IN THE ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT, ANNEX 14-C
OF THE UNITED STATES-MEXICO-CANADA AGREEMENT, AND
THE ICSID ARBITRATION RULES

CYRUS CAPITAL PARTNERS, L.P. AND CONTRARIAN CAPITAL MANAGEMENT, LLC,

Claimants

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. ARB/23/33

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), Article 14.D.7(2) of the United States-Mexico-Canada Agreement ("USMCA"), and Section 25 of Procedural Order No. 1, the United States of America makes this submission on questions of interpretation of the NAFTA and the USMCA. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.[*]

[*] In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

USMCA Annex 14-C

Consent to Arbitrate (USMCA Annex 14-C Paragraph 1)

2. A State's consent to arbitration is paramount.[1] Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration,[2] it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.[3]

3. Paragraph 1 of USMCA Annex 14-C provides the USMCA Parties' consent, with respect to "legacy investments," to the submission of claims for breaches of certain NAFTA obligations that allegedly occurred after the NAFTA entered into force and before it was terminated. That paragraph states:

> Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
>
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
>
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and

[1] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 (2009) ("DOUGLAS, THE LAW OF INVESTMENT CLAIMS") ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); *AsiaPhos Ltd. & Norwest Chemicals Pte Ltd. v. People's Republic of China*, ICSID Case No. ADM/21/1, Award ¶ 59 (Feb. 16, 2023) ("[T]he jurisdiction of any arbitral tribunal should be based on the clear and unambiguous consent of both parties to have their dispute resolved by arbitration. This applies, in particular, in investment disputes where one of the parties is a sovereign State, which generally enjoys jurisdictional immunity from being sued in any kind of proceedings outside of its own State courts. Only where a State has waived its jurisdictional immunity by expressing its consent to have a dispute resolved by international arbitration in a clear and unambiguous manner does an arbitral tribunal have jurisdiction to decide on that dispute.") (internal citations omitted).

[2] As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965).

[3] *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) ("*Renco* Partial Award") ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru."). *See also* CHRISTOPH SCHREUER, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 (Peter Muchlinski et al., eds. 2008) (explaining that "[l]ike any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); CHRISTOPHER F. DUGAN ET AL., INVESTOR STATE ARBITRATION 219 (2008) (explaining also that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

(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.[4]

Paragraph 3 of Annex 14-C provides that claims may be submitted under Paragraph 1 for three years after the NAFTA's termination.[5]

4. Consent to arbitration in Annex 14-C was limited to allegations of breach of obligations under the NAFTA. Those obligations terminated on July 1, 2020, when the NAFTA was superseded by the USMCA. There could be no breach of the NAFTA's obligations after it terminated because the NAFTA no longer imposed obligations on the Parties. As explained in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[6] Thus, Annex 14-C necessarily permits only claims for breaches of the NAFTA that are alleged to have occurred while the NAFTA was in force. The USMCA Parties did *not* consent in Annex 14-C to the submission of claims based on conduct that occurred *after* the NAFTA terminated.[7]

5. Paragraphs 1 and 2 of Annex 14-C closely resemble NAFTA Articles 1116(1)/1117(1) and 1122.[8] Long before they began negotiating the USMCA, the United States, Canada, and Mexico all agreed that the text of these NAFTA provisions functioned to bar claims based on events occurring while the NAFTA was not in force.[9] The tribunal in *Feldman v. United*

[4] USMCA Annex 14-C, ¶ 1 (footnotes omitted).

[5] *See* USMCA Annex 14-C, ¶ 3.

[6] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc. A/56/10 (2001).

[7] *See TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Award ¶ 177 (July 12, 2024) ("*TC Energy* Award") ("[T]he ordinary meaning of Annex 14-C is that consent to arbitrate was established until 30 June 2023 for facts capable of constituting a breach of NAFTA while NAFTA was in force.").

[8] A detailed analysis of these similarities is available in the U.S. submissions in *TC Energy*. *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, U.S. Memorial on Preliminary Objection ¶¶ 67–71 (June 12, 2023).

[9] For Canada: *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Submission of the Government of Canada ¶ 18 (Oct. 6, 2000) ("[I]nvestors are limited as to the claims they may bring. They may bring only claims arising from a breach of NAFTA. . . . A measure may only potentially violate

Mexican States reached the same conclusion more than 20 years ago, explaining: "Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis*."[10] Scholars have also long been in accord on this point.[11] There is no reason to interpret the nearly identical language in Annex 14-C any differently.

6. Whether claims are based on events occurring before the NAFTA entered into force or after it terminated, the jurisdictional flaw is the same: the NAFTA's obligations were not binding on the Parties at the relevant time and, accordingly, a claimant cannot allege a breach of those obligations. The *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States* ("*TC*

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

[10] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000).

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

Energy") tribunal concurred: "the situation in this case is not conceptually different than that which led the *Feldman* tribunal to decline jurisdiction: for the same reasons why a treaty-based tribunal has no jurisdiction on breaches pre-dating the treaty, it equally lacks jurisdiction on breaches post-dating its termination."[12]

7. The NAFTA terminated and the USMCA entered into force on July 1, 2020.[13] The default position in customary international law, reflected in Article 70(1)(a) of the Vienna Convention on the Law of Treaties ("VCLT"), is that "[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 . . . releases the parties from any obligation further to perform the treaty."[14]

8. The NAFTA did not contain a survival provision binding the Parties to continue performing its obligations for a period post-termination. Nor did the USMCA Parties make such a commitment, explicitly or implicitly, with respect to the NAFTA's obligations in the USMCA. Thus, once the NAFTA terminated and the USMCA entered into force, the USMCA Parties ceased to be bound by the NAFTA's obligations, including the substantive investment obligations in Section A of NAFTA Chapter Eleven. Accordingly, because these obligations terminated upon the NAFTA's termination, there can be no breach based on post-termination conduct and no claim based on such conduct can be submitted to arbitration under Paragraph 1 of Annex 14-C.[15]

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[12] *TC Energy* Award ¶ 207.

[13] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada ¶ 1 ("Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."). *See also* USMCA Annex 14-C, ¶¶ 3, 5-6 (discussing the "termination of NAFTA 1994").

[14] Vienna Convention on the Law of Treaties, art. 70(1)(a), May 23, 1969, 1155 U.N.T.S. 331 ("VCLT"). Although the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is an "authoritative guide" to treaty law and practice. *See* Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties (Oct. 18, 1971), S. Ex. L. 92d Cong., 1st Sess., *reprinted in* 65 DEP'T ST. BULL. No. 1694, at 684, 685 (Dec. 13, 1971).

[15] *TC Energy* Award ¶ 146 ("[T]he USMCA parties could have agreed to make an exception to [the] general rule [under VCLT Article 70(1)] by extending the offer to arbitrate, by extending the substantive provisions of NAFTA, or both. The ordinary terms of Annex 14-C indicate that they agreed to extend the offer to arbitrate. They did however not agree to also extend Section A."); *id.* ¶ 151 ("Annex 14-C therefore establishes an exception to the expiry of Chapter 11. Because the scope of Annex 14-C is procedural (the offer to arbitrate), that exception has to be understood as an exception to the expiry of the offer to arbitrate. On the face of the text of Annex 14-C, it cannot

9. Annex 14-C did not extend the NAFTA's substantive investment obligations. As noted above, paragraphs 1 and 2 of Annex 14-C closely resemble NAFTA Articles 1116(1)/1117(1) and 1122, which are part of the investor-State dispute resolution framework established in Section B of NAFTA Chapter 11, and are not part of the substantive investment obligations detailed in NAFTA Chapter 11, Section A. As the *TC Energy* tribunal explained:

> The purpose of Annex 14-C to extend the consent of NAFTA parties to arbitrate claims that arose prior to NAFTA's termination is reflected in the treaty structures of USMCA and NAFTA, which both include a set of substantive rules for the treatment of investments, found in the body of Chapter 14 of USMCA and Section A of Chapter 11 in NAFTA, and a set of jurisdictional and procedural rules for the arbitration of disputes concerning the substantive rules, found in Annex 14-C, 14-D, and 14-E of USMCA and Section B of Chapter 11 in NAFTA.[16]

10. The tribunal therefore concluded that "Annex 14-C . . . simply sets forth USMCA parties' consent to arbitrate certain claims," and "Annex 14-C addresses only procedural matters and does not impose substantive investment obligations."[17]

11. The United States has explained in more detail its interpretation of Annex 14-C to the USMCA in its submissions in support of its preliminary objection in *TC Energy Corp. & TransCanada PipeLines Limited v. United States*, ICSID Case No. ARB/21/63, which are available on the ICSID website. The tribunal in *TC Energy* upheld the U.S. preliminary objection in a thorough and well-reasoned award confirming the interpretation of Annex 14-C set forth above.[18]

12. The three USMCA Parties all agree that Annex 14-C permits only claims based on conduct occurring while the NAFTA was in force. In addition to its submissions in the *TC Energy* case, the United States has also taken this position in the *Alberta Petroleum Marketing*

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be also understood as an exception to the termination of Section A (hence a provision operating as a sunset clause based on which Section A would have been extended for three years)."); *id*. ¶ 152 ("Annex 14-C is therefore only an exception to the expiration of NAFTA in respect to the offer to arbitrate. It is not an exception to the termination of Section A.").

[16] *TC Energy* Award, ¶ 93.

[17] *Id*., ¶ 94.

[18] *See supra* note 3.

Commission v. United States ("*APMC*"), *Legacy Vulcan v. United Mexican States* ("*Legacy Vulcan*"), *Amerra Capital Management and others v. United Mexican States, Coeur Mining, Inc. v. United Mexican States, Access Business Group LLC v. United Mexican States* ("*Access Business*"), and *Goldgroup Resources, Inc. v. United Mexican States* arbitrations.[19] Mexico has expressed its agreement with the U.S. position in the *Legacy Vulcan*, *TC Energy*, *APMC*, and *Access Business* arbitrations.[20] Canada likewise confirmed its agreement with this interpretation of Annex 14-C in *APMC*, *Access Business,* and *Ruby River v. Canada*, where it observed that there is "consensus among the USMCA Parties" on this issue.[21]

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

[19] *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, U.S. Memorial on Its Preliminary Objection ¶¶ 9-98 (Oct. 15, 2024); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Second Submission of the United States of America ¶¶ 8-12 (July 21, 2023); *Amerra Capital Management and others v. United Mexican States,* ICSID Case No. UNCT/23/1, Submission of the United States of America ¶¶ 2-9 (Dec. 17, 2024); *Coeur Mining, Inv. v. United Mexican States*, ICSID Case No. UNCT/22/1, Submission of the United States of America ¶¶ 2-6 (Feb. 12, 2024); *Access Business Group LLC v. United Mexican States,* USMCA/ICSID Case No. ARB/23/15, Submission of the United States of America ¶¶ 2-13 (Mar. 28, 2025); *Goldgroup Resources, Inc. v. United Mexican States*, USMCA/ICSID Case No. ARB/23/4, Submission of the United States of America ¶¶ 4-18 (June 23, 2025).

[20] *See, e.g.*, *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA ¶ 5 (Sep. 11, 2023) ("This consent [in Annex 14-C] is limited to the submission of a 'claim' alleging a 'breach of an obligation under … Section A of Chapter 11 (Investment) of NAFTA 1994.' A breach of a Treaty can only occur if that Treaty is in force. The NAFTA ceased to be in force as of July 1, 2020, and therefore a violation of Section A of Chapter 11 (Investment) of NAFTA was no longer possible as of that date."); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Mexico's Counter-Memorial on the Ancillary Claim ¶¶ 407-14 (Dec. 19, 2022); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Mexico's Rejoinder on the Ancillary Claim ¶¶ 258-87 (Apr. 21, 2023); *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Mexico's Submission Pursuant to Article 1128 of NAFTA ¶¶ 3–33 (Jan. 15, 2025); *Access Business Group LLC v. United Mexican States,* USMCA/ICSID Case No. ARB/23/15, Respondent's Memorial on Objections to Jurisdiction ¶¶ 70-71 (Nov. 29, 2024).

[21] *Ruby River Capital LLC v. Government of Canada*, USMCA/ICSID Case No. ARB/23/5, Contre-Mémoire Sur Le Fond Et Mémoire Sur La Compétence Du Canada ¶ 262 (July 15, 2024) (English translation) (French original: "d'un consensus parmi les Parties à l'ACEUM"). *See also id.* ¶ 182 ("Annex 14-C of the USMCA . . . does not allow [Claimant] to submit to arbitration a claim relating to events giving rise to liability after June 30, 2020.") (English translation) (French original: "l'annexe 14-C de l'ACEUM . . . ne lui permet pas de soumettre à l'arbitrage une plainte portant sur des faits générateurs de responsabilité postérieurs au 30 juin 2020."); *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Canada's Submission Pursuant to Article 1128 of NAFTA ¶¶ 4–18 (Jan. 15, 2025); *Access Business Group LLC v. United Mexican States,* USMCA/ICSID Case No. ARB/23/15, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128 ¶¶ 4-16 (Mar. 28, 2025).

the agreement of the parties regarding its interpretation."[22] In accordance with VCLT Article 31(3), the Tribunal must take into account the USMCA Parties' common understanding of Annex 14-C.

14. It is well-established that the common understanding of the States Parties may be evidenced in a variety of ways, including through the positions that they take in the course of litigations or arbitrations. The International Law Commission has stated specifically that subsequent practice under Article 31(3)(b) may include "statements in the course of a legal dispute."[23] Investment tribunals have also agreed in the NAFTA context that submissions by the NAFTA Parties in Chapter Eleven arbitrations may serve to demonstrate a common understanding for purposes of Article 31(3).[24]

15. Investment agreements such as those in NAFTA Chapter 11 and USMCA Chapter 14 resulted from negotiations between the States Parties to those agreements, and the States Parties have an inherent interest in providing a good faith interpretation that reflects the ordinary meaning of the terms to which they agreed.

Definition of "legacy investment" (USMCA Annex 14-C Paragraph 6)

16. The USMCA Parties' consent in Paragraph 1 of Annex 14-C is limited to claims "with respect to a legacy investment." Paragraph 6(a) of Annex 14-C defines "legacy investment" as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the

[22] VCLT, art. 31(3).

[23] Report of the International Law Commission, U.N. Doc. A/73/10, Chapter IV, p.32, ¶ 18.

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

date of entry into force of this Agreement." Paragraph 6(b) further provides that "'investment', 'investor', and 'Tribunal' have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994."

17. The claimant bears the burden of establishing a "legacy investment" within the meaning of Paragraph 6 of Annex 14-C.[25] Among other things, this requires a claimant to establish that, as of the USMCA's entry into force on July 1, 2020, there existed an "investment" within the meaning of NAFTA Article 1139; such investment was an investment "of" the claimant (*i.e.*, an investment that the *claimant* established or acquired while the NAFTA was in force); and the claimant was "an investor of another Party." In addition, a claimant pursuing a claim under Annex 14-C must meet the procedural requirements of NAFTA Chapter 11, Section B. NAFTA Article 1116 limits the States' consent to arbitrate to "an investor of a Party." NAFTA Article 1139, in turn, defines "investor of a Party" as "a national or enterprise of such Party, that seeks to make, is making or has made an investment."[26] In the absence of a "legacy investment" under Annex 14-C or an "investor of a Party" under NAFTA Articles 1116 and 1139, the claimant's claims are outside the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C and the tribunal lacks jurisdiction over them.

Standing to Bring a Claim and Limitations on Claims for Loss or Damage (NAFTA Articles 1116 & 1117)

18. NAFTA Articles 1116 and 1117 affirmatively grant the right to submit a claim to arbitration to an "investor of a Party" under the conditions specified in those articles, including that "another Party" has breached Section A of Chapter Eleven, Article 1503(2), or Article 1502(3)(a).

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

[26] USMCA Article 14.1 similarly defines "investor of a Party' as "a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party."

19. Each claim by an investor must fall within either NAFTA Article 1116 or NAFTA Article 1117 and is limited to the type of loss or damage available under the article invoked.[27] Article 1116(1) permits an investor to present a claim for loss or damage incurred by the investor itself:

> An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *investor* has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added)

20. Article 1117(1), in contrast, permits an investor to present a claim on behalf of an enterprise of another Party that it owns or controls for loss or damage incurred by that enterprise:

> An investor of a Party, *on behalf of an enterprise of another Party* that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *enterprise* has incurred loss or damage by reason of, or arising out of, that breach. (emphases added)

21. Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury.[28] Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under Article 1116. Where the investor seeks to recover loss or damage to an enterprise that the investor owns or controls, the investor's injury is only *indirect*. Such a derivative claim must be brought, if at all, under Article 1117.[29] However, Article 1117 is applicable only where the loss or damage has been incurred by "*an enterprise of another Party* that is a juridical person that the investor owns or controls directly or indirectly." (Emphasis added). Article 1117 does not apply

[27] An investor may bring separate claims under both Articles 1116 and 1117; however, the relief available for each claim is limited to the article under which that particular claim falls.

[28] *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 146 (1993) ("Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor.").

[29] *See, e.g.*, Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 824-25 (Chester Brown ed., 2013) (noting that Article 24(1)(a), nearly identically worded to NAFTA Article 1116(1), "entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor," while Article 24(1)(b), nearly identically worded to NAFTA Article 1117(1), "creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls").

where the alleged loss or damage is to an enterprise of a non-Party or of the same Party as the investor.

22. Under Article 1116(1), an investor who wishes to pursue a claim must allege that "another Party" has breached specified obligations in the NAFTA and further that "*the* investor has incurred loss or damage by reason of, or arising out of, *that breach*." (Emphases added.) By using the words "the investor" and "that breach," Article 1116(1) requires that the investor bringing the claim be the same investor who suffered loss or damage as a result of the alleged breach. Article 1116(1) does not authorize a different investor to bring a claim on behalf of the investor who suffered the loss or damage as a result of the alleged breach.

23. As noted above, NAFTA Article 1139 defines an "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment[.]" A claimant (*i.e.*, the investor bringing the claim) must be the same investor who sought to make, was making, or made the investment at the time of the alleged breach, and incurred loss or damage thereby. There is no provision in Chapter Eleven which authorizes an investor to bring a claim for an alleged breach relating to a different investor, or with respect to an investment that investor did not own or control at the time of the alleged breach.

"Investment" (NAFTA Article 1139)

24. By its ordinary meaning, an "investment" has several hallmark characteristics.[30] These characteristics, which reflect not only legal interest but also economic interest, may include the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and/or duration.[31] NAFTA Chapter Eleven protected "investments," as that term is

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

[31] The hallmark characteristics of an investment – described as "well-established features" representing the "minimum requirements for an investment" – have been broadly applied in both ICSID and non-ICSID arbitrations. *See Nova Scotia* Award ¶ 84. For ICSID cases, *see Nova Scotia* Award ¶¶ 81, 92-97 ("The term investment carries inherent features as part of its ordinary meaning and these must be taken into account by the Tribunal" and "[a] commitment to simply pay money in the future after delivery of goods is inadequate to be considered as the contribution which forms the basis of an investment."); *Poštova Banka, A.S. and Istrokapital SE v. The Hellenic*

commonly understood, and did not protect transactions in which the alleged investor lacked an economic interest. NAFTA Article 1139 (Definitions) provides an exhaustive, not illustrative, list of what "investments" qualify for purposes of NAFTA Chapter Eleven.[32]

25. As one tribunal observed, the term "investment" "has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings)" entailing a contribution that involves some risk.[33] In other words, the term "investment" as normally understood contains an inherent "economic aspect"—a commitment of resources—that must be

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Republic, ICSID Case No. ARB/13/8, Award ¶ 360 (Apr. 9, 2015); *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award ¶ 170 (Oct. 17, 2013); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction ¶ 52 (July 23, 2001). For non-ICSID cases, *see Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Award ¶ 155 (Aug 3, 2022) ("*Komaksavia Airport Invest* Award") ("[I]nherent in the act of 'investing' is an objective element: a requirement of a positive act that involves some sort of contribution to acquire the asset or enhance its value, coupled with an expectation or desire that the asset will produce a return over a period of time, with the possibility or risk that it may not do so (with the result that the contribution might be forfeited in part or in whole)"); *Romak SA v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award ¶ 207 (Nov. 26, 2009) ("*Romak* Award") ("[T]he term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk[.]") (emphasis in original); *see also* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 217, ¶ 6.170 (2d ed. 2017) ("MCLACHLAN, INT'L INVESTMENT ARBITRATION") ("In a non-ICSID case, the notion of 'investment' in a BIT still has two aspects: (a) *a legal aspect*—the asset belonging to the claimant, being an asset of the type listed in the BIT; and (b) *an economic aspect*—'a commitment of resources' or 'contributions that have created such . . . assets'.[] Both elements must be present to constitute an investment.") (citations omitted); DOUGLAS, THE INT'L LAW OF INVESTMENT CLAIMS 163 (2009) ("[A]n investment, in order to qualify for investment treaty protection, must incorporate certain legal and economic characteristics. . . . It is essential that an investment have *both* the requisite legal and economic characteristics[.]") (emphasis in original).

[32] *See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 82 (Jan. 12, 2011) ("NAFTA's Article 1139 is neither broad nor open-textured. It prescribes an exclusive list of elements or activities that constitute an investment for purposes of NAFTA."). All three NAFTA Parties agree on this. *See e.g.*, *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 32 (Nov. 13, 2000) ("Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an 'investment' for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of 'investment' in Article 1139, however, encompass a mere hope that profits may result from prospective sales[.]"); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶ 59 (Apr. 30, 2001) ("The definition of 'investment' in NAFTA Article 1139 . . . is exhaustive, not illustrative."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 19 (May 15, 2001) ("[A]n investment as defined in Article 1139 . . . while inclusive of several categories, is also exhaustive.").

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

present in the host State's territory to constitute a protected investment under a treaty, regardless of the additional specifications imposed by NAFTA Article 1139.[34]

26. The USMCA Parties later made this explicit, largely maintaining NAFTA Article 1139's exclusive list of covered "investments" in USMCA Article 14.1 but making clear that for the 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."[35]

Consent to Arbitration (NAFTA Articles 1119 and 1121 and USMCA Annex 14-C(1))

27. As explained above, USMCA Annex 14-C(1) provides that "[e]ach 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," for certain alleged breaches of the NAFTA that arose while that treaty was in force.[36] Assuming that a claim filed under Annex 14-C alleges a breach of the NAFTA that occurred while the NAFTA was in force, an agreement to arbitrate is formed upon the investor's consent to arbitrate in accordance with the procedures provided in Section B of NAFTA Chapter 11.[37] Thus, the USMCA Parties have explicitly conditioned their consent upon satisfaction of the relevant procedural requirements detailed in the NAFTA. All three USMCA Parties have expressed agreement on this point in relation to similar consent language included in NAFTA Article 1122.[38]

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[34] MCLACHLAN, INT'L INVESTMENT ARBITRATION ¶ 6.170; DOUGLAS, THE INT'L LAW OF INVESTMENT CLAIMS 163.

[35] *See also*, 2004 U.S. Model Bilateral Investment Treaty, Art. 1, which defines 'investment' as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk"; 2012 U.S. Bilateral Investment Treaty, Art. 1 (same); Borzu Sabahi, Noah D. Rubins & Don Wallace, Jr., *Notion of Investment, in* INVESTOR-STATE ARBITRATION 342 ¶ 10.18 (2 ed. 2019) (explaining that "[t]he US practice in this context is in harmony with the Salini test used in ICSID Convention disputes").

[36] USMCA Annex 14-C(3) provides that such consent expires three years after the NAFTA's termination.

[37] NAFTA Article 1121(1)(a) and (2)(a).

[38] *See, e.g.*, *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America ¶ 2 (July 26, 2014) (stating that pursuant to Article 1122, no Chapter Eleven claim may be submitted to arbitration unless the required procedures were satisfied); *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case. No. 2009-04, Submission of the United States of America on Damages ¶ 22 (Dec. 29, 2017) ("Under Article 1122, the scope of a NAFTA Party's consent to arbitrate an investment dispute is conditioned on compliance with the procedural requirements of Chapter Eleven."); *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/UNCITRAL,

28. The procedures required to engage the NAFTA Parties' consent and form the agreement to arbitrate are found principally in NAFTA Articles 1116–1121. Moreover, by conditioning their consent in USMCA Annex 14-C(1) on the procedures established in NAFTA Chapter 11, Section B, the USMCA Parties explicitly made the satisfaction of these procedures jurisdictional (not admissibility) requirements.

Notice of Intent to Submit a Claim to Arbitration (NAFTA Article 1119)

29. Article 1119 (Notice of Intent to Submit a Claim to Arbitration) is one of the procedural conditions which must be satisfied before a NAFTA Party's consent to arbitrate [under USMCA Annex 14-C] is engaged. Article 1119 provides that:

> The disputing investor *shall deliver* to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice *shall specify*:
>
> (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;
>
> (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
>
> (c) the issues and the factual basis for the claim; and

PCA Case No. 2016-13, Submission of the United Mexican States pursuant [to] NAFTA Article 1128, ¶¶ 2, 3 (June 14, 2017) (noting its agreement with Canada that consent to arbitration cannot be established pursuant to Article 1122 unless the claim has been brought in accordance with NAFTA's procedural requirements); *Detroit Int'l Bridge Co. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-25, Submission of the United Mexican States pursuant [to] Article 1128 of NAFTA ¶ 3 (Feb. 14, 2014) (stating that Article 1122's offer to arbitrate required compliance with the requirements of Article 1121); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada pursuant to NAFTA Article 1128, ¶ 52 (Apr. 30, 2001) (explaining that "the NAFTA Parties' consent to investor-State dispute settlement" is conditioned upon "*accordance with* the procedures set out in this Agreement" (emphasis in original) and that the "[f]ailure to observe these requirements means that an investor cannot access the dispute settlement mechanism under Section B of Chapter Eleven."); *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Second Submission of the Government of Canada Pursuant to NAFTA Article 1128, ¶¶ 7-31 (July 7, 2001) (accord). Pursuant to Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, this subsequent agreement or subsequent practice of the NAFTA Parties "shall be taken into account." VCLT, art. 31(3) (a)-(b) ("There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"). Although NAFTA Article 1131(2) also provides a manner by which the NAFTA Parties may interpret the NAFTA, nothing in that article states that it is the exclusive means by which the Parties may interpret the Agreement.

(d) the relief sought and the approximate amount of damages claimed.[39]

30. A disputing investor who does not deliver a Notice of Intent at least 90 days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural requirement and fails to engage the respondent's consent to arbitrate.[40] Under such circumstances, a tribunal will lack jurisdiction *ab initio*. A respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.[41]

31. The procedural requirements in Article 1119 are explicit and mandatory, as reflected in the way the requirements are phrased (*i.e.*, "shall deliver"; "shall specify"). These requirements serve important functions, including to provide a NAFTA Party time to identify and assess potential disputes, to coordinate among relevant national and subnational officials, and to consider, if they so choose,[42] amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence and/or the preparation of a defense. As recognized by the tribunal in *Merrill & Ring v. Canada*, rejecting a belated attempt to add a claimant in that case, the safeguards found in Article 1119 (among other requirements) "cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim[.]"[43]

32. Regardless, a tribunal cannot simply overlook an investor's failure to comply with the procedural requirements of Article 1119. Rather, satisfaction of the requirements of Article 1119

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[39] NAFTA Article 1119 (emphasis added).

[40] *See Waste Management, Inc. v. United Mexican States,* NAFTA/ICSID Case No. ARB(AF)/98/2, Award ¶¶ 4-5 (June 2, 2000) ("*Waste Management I* Award") (noting ICSID's refusal to accept a request for arbitration under the NAFTA because of claimant's failure to satisfy "one of the procedural requirements to be met by the Claimant, namely, mandatory notice of intent to submit the claim to arbitration under NAFTA Article 1119," and noting that the claimant's request was not accepted until "the formal defect . . . had been remedied by notice of intent to submit a claim to arbitration being forwarded to the body designated by the Government of Mexico" and the elapse of more than 90 days).

[41] NAFTA Article 1137(1) defines when a claim is considered "submitted to arbitration" as being when the "request for arbitration" or "notice of arbitration" is received, depending on which set of arbitral rules has been selected.

[42] In this regard, NAFTA Article 1118 (Settlement of a Claim through Consultation and Negotiation) provides that the disputing parties "*should* first attempt to settle a claim through consultation or negotiation." (Emphasis added.) Such consultations or negotiations are not required.

[43] *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Decision on a Motion to Add a New Party ¶ 29 (Jan. 31, 2008).

through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by at least 90 days in order to engage the respondent's consent to arbitrate.

Consent and Waiver (NAFTA Article 1121)

33. NAFTA Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration", states in relevant part:

> 1. A disputing investor may submit a claim under Article 1116 only if:
>
> (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
>
> (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> 3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

34. Because the waiver requirements under Article 1121 are among the requirements upon which the Parties have conditioned their consent, a valid and effective waiver is a precondition to the Parties' consent to arbitrate claims, and accordingly to a tribunal's jurisdiction, under

USMCA Annex 14-C.[44] The purpose of the waiver provision is to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[45]

35. Similar to provisions found in many of the United States' other international investment agreements,[46] NAFTA Article 1121 is a "no U-turn" waiver provision. As such, it permits claimants to elect to pursue any proceeding (including in domestic court) without relinquishing their right to assert a subsequent claim through arbitration.[47] However, Article 1121 makes clear that as a condition precedent to the submission of a claim to arbitration, a claimant must submit an effective waiver together with its Notice of Arbitration, which would bar the claimant from initiating or continuing any proceeding in any other forum relating to the alleged breaching measure. The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Articles 1120 and 1137, assuming all other relevant procedural requirements have been satisfied.

[44] *See Waste Management I* Award §§ 16, 31; *Renco* Partial Award ¶ 73 ("[C]ompliance with Article 10.18(2) is a condition and limitation upon Peru's consent to arbitrate. Article 10.18(2) contains the terms upon which Peru's non-negotiable offer to arbitrate is capable of being accepted by an investor. Compliance with Article 10.18(2) is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal's jurisdiction."). *See also Detroit International Bridge Co. v. Government of Canada*, NAFTA/PCA Case No. 2012-25, Award on Jurisdiction ¶¶ 291, 336-337 (Apr. 2, 2015); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, CAFTA/ICSID Case No. ARB/09/17, Award ¶¶ 79-80 (Mar. 14, 2011) ("*Commerce Group* Award"); *Railroad Development Corp. v. Republic of Guatemala*, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, ¶ 56 (Nov. 17, 2008) ("*Railroad Development* Decision on Jurisdiction").

[45] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006)("*Thunderbird* Award") ("[t]he consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure"); *see also Waste Management I* Award § 27 ("when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the *double benefit* in its claim for damages") (emphasis added).

[46] For example, waiver provisions similar to Article 1121 of NAFTA can be found in Article 10.18.2 of the U.S.-Peru TPA, Article 10.18.2 of the Dominican Republic-Central American Free Trade Agreement ("CAFTA-DR"), and Article 26 of the 2012 U.S. Model Bilateral Investment Treaty.

[47] Any such subsequent arbitration claim would be subject to the three-year limitations period for claims under NAFTA Articles 1116(2) and 1117(2).

36. Compliance with the Article 1121 waiver obligation entails both formal and material requirements.[48] The waiver must be in writing and "clear, explicit and categorical."[49] As the *Renco* tribunal stated, interpreting a waiver provision in the U.S.-Peru Trade Promotion Agreement similar to Article 1121 of the NAFTA, the waiver provision requires an investor to "definitively and irrevocably" waive all rights to pursue claims in another forum once claims are submitted to arbitration with respect to a measure alleged to have breached the Agreement.[50] NAFTA Article 1121 is thus "intended to operate as a 'once and for all' renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits)."[51] That is, the waiver requirement seeks to give the respondent State certainty, from the very start of arbitration, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration. Accordingly, a waiver containing any conditions, qualifications, or reservations will not meet the formal requirements and will be ineffective.

37. Article 1121 also requires a claimant's waiver to encompass "any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to" in both Article 1116 and Article 1117, with certain limited, specified exceptions. The phrase "with respect to" should be interpreted broadly. This construction of the phrase is consistent with the purpose of this waiver provision: to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[52] As the tribunal in *Commerce Group* observed, the waiver provision permits other concurrent or parallel

[48] *Waste Management I* Award § 20; see also *Renco* Partial Award ¶ 73; *Commerce Group* Award ¶¶ 79-80.

[49] *Waste Management I* Award § 18; see also *Renco* Partial Award ¶ 74.

[50] *See Renco* Partial Award ¶¶ 95-96. *See also Waste Management I* Award § 19 ("It was from [the date of the notice of request for arbitration] that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.").

[51] *See Renco* Partial Award ¶ 99 (interpreting the similar waiver provision in Article 10.18 of the U.S.-Peru TPA).

[52] *Thunderbird* Award ¶ 118 (In construing the waiver provision under the NAFTA, the tribunal held, "[o]ne must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.").

domestic proceedings where claims relating to different measures at issue in such proceedings are "separate and distinct" and the measures can be "teased apart."[53]

38. For a waiver to be and remain effective, any juridical person or persons that a claimant directly or indirectly owns or controls, or that directly or indirectly owns or controls the claimant, must likewise abstain from initiating or continuing proceedings in another forum as of the date of filing the waiver (and thereafter) with respect to the measures alleged to constitute a Chapter Eleven breach. To allow otherwise would permit a claimant to circumvent the formal and material requirements under Article 1121 through affiliated corporate entities, thereby rendering the waiver provision ineffective. This in turn would frustrate the purpose of this waiver provision mentioned in the preceding paragraph of this submission.

39. If all requirements under Article 1121 are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration or the tribunal's jurisdiction *ab initio*. A tribunal is required to determine whether a disputing investor has provided a waiver that complies with the formal and material requirements of Article 1121. However, the tribunal itself cannot remedy an ineffective waiver. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent State as a function of its general discretion to consent to arbitration.[54]

Minimum Standard of Treatment (NAFTA Article 1105)

40. NAFTA Article 1105(1) requires each Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Article 1105(1) differs from other substantive obligations in NAFTA Chapter Eleven, such as those in Articles 1102, 1103, and the second

[53] *Commerce Group* Award ¶ 111-112 (holding that the waiver barred the claimant from pursuing a claim in a domestic proceeding that was "part and parcel" of its claim in a pending CAFTA-DR arbitration, because the measures subject to the claims in the respective proceedings could not be "teased apart"). NAFTA Article 1121 does not require a waiver of domestic proceedings where the measure at issue in the NAFTA arbitration is, for example, only tangentially or incidentally related to the measure at issue in the domestic proceedings.

[54] *Waste Management I* Award § 31 (holding that the waiver deposited with the first notice of arbitration did not satisfy NAFTA Article 1121 and that this defect could not be made good by subsequent action on the part of the claimant). *See also Renco* Partial Award ¶ 173; *Railroad Development* Decision on Jurisdiction ¶ 61 (finding that "the Tribunal has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver" and that "[i]t is for the Respondent and not the Tribunal to waive a deficiency under [CAFTA-DR] Article 10.18 or to allow a defective waiver to be remedied").

paragraph of Article 1105, in that it obligates a Party to accord treatment only to "investments."[55] In the context of a claim for denial of justice under Article 1105(1), a claimant (*i.e.*, an investor) must therefore establish that the treatment accorded to its investment rose to the level of a denial of justice under customary international law.

Claims Based on Judicial or Administrative Adjudicatory Proceedings

41. It is well established that the international responsibility of States may not be invoked with respect to non-final judicial acts,[56] unless recourse to further domestic remedies is obviously futile or manifestly ineffective. While it is not controversial that acts of State organs, including acts of State judiciaries, are attributable to the State,[57] there will be a breach of NAFTA Article 1105(1) based on judicial acts (*e.g.*, a denial of justice) only if the justice system *as a whole* produces a denial of justice (*i.e.*, when there has been a decision of the court of last resort available).[58] As the United States has elsewhere explained, while:

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[55] *See, e.g.*, Meg N. Kinnear et al., *Article 1105 – Minimum Standard of Treatment*, *in* INVESTMENT DISPUTES UNDER NAFTA, AN ANNOTATED GUIDE TO CHAPTER 11, at 1105-17 (2006) ("Several aspects of this are notable. First, the subject of this protection is investments rather than investors. The first paragraph of Article 1105 is limited to treatment of investments, unlike the second paragraph of Article 1105, and indeed other provisions such as Article 1102 and 1103, which refer to treatment accorded to both investments and investors. This limitation was present even in the earliest drafts of what became Article 1105(1).").

[56] *See Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶ 282 (June 14, 2013) ("[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself."); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 156 (June 26, 2003) ("The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 108 (2005) ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself."); Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L & COMP. L.Q. 867, 894 (2014) (explaining that "international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national").

[57] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 4(1), U.N. Doc. A/56/10 (2001) ("ILC Draft Articles") ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.").

[58] *See* ILC Draft Articles, Commentary to Chapter II, Attribution of Conduct to a State, ¶ 4 (noting that the fact that conduct can be attributed to the State "says nothing . . . about the *legality* or otherwise of that conduct") (emphasis added); James Crawford (Special Rapporteur on State Responsibility), International Law Commission, *Second*

> [t]he lower court decision, in and of itself, may be attributable to the State pursuant to article 4 [of the ILC Draft]; whether it constitutes, in and of itself, an internationally wrongful act is a separate question, as recognized in article 2. Except in extraordinary circumstances, there is no question of breach of an international obligation until the lower court decision becomes the final expression of the court system as a whole, *i.e.*, until there has been a decision of the court of last resort available in the case.[59]

42. As Judge Aréchaga, former President of the International Court of Justice, likewise observed, States are internationally liable only for judicial decisions of "a Court of last resort, all remedies available having been exhausted."[60] Thus, decisions of lower courts that may be corrected on appeal, for example, have not produced a denial of justice and cannot be the basis of a NAFTA Chapter Eleven claim. Rather, an act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless such recourse is obviously futile or manifestly ineffective.

Respectfully submitted,

[Signed]

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Report on State Responsibility, ¶ 75, U.N. Doc. A/CN.4/498 (July 19, 1999) (explaining that "[t]here are . . . cases where the obligation is to have a *system* of a certain kind, *e.g.* the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.") (emphasis in original).

[59] International Law Commission, Draft Articles on State Responsibility, Comments and Observations Received from Governments, at 51, U.N. Doc. A/CN.4/515 (2001) (comments of the United States on Draft Article 15).

[60] Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 281-82 (1978) (emphasis added) (quoted with approval in the *Loewen* Award ¶ 153); *Norwegian Loans* (*France v. Norway*), 1957 I.C.J. 9, 39 (July 6) (Separate Opinion of Judge Lauterpacht) ("[H]owever contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them.").