribunal did not find credible.[271] Indeed, it is generally difficult to conceive of conduct in violation of the kinds of protection for investment in Chapter 11 of NAFTA about which the conduct and damage could go unnoticed for any serious length of time. And so indeed a policy decision to definitively end a grandfather period after 3 years makes sense where the protection against future conduct, but only for a limited time, is the goal of the annex, and was part of the structure from the outset where the draft made no sense otherwise.

134. The criticism of Mr. Mandell's "*wrong triggering event*"[272] is not credible. Mr. Mandell discusses his analysis as "*after USMCA entry into force*."[273] Technically, as paragraph 3 was finalised it was indeed drafted as closing off application of paragraph 1 according to a clock

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

270 Respondent's Reply, paras. 124-126 (citing *TC Energy*, para. 158); *see* Claimant's Counter-Memorial, para. 45.

271 Respondent's Reply para. 125 (citing *Tennant Energy, LLC v. Government of Canodo*, NAFTA/PCA Case No. 2018-54, Final Award, dated 25 October 2022, paras. 319-35 (RL-157)).

272 *Id.*, para. 127.

273 Series of emails between Lauren Mandell and Khalil Gharbieh, dated 2 March 2021 (R-49).

after NAFTA terminated. But as Respondent discusses itself a few pages earlier in its Reply,[274] this issue was debated in November 2018, and the timing of those events was merged. In 2021, they were analytically the same moment in the past.

135. As demonstrated above,[275] Mr. Mandell very well should have known the point of footnote 21,[276] since he introduced it and edited it.

136. Mr. Mandell's remarks do also discuss the title of the Annex, and the textual structure of paragraph 1:[277]

> *I think it's also significant that the title of the annex -- and the key concept in the annex -- references legacy investments, not legacy measures. If we were focused only on legacy measures, it would have been easy to expressly limit paragraph 1 accordingly, but we didn't.*[278]

137. Claimant has noted above the original title of the draft Annex 11-D, explanation for its evolution, and import of "*legacy investment*" in both definition and structure of paragraph 1.[279] And as also noted above, it was easy to expressly limit paragraph 1 as two of the CUSMA Parties had done it several times before.[280]

138. As *TC Energy* exhibit C-143 has not been produced, the *TC Energy* Dissent's paragraphs 25 to 32 remain redacted. It appears that C-143 may contain commentary on the position of other CUSMA Parties, and Claimant notes the Dissent's position that the discourse of the exhibit and its interaction with Mr. Mandell's known comments in March 2021 "*is consistent with and confirms the description and discussion of the proposed text of Annex 14-C described above at paragraphs 14 to 18.*"[281] It is now clear that the discussion at Dissent paragraphs 14-18 with regard to similar remarks Mr. Mandell made about the function of Annex 14-C during the

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274 *See* Respondent's Reply, paras. 103-07. *See supra* sec. II.E for Claimant's comments thereon.
275 *See supra* paras. 76-78.
276 *C.f.* Respondent's Reply, para. 128.
277 *C.f. Id.*, para. 122.
278 Series of emails between Lauren Mandell and Khalil Gharbieh, dated 2 March 2021 (R-49).
279 *See generally supra*, sec. II.A.ii and II.B.ii.
280 *See supra* sec. II.D.
281 Alvarez Dissent, para. 32 (RL-171).

negotiation process is fair. And that the *TC Energy* majority was just as errantly dismissive of those.

139. As to Mr. Smith Ramos, Mexico's senior CUSMA negotiator, his testimony is clear, and consistent with the record set out in favour of Claimant's position in this Rejoinder.[282] Respondent's criticism that the extract of his testimony available to Claimant does not directly analyse the text of Annex 14-C[283] does not change that.

III. THE TRIBUNAL'S JURISDICTION *RATIONE MATERIAE*

140. Respondent prefaces its second argument on jurisdiction *ratione materiae* with a series of bullets that purport to summarize various "*facts*" upon which the Parties allegedly agree. This exercise is unproductive and misleading and only serves to highlight Respondent's persistent[284] mischaracterization of the facts and their implications, its propensity to distort the record, and its repeated misrepresentation of Claimant's arguments. The Tribunal should consider this, and all of Respondent's characterizations of the evidence and Claimant's positions, with caution.

141. As demonstrated in its prior submissions, Claimant's interests in the Keystone XL Project constitute protected investments under NAFTA Article 1139 "*investment*" categories (a), (e), (f), and (h).[285] APMC's interests in the enterprises and economic activity in the United States were part of an integrated Project in which APMC's [redacted] Respondent attempts to

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282 *Cyrus Capital Partners, L.P. Contrarian Capital Management, LLC v. United Mexican States,* ICSID Case No. ARB/23/33, Claimants' Counter-Memorial on Jurisdiction, dated 29 August 2024, paras. 232-33 (citing Witness Statement-Kenneth Smith Ramos-Counter-Memorial on Jurisdiction) (C-297).

283 Respondent's Reply, para. 129.

284 *See* Claimant's Counter-Memorial, para. 115 (noting that Respondent's Memorial does this as well).

285 *See generally* Claimant's Memorial, sec. II.C, IV.A; Claimant's Counter-Memorial, sec. III.

286 Claimant's Memorial, para. 206; Claimant's Counter-Memorial, para. 124 [redacted] Claimant's Observations, para. 45; Begley Witness Statement, para. 24 [redacted]

avoid the fundamentally integrated nature of the Project by mischaracterizing Claimant's investment activities in the United States as "*temporary*."[287] The notion of APMC's investment being "*temporary*" is only correct in the broadest sense: APMC's investment in the Keystone XL Project was planned to conclude upon [redacted] which became impossible due to the Revocation [redacted] Therefore, any temporality with respect to APMC's investment is irrelevant to the timeline at issue. As Claimant has already explained and further details in the Sections below, following the activities and to an expectation of gain and risk of loss tied to the United States.[289]

A. Respondent's Attempt to Alter NAFTA Article 1139's "Exhaustive" Definition of Investment is Irrelevant

142. Respondent's Reply continues to advance arguments about NAFTA Article 1139's definition of "*investment*" that are plainly contradicted by the actual text of the treaty, rely on inconsistent application of VCLT Article 31, and reference inapposite legal authority.[290] Respondent's efforts in this regard demonstrate its willingness to advance *any* argument – regardless of its veracity – that might help it avoid scrutiny of its wrongful acts.

143. By Respondent's own admission, Article 1139 contains an "*exhaustive list of assets and interests that may constitute an 'investment' for purposes of Chapter 11.*"[291] And – at least in the context of its jurisdiction *ratione temporis* arguments – Respondent has insisted that VCLT

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287 Respondent's Reply, para. 138.

288 Claimant's Memorial, para. 86; Begley Witness Statement, [redacted]; Investment Agreement, dated 31 March 2020, [redacted] (C-110); [redacted]

289 *See* Claimant's Counter-Memorial, para. 120; Claimant's Memorial, paras. 81-84, 206-09; Begley Witness Statement, para. 24; [redacted]

290 *See also* Claimant's Counter-Memorial, paras. 121-24.

291 Respondent's Memorial, para. 102.

Article 31 "*gives primacy to the treaty text*," and that text which has plain meaning *must* be respected.[292] Article 1139 says, without preamble of chapeau: "*investment means*." In other words, the treaty is plain on its face. However, for purposes of its jurisdiction *ratione materiae* objection, Respondent ignores its prior VCLT Article 31 arguments, instead relying on one authority over another to undermine VCLT article 31(4),[293] and repeats "*hallmark characteristics*"[294] that it asserts must be wedged in to Article 1139: the "*commitment of capital*", "*the expectation of gain or profit*" and the "*assumption of risk.*"[295]

144. Respondent knows full well that these "*hallmark characteristics*" are not required, as it specifically introduced such language as a chapeau to the definition of an "*investment*" in CUSMA Chapter 14,[296] but in Annex 14-C made no attempt to add such stipulation to the concept of a "*legacy investment*." Indeed, the opposite point is true: the CUSMA Parties made clear that "*investment*" in that Annex should be interpreted following NAFTA Article 1139.[297] None of the CUSMA Parties ever tried to disturb that in the negotiations, although they made various efforts regarding the formulation of "*investment*" for Chapter 14 generally.[298] Respondent now tries to

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[292] *See* Respondent's Reply, para. 11 ("[C]*ustomary international law principles of treaty interpretation reflected in VCLT Article 31 give primacy to the treaty text*.").

[293] *Id.*, paras. 136-37 (comparing *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award dated 12 January 2011, para. 82 (RL-29) and *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Decision on Jurisdiction and Liability dated 4 November 2024, para. 245 (RL-162)). As to Respondent's continued reliance on *Ramak* and other authorities (Reply, paras. 135-36 and citations therein), the debates and inconsistencies of general discourse regarding other treaty definitions of "*investment*" and ICSID arbitration analyses are not very meaningful to the specific task of approaching NAFTA Article 1139, particularly in a non-ICSID context. *See further* Claimant's Counter-Memorial, paras. 121-22 and citations therein.

[294] Respondent's Reply, paras. 134-38.

[295] *Id.*, para. 136 (quoting Agreement Between the United States of America, the United Mexican States, and Canada, art. 14.1 (R-2) ("*Article 1139 specifically provides an exhaustive list of the categories of 'investment' that are protected by Chapter 11. 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 it clear that far 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*.') (emphasis added) (internal citations omitted).

[296] *See, e.g.*, Draft of Investment Chapter uploaded to MAX.gov, last edited 25 September 2017 (R-65).

[297] Canada-United States-Mexico Agreement, 1 July 2020, Annex 14-C, sec. 6(b) (CLA-40).

[298] *See, e.g.*, Draft of Investment Chapter uploaded to MAX.gov, last edited 17 October 2017 (R-71); Draft of Investment Chapter uploaded to MAX.gov, last edited 28 February 2018 (R-84); Draft of Investment Chapter uploaded to MAX.gov, last edited 17 May 2018 (progressing language on definitions of "investment" in Chapter 14) (R-92).

have its argument both ways by reading additional requirements into Article 1139 that the CUSMA Parties chose not to include.[299]

145. These efforts are nonetheless irrelevant because Claimant's interests in the Keystone XL Project satisfy even Respondent's distorted version of "*investment*", as will – once again – be variously reiterated below.

B. Claimant's Interests Were NAFTA Article 1139 Investments in the United States at the Time of the Revocation

i. Claimant Had Article 1139(a) Enterprises After the Repurchase

146. For ease of reference, Claimant [redacted]

[redacted]

299 *See also* Claimant's Counter-Memorial, n.173.

300 [redacted]

147. Claimant has already introduced [redacted] And as APMC has repeatedly detailed,[302] the American enterprises of the Keystone XL Project were *"owned or controlled directly or indirectly by"* Claimant at the time of the Revocation and fall squarely within the terms of NAFTA Articles 201 and 1139(a).[303] Respondent has devised an "economic interest" test that requires direct financial flows into and out of an enterprise.[304] This requirement does not exist in Article 1139(a), nor does Respondent rely upon any legal authority to support its claim.

148. Respondent's attempt to deny APMC's satisfaction of the treaty text places great emphasis on the Repurchase of all but [redacted] of APMC US Partner's Class A shares in the US SPV, calling it variously an *"unexplained de minimis . . . holding"*[305] and a *"mere technicality,"*[306] yet sometimes ignoring its existence entirely.[307] It was not *"unexplained."* It was about governance of the Project investment. [redacted]

[redacted]

301 *See* [redacted]

302 *See* Claimant's Counter-Memorial, paras. 127-32; Bifurcation Rejoinder, para. 27; Claimant's Memorial, paras. 205-09; Claimant's Notice of Arbitration, dated 27 April 2023, paras. 30-35.

303 NAFTA Article 1139 defines an *"investment"* as, *inter alia*, *"(a) an enterprise."* NAFTA Article 201, in turn states that *"**enterprise** means any entity constituted or orgonized under applicable law, whether or not for profit, and whether privately-owned or governmentolly owned, including any corparotion, trust, partnership, sole proprietorship, joint venture or other associotion*[.]" (emphasis in original). North American Free Trade Agreement, Can.-Mex.-U.S., 17 Dec. 1992, 32 I.L.M 289 (1993), art. 1139 (CLA-38).

304 *See generally* Respondent's Reply, paras. 147-52; *id.* paras. 149-50 (Respondent seeks to characterize APMC's interest in the US Carrier as *"non-economic"* because it alleges that *"Claimant only played an indirect role in the U.S. Carrier, ond in ony event maintained no finonciol contribution in that entity ot the time of the olleged breach."*); *id.* para. 151 (Respondent attempts to dismiss APMC's interests in the US SPV GP, and the US Carrier GP, claiming that Claimant *"hod no financial commitment in any U.S. entity at the time af the permit revocation."*).

305 *Id.*, para. 147.

306 *Id.*, para. 152.

307 *See, e.g., id.*, para. 151 (*"Claimont therefore hod no finonciol commitment in any U.S. entity ot the time of the permit revocotion."*); *id.*, para. 139 (*"Cloimont had no investment in the United States, including ony finonciol commitments, risk, or expectation of gain or profit in the U.S. SPV."*) (internal citations omitted); *id.* para. 141 (*"*[T]*he repurchase **eliminated** ony U.S. investment."* (emphasis in original)).

[redacted]

149. Thus, the Repurchase did not alter APMC's ownership interests in the APMC US Partner, US SPV, US SPV GP, US Carrier GP, and US Carrier.[309] These entities remained Claimant's enterprises and were therefore Article 1139 category (a) "*investments*" at the time of the Revocation.

150. As demonstrated by the [redacted] not only was the US Carrier an American entity [redacted] but the US Carrier was the holder of the Presidential Permit at issue in this case.[311] APMC's economic interest in this entity was, therefore, central to the entire premise of the Project – as evidenced by the losses resulting from the Revocation of that Permit.[312]

151. And as Respondent is well aware, how that interest was managed was governed by the general structure of these enterprises. It was not the point of each legal entity to provide direct economic benefits to Claimant. But of course they still comprised investment interests for Claimant as enterprises in U.S. territory and under U.S. law.[313] Although Respondent never

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308 [redacted] *see also id.*, paras. 31, 44.

309 [redacted] Claimant's Counter-Memorial, para. 130; [redacted]

310 *See* [redacted].

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

312 [redacted] Claimant's Counter-Memorial, para. 132.

313 Claimant's Counter-Memorial, para. 131 [redacted] Begley Witness Statement, paras. 24-26. The fact that US Carrier GP did not itself make financial contributions to US Carrier is beside the point; that was not its function (Respondent's Reply, para. 150, *citing* [redacted]

actually questioned this last point, it made requests for production anyway.[314] [redacted]

[redacted]

152. [redacted] As further detailed below in **Section III.B.iii**, APMC's

[314] Procedural Order No. 5, dated 1 April 2025, Annex B – Respondent's Requests, Requests 2 and 4. Having done so, Respondent has made no point of it all. For the sake of completeness, Claimant makes a matter of the record its request 2 production confirming these are U.S. entities and its request 4 production regarding APMC US Partner: [redacted] Letter from Claimant's counsel to Respondent's counsel, dated 23 April 2025 (C-363).

[315] [redacted]

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

sustained contractual relationships with the U.S. enterprises ensured its category (f) NAFTA Article 1139 interests connected to the US SPV.

ii. Claimant's Class A Accretion Was an Article 1139(h) Interest After the Repurchase

153. Respondent's attempt to disqualify APMC's interests under Article 1139(h) is, yet again, premised on injecting a condition into the NAFTA text that simply does not exist. In its Reply, Respondent repeats its prior claim that Claimant's Class A accretion rights "*do not qualify as an investment under the NAFTA, because they are not located 'in the territory' of the United States.*"[317] As Claimant has repeatedly pointed out, "*sub-category (h) does not condition how an investor's interest may be realized territorially, as long as that interest arises out of the commitment of capital in the territory of a relevant NAFTA party.*"[318] The territoriality at issue concerns where the capital is committed – *i.e.*, initially invested – not where such investment might be ultimately paid out, and, as Respondent has not tried to refute, category (h) "*covers a broad range of interests.*"[319]

154. Here, the Class A accretion rights were undeniably "*arising out of the commitment of capital*" in the United States. [redacted]

[redacted]

317 Respondent's Reply, para. 153; *see also id.* para. 154.

318 Claimant's Counter-Memorial para. 135 (quoting Bifurcation Rejoinder, para. 32) (emphasis added).

319 *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award dated 21 November 2022, para. 355 ("*The term 'interests' is not defined under NAFTA Article 1139(h). Therefare, the term 'interests' under NAFTA Article 1139(h) must be interpreted 'in good faith in accordance with the ordinary meaning ta be given to the terms of the treaty' [. . .] The Tribunal considers that the term must be interpretated* [sic] *broadly as covering a broad range of interests, provided that (i) the interests arise aut of the commitment of capital in the territory af a NAFTA party towards economic activity in that territory, pursuont to a contract; and (ii) are not covered by the exclusionary languoge under NAFTA Article 1139(i) and (j) . . . .*") (CLA-63).

[redacted]

155. As Mr. Begley has noted: "*All that changed—as far as U.S. Class A accretion rights was concerned—was the right of the U.S. Class A accretions value in a buyback would fall to the Canadian joint venture partner. But the value of the buyback was a function of the whole equity contribution on both sides of the border.*"[321]

156. More particularly, Respondent insists: "*the accretian rights themselves are entirely regulated by Canadian law, further demonstrating that they do not meet Annex 14-C's territoriality requirement*"[322] and "*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 . . . .*"[323] Respondent also points out that the Repurchase "*transaction was structured this way . . . in order to* ***avoid*** *U.S. law—specifically U.S. tax regulations*" (emphasis in original).[324] But APMC's desire to achieve tax efficiency for Alberta is both beside the point and uncontroversial. [redacted]

320 [redacted]

321 Begley Witness Statement, para. 24.

322 Respondent's Reply, para. 157.

323 *Id.*, para. 158 (emphasis added).

324 *Id.*, para. 158; *see alsa id.*, paras. 4, 9, 143.

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

326 *Infra* para. 164.

157. The *Bayview* tribunal rightly noted that a qualifying investment would have a connection to the territory of the respondent State under NAFTA Chapter 11.[327] It described such a connection as:

> *When an investment is made, such as the investments in farms and irrigation equipment, etc., in the present case, the investor makes its decision in the light of its appraisal of the law and of the authorities who are making, creating ond applying the law to that investment. When the investment is made in the investor's State, it is made in the light of the investor's understanding of laws, institutions and procedures that are familiar to the investor. When the investment is made in a different country which has concluded an investment protection treaty covering that investment, the investor is entitled to rely upon the fact the States Parties to the treaty have decided to commit themselves to give a minimum level of legal protection to such foreign investments.*[328]

158. Claimant capitalized the US SPV and through it the US Carrier to build pipelines and pump stations in the United States and governed by U.S. regulation.[329] In exchange, as Claimant has repeatedly explained,[330] APMC's ability to obtain a return on its investment was conditioned by the Keystone XL Project achieving [redacted] And that possibility was destroyed by the Revocation of the Presidential Permit – an act predicated solely on "*U.S. law ar regulation*," destroying[333] a Permit that was itself a creature of "*U.S. law or regulation*" and which on its terms was given so that the

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327 *Bayview Irrigation District et. al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award dispatched 19 June 2007, para. 98 (RL-34).

328 *Id.*, para. 99 (RL-34).

329 Begley Witness Statement, paras. 37, 42-45; TC Energy, Press Release, U.S./Canada border crossing completed, dated 25 May 2020, https://www.keystonexl.com/project-updates/updates-feed/2020/u.s.-canada-border-crossing-completed/ (C-112); [redacted]

330 *See, e.g.*, Claimant's Memorial, paras. 79-82, 87, 269; Claimant's Counter-Memorial, para. 140.

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

332 [redacted]

333 Exec. Order No. 13990 (20 January 2021) 86 Fed. Reg. 7037 (25 January 2021) (C-3).

US Carrier would have the U.S. law right to "*construct, connect , operate, and maintain pipeline facilities . . .*"[334] What Respondent is essentially claiming is that APMC should be punished because it made its future benefit from its investment in the US SPV subject to Canadian tax law, while its ability to benefit at all remained contingent on U.S. law regulation.

159. Respondent even claims, [redacted] First, Respondent has only selectively referenced the available information it sought. For example, [redacted] further discussed below in **Section III.B.iii**).

160. Second, Respondent primarily relies on [redacted] Furthermore, it is apparent that [redacted] And in any event, [redacted]

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

335 Respondent's Reply, para. 141 [redacted]

336 [redacted]

337 [redacted]

338 [redacted]

339 *Id.* [redacted]

161. [redacted]

162. Taxation was a [redacted] But, as other discussions Respondent relies on show, [redacted]

iii. Claimant's Rights to Income and Share of Assets on Dissolution Were Article 1139(e) and (f) Interests After the Repurchase

163. Respondent relies on its incorrect arguments about the territoriality of the Class A Accretion rights to also contend that Claimant did not have a qualified investment under Article 1139(e), which defines "*investment*" as "*an interest in an enterprise that entitles the owner to*

340 [redacted]

341 *Id.*

342 *See* [redacted]

343 *See* [redacted]

share in income or profits of the enterprise."[344] Claimant and [redacted] repeatedly explained the broad nature of Claimant's interests in income and profits:

[redacted]

164. And indeed, the accretion payout rights, regardless of being formally paid out from Canada in the Repurchase scenario, remain an interest of Claimant's that is a function of the income of the Project on both sides of the border. There could be no clearer example of a contract mechanism to share income and profits as that was its purpose.

165. With respect to Claimant's Article 1139(f) interests concerning the sharing of assets on dissolution,[346] although Respondent no longer cites to caselaw to support its argument (with no apology to Claimant or the Tribunal for at least one explicit misrepresentation of an authority),[347] it continues to complain that Claimant's right to Class C shares in the US SPV was "*entirely contingent*" and that such shares were only available as a result of the guarantee, which "*is excluded from . . . Article 1139(f).*"[348] Instead, Respondent appeals that "[i]*t is plain on the face of the treaty that Claimant is wrong as a textual matter, as Article 1139(f) is cast in the present tense ('entitles')*."[349] The full text of 1139(f) belies this point:

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344 Respondent's Reply, paras. 156-58.

345 [redacted] *see also id.*, para. 39; Claimant's Memorial, para. 81; Claimant's Counter-Memorial, paras. 143-46.

346 Article 1139(f) defines "*investment*" as: "*an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagroph (c) or (d).*" NAFTA, art. 1139, definition of "*investment*," at (f) (CLA-38).

347 *See* Claimant's Counter-Memorial, para. 144 (explaining how Respondent's citation to various legal authorities including, *inter alia*, *Lion* and *Apotex*, was incorrect and misplaced); *see also id.*, n.217.

348 Respondent's Reply, para. 166.

349 *Id.*, para. 167.

> *an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d).*

166. As can be seen from the full sentence, Article 1139(f) indeed contains the word "*entitles*" in present tense, but is also written in the conditional, "*on dissolution,*" which is used for future events, a point Claimant already reviewed.[350]

167. Respondent has therefore resorted at this tardy stage to claiming "*the contingent potential for Class C shares as a result of payments under the Guarantee also fails to quality as an interest under Article 1139(f) because of the exclusion contained in that paragraph.*"[351] Respondent has not made clear what aspect of the exclusions of category (f) relating to categories (c) and (d) it even alleges is relevant. In any event, they are beside the point. The guarantee is a promise for which, in part, APMC had exchanged an interest in the dissolution process of the enterprise US SPV – Claimant's interest is the function of neither a debt security nor a loan of its own.

168. Respondent's semantic argument is just wrong. [redacted] And thus when Respondent says that "*Claimant has*

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350 Claimant's Counter-Memorial, para. 145; *see also id.*, para. 146 ("*Respondent's argument that an entitlement to share in assets on dissolution will only be triggered by a dissolution event is specious.*").

351 Respondent's Reply, para. 170. Respondent goes on to state: "*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 a debt security or a loan excluded from subporograph (c) or (d).***'") (emphasis in original).

352 Respondent's Reply, para. 170.

353 [redacted]

354 [redacted]

355 Respondent's reference to [redacted] is not understood. *See* Respondent's Reply, para. 170 *citing* [redacted]

already conceded that the Guarantee does not constitute an investment under NAFTA Article 1139[,]"[356] what it means is that Claimant conceded nothing, because it had never asserted the promise to pay the guarantee was an investment, but actually said, demonstrating again the repeated twisting of the situation by Respondent for the last year:

> *Respondent's discussion of the loan guarantee is not clear either* [. . .] *The loan guarantee is not an Article 1139 interest or investment. It was, though, a real contractual obligation which was activated because of Respondent's breach of obligation in the Revocation, and connected through a contractual network to elements which were Claimant's investments as defined by Article 1139.*[357]

169. To the extent that Respondent is trying to claim that Claimant agreed that [redacted] is obviously not the source of Claimant's interests on dissolution of U.S. enterprise assets, and Claimant has never said it was.

170. [redacted]

[redacted] The bargain struck to get something specific in return for the promised guarantee is rather the point here, insofar as what Claimant got in return confirms a continued interest in the US SPV in exchange for the continued financial risk to Claimant related to its investment in the US SPV. Hence [redacted]

356 Respondent's Reply, para. 170. *See also, id.*, para. 132.

357 Bifurcation Rejoinder, paras. 34, 36.

358 [redacted]

171. And that did not change in the essentials of the contractual relationships after the Repurchase. Respondent's argument that Claimant's interest at the time of the Revocation was a contingency is made without reference or acknowledgement of [redacted]

[redacted]

172. Conversion of such a subsisting interest is what occurred as a result of the Revocation. In June 2021, the Project parties agreed specifically to the Final KXL Agreement, [redacted] This of course included Claimant now disgorging the US Class A Repurchase value, which had been paid for by that debt incurred by the US SPV,[361] thus crystallizing the risk to Claimant's U.S. investment it had remained exposed to, as part of Cancellation Payments of approximately US$ 1 billion.[362]

173. Respondent has noted that "*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.*

359 [redacted]

360 [redacted]

361 [redacted] *See further* n.364 below.

362 [redacted]

These events did not occur until June 2021."[363] [redacted] As noted in the Final KXL Agreement, [redacted]

174. This history offers no excuse for Respondent to claim that, after the Repurchase, Claimant had no financial risk connected to investments in United States territory or rights regarding the dissolution of U.S. enterprise assets. Claimant clearly had an investment in U.S. territory that it was forced to wind down after Respondent's capricious Revocation of the Presidential Permit.

IV. CONCLUSION

175. For the reasons given above, Claimant requests that the Tribunal issue an Order:

a. Dismissing Respondent's preliminary objections;

[363] Respondent's Reply, para. 167 [redacted]

[364] Claimant's Memorial, para. 102. *See further* Begley Witness Statement, [redacted]

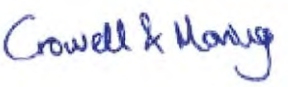
[365] [redacted]

[366] [redacted]

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

Date Filed: 7 July 2025

Respectfully submitted,



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APPENDIX 1: Dispute Resolution Clauses

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

APPENDIX 1: Dispute Resolution Clauses

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

APPENDIX 1: Dispute Resolution Clauses

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

APPENDIX 2: Cross-Reference to *TC Energy* Exhibits

***APMC* Exhibit Number**	***TC Energy* Exhibit Number**
C-309	R-119
C-311	R-140
C-312	C-205
C-313	R-129
C-314	R-143
C-317	C-190
C-318	C-166
C-324	C-151
C-325	R-157
C-331	C-112
C-332	C-160
C-333	C-164
C-334	C-165
C-335	C-167
C-336	C-168
C-337	C-169
C-338	C-170
C-339	C-171
C-340	C-175
C-341	C-180
C-342	C-183
C-343	C-200
C-344	C-204
C-346	C-206
C-347	C-208
C-348	C-213
C-349	R-051
C-350	R-102
C-351	R-109
C-352	R-138
C-353	R-148
C-354	R-150
C-355	R-153
C-356	R-158
R-49	C-221
R-83	R-41