INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/23/33

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

Claimants

vs.

THE UNITED MEXICAN STATES

Respondent

REJOINDER ON JURISDICTION

June 30, 2025

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GLOSSARY

Short name	Description
BNYM or The Trustee	Bank of New York Mellon
Contrarian	Contrarian Capital Management, L.L.C.
Cyrus	Cyrus Capital Partners, L.P.
Opps II Offshore Feeder	Cyrus Opportunities Fund II Ltd.
Opps II Domestic Feeder	Cyrus Opportunities Fund II, L.P.
Opps II Master	Cyrus Opportunities Master Fund II., Ltd.,
Notes	Debt securities issued by TV Azteca on August 9 2017
Noteholders	Holders of the Notes issued by TV Azteca on August 9 2017
Indenture	Indenture agreement, August 9 2017
Judge Robles	Judge Miguel Angel Robles Villegas
NAFTA	North American Free Trade Agreement
Opportunities Funds	Opps II Master, Opps II Domestic Feeder, and Opps II Offshore Feeder
USMCA Protocol	Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada
Request for Arbitration	Request for arbitration filed on June 30, 2023
Sixty-Third Superior Court	Sixty-Third Superior Civil Court in Mexico City
TV Azteca	TV Azteca S.A.B. de C.V.
USMCA	U.S.-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

1. This pending arbitration arises from the shameful actions of Mexico's courts to subvert justice. Powerful Mexican media mogul and billionaire, Ricardo B. Salinas Pliego, and one of his main companies, TV Azteca, a prominent television network and leading global creator of Spanish-language content, have disgracefully wielded Mexico's judiciary to obstruct U.S. investors' legitimate recovery of the $500 million (and growing) debt owed to them.

2. In this arbitration, Claimants seek redress for the denial of justice wrought upon them by the Mexican judiciary. Since 2022, Claimants have been involuntarily subjected to scurrilous legal actions initiated by TV Azteca and Mr. Salinas in Mexican courts in an abusive (and sadly successful) effort to evade clear financial obligations to repay nearly $500 million in debt presently and unmistakably owed to Noteholders.

3. Claimants have time and time again sought in good faith to engage with Mexico's representatives to this arbitration to discuss options for reaching a mutually agreeable resolution to this dispute, founded upon the parties' shared interest in recovering vast sums of money owed by Mr. Salinas and his companies to Mexico and Claimants, respectively.

4. And yet Mexico's representatives have shown no interest in meeting or engaging with Claimants or their representatives, preferring instead to engage in petty procedural maneuvers and obfuscation of the underlying facts.

5. That those Mexican representatives are obligating Claimants to expend further time and resources to defend the clear validity of the Tribunal's jurisdiction underscores the lengths Mexico is willing to go to do Mr. Salinas's bidding.

6. Having failed to secure any dialogue or discussion with those representatives of Mexico in this matter, Claimants have even attempted to engage directly in a dialogue with the Office of the President of Mexico to raise the parties' mutual interests.[1]

7. For reasons that remain unknown to Claimants, however, Claimants' letter was mysteriously routed *not* to the Ministry of Economia or to President Sheinbaum, but rather to the Ministry of the Interior that has no remit or involvement regarding this pending dispute. The response from the Ministry of the Interior nonsensically

[1] **C-0076,** December 16, 2024 Letter from Cyrus and Contrarian to President Sheinbaum.

described Claimants' pending claim against the Government of Mexico as a private dispute between two parties and thus not addressable by the government.[2]

8. Thus Claimants remain unable to consult on an amicable resolution with the Ministry of Economia representatives in this case or to bring their complete recalcitrance to the attention of their superiors within the Ministry or the Office of the President.

9. And for what purpose does Mexico continue to expend its own finite government resources to robustly defend the actions of its courts and ignore Claimants' desire to seek a mutually agreeable settlement, the very same courts the Government has levied the same concerns on corruption and favoritism?[3] To obsequiously carry water for Mr. Salinas rather than work to address the serious miscarriages of justice Mexico's court system continues to inflict on Claimants and the Noteholders under their control? To willfully ignore Mexico's own interests in going after Mr. Salinas for his massive unpaid tax liabilities in conjunction with Claimants' efforts to recover debts rightfully owed? Mexico does not say.

10. In this unprecedented time of fluctuating relations with the U.S. government and efforts to seek additional U.S. investments into Mexico, surely it would be in Mexico's interest to shore up relations and resolve seriously questionable judicial procedural actions with U.S. investors rather than take actions to defend and showcase the ineptitude and corruption of their court system vis a vis foreign investors.

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[2] **C-0077,** Response to Cyrus and Contrarian President Sheinbaum Letter from Mexico's Ministry of Interior.

[3] Speaking at the June 27, 2025 morning press conference, President Sheinbaum addressed recent judiciary reform criticisms and TV Azteca's tax liabilities pending judicial proceedings, stating that:

> … el fondo de por qué están en contra de la elección al Poder Judicial, por qué tanta motivación, tanta crítica, tanto enojo en contra de la elección al Poder Judicial: pues porque tenían vínculos con muchos ministros y ministras que permitían este aletargamiento en la decisión, o una decisión que pudiera ser favorable a este grupo que sería, ahora sí que la injusticia llevada a la máxima expresión.... es importante que toda la gente sepa que esta andanada que se ha hecho de críticas contra la elección al Poder Judicial —que provienen, en mucho, de medios de comunicación, en particular de uno— tiene que ver con que no quieren pagar impuestos y quieren que continúe este régimen de corrupción y privilegios que los protegía.

See also **C-0078** Stenographic Version of the June 27, 2025 Morning Conference of President Sheinbaum, *available at* https://www.gob.mx/presidencia/articulos/version-estenografica-conferencia-de-prensa-de-la-presidenta-claudia-sheinbaum-pardo-del-27-de-junio-de-2025; *See also*, the following media releases: **C-0079,** The CSP refers Salinas debt to court – Reforma (June 27, 2025)**,** *available at* https://www.reforma.com/exhiben-modus-operandi-de-salinas-pliego-debe-74-mil-mdp/ar3029438. *See also* June 27, 2025 President Sheinbaum Press Conference, YouTube, available at https://www.youtube.com/watch?v=WPptIn1I5Po.

11. As stated in Claimants' Counter-Memorial on Jurisdiction and as bears repeating here: When prospective investors consider the viability and feasibility of undertaking any material investment in Mexico, they will surely consider the actions of the sovereign State in this case. Unfortunately, what they will see is the State's choice to bless unlawful local actions rather than counter the threat that such actions pose to the perception of Mexico as a stable and functioning target for foreign investment. Although the Mexican courts are allowing TV Azteca to dodge its contractual agreements, the Tribunal should hold Mexico to its treaty obligations.[4]

B. Executive Summary

12. From the outset of this arbitration, Mexico has repeatedly failed to engage with the core complaints raised by Claimants. Consistent with that tactic, Mexico's Reply focuses on isolated (and often irrelevant) points while disregarding the systemic breaches of due process by the Mexican courts.

13. For instance, Mexico's effort to claim that it has uncovered a supposed "plan"[5] by Claimants seems to be a baseless diversion rather than a meaningful response to the key allegations in this dispute. The documents produced by Claimants in this arbitration clearly demonstrate that far from "planning" some convoluted litigation scheme, the Claimants have found themselves unwillingly subjected to a biased judicial system that has systematically shielded TV Azteca while obstructing Claimants' access to due process (even while the Mexican State itself has raised concerns about similar actions by TV Azteca against the government). Instead of addressing these systemic failures, Mexico's narrative lobs speculative allegations to obscure its courts' breaches of fundamental judicial safeguards.

14. This tactic is simply not credible, particularly given that the Government of Mexico has itself conceded that its judicial system is systematically broken, leading to recent nationwide elections to remove many of its judges. Moreover, the Government has itself accused TV Azteca's chairman, Mr. Salinas, of also defaulting on his financial obligations and debts owed to the Government.

15. More specifically, Mexico has notably failed to address several critical points raised by Claimants in their response to Mexico's jurisdictional objections. These include TV Azteca's secret *ex parte* injunction obtained from a court known for its affiliation with Mr. Salinas, based on demonstrably false grounds; the burdensome litigation faced by Noteholders, who have been compelled to engage in more than 10 separate court actions in Mexico derived from TV Azteca's deliberate default and manipulative misuse of the Mexican judicial system; and TV Azteca's objection to the plaintiffs' request for an anti-suit injunction, citing constitutional protections that it has paradoxically used to maintain parallel proceedings.[6] Each of these instances

[4] Claimants' Counter-Memorial on Jurisdiction, at ¶ 10.

[5] Respondent's Reply on Jurisdiction, at ¶ 2.

[6] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 4, 6-7.

exemplifies systemic judicial failures that Mexico has chosen to ignore. Even the President of Mexico, Claudia Sheinbaum, has recognized the ongoing issues of wrongdoing within the Mexican judicial system, particularly concerning corruption and favoritism.[7]

16. Mexico contends that "this case is an abuse of the investor-State dispute settlement system," as it was initiated with Claimants' full knowledge that they had not complied with the jurisdictional requirements.[8] However, as Claimants have systematically demonstrated, they have met all substantive jurisdictional requirements. The procedural matters on which Mexico focuses, such as the 90-day interval between the notice of intent and the arbitration request, do not alter Mexico's consent to the proceedings.

17. In this Rejoinder, Claimants will respond to factual inaccuracies presented by Mexico, and provide detailed responses to each of the eight jurisdictional objections raised.

18. Regarding Objection 1, Claimants reaffirm that they have met all requirements under NAFTA Chapter 11 to submit the dispute to arbitration. Mexico's Reply confirms that the alleged procedural issue is not a jurisdictional barrier, as there is no precedent establishing it as such. Since the Parties' consent to arbitrate remains intact, the Tribunal's jurisdiction is unaffected. Claimants made a good faith efforts to resolve the dispute amicably, as required by NAFTA Article 1118, and Mexico repeatedly failed to engage in negotiations. Any procedural deficiency arose from the Mexican court's failure to timely notify Claimants of the September 2022 injunction.

19. With respect to Objection 2, both Claimants are enterprises of the United States that control Notes that are investments in the territory of Mexico. As "investors of a Party" under NAFTA who have made an "investment," Claimants are entitled to bring the current claims against Mexico under Article 1116 for its breach of Article 1105. Claimants control the Noteholders and, therefore, control the Notes held by them. Mexico's alternative argument that neither Claimant in fact controls their respective Noteholder is unsupported by the facts and reflects a fundamental misunderstanding of how investment managers and investment funds are structured and governed all around the world.

20. Objection 3 similarly fails because the investment—the Notes controlled by Claimants—was issued in August 2017, while NAFTA was still in force, and was therefore "established" before the USMCA took effect on July 1, 2020. Annex 14-C of the USMCA does not require that investments be both established and acquired

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[7] *See* **C-0078** Stenographic Version of the June 27, 2025 Morning Conference of President Sheinbaum, *available at* https://www.gob.mx/presidencia/articulos/version-estenografica-conferencia-de-prensa-de-la-presidenta-claudia-sheinbaum-pardo-del-27-de-junio-de-2025.

[8] Respondent's Reply on Jurisdiction, at ¶ 4.

prior to the agreement's entry into force. Accordingly, Claimants' investments qualify as "legacy investments" under Annex 14-C.

21. Objection 4 is without merit because, as confirmed by Mexico's former lead USMCA negotiator, Annex 14-C of the USMCA does not limit its application to breaches occurring before NAFTA's termination. Instead, it provides consent to arbitrate claims alleging breaches of Section A of NAFTA Chapter 11 with respect to legacy investments, without distinguishing between pre- or post-termination breaches.

22. Regarding Objection 5, the Notes qualify as investments under Article 1139 of NAFTA and therefore meet the requirements of Article 25 of the ICSID Convention. Since the treaty provides a clear definition of "investment," Mexico's reliance on the *Salini* factors is misplaced. The Tribunal should avoid a rigid application of the *Salini* test, which can lead to inconsistent outcomes when applied indiscriminately across different types of investments.

23. Objection 6 fails because both Claimants have met their burden of demonstrating an unbroken chain of control over the Notes, both before and after the September 2022 Injunction. Moreover, Mexico's position reflects a fundamental misunderstanding of Claimant Contrarian's structure in particular and the mechanisms through which the Notes it holds were transferred.

24. Objection 7 fails because Claimants' NAFTA Article 1121 waivers are clearly valid. Mexico's reasoning is circular, unsubstantiated, and fails to demonstrate in any meaningful way that the waivers do not comply with the requirements of Article 1121(1) of NAFTA.

25. Objection 8 likewise fails because Contrarian controls Notes that were the subject of the Injunction at the time of its issuance and the related breach of due process by Judge Robles. Mexico does not raise any new rebuttal in its Reply as to the facts established by Claimants.

26. Finally, Mexico waived its untimely new claim on inadmissibility, the presentation of which in Mexico's Reply is inconsistent with the ICSID Arbitration Rules.

II. MEXICO FAILS TO GRAPPLE WITH THE FACTS THAT GIVE RISE TO THIS ARBITRATION.

27. Mexico repeatedly asserts that Claimants have the burden of establishing the Tribunal's jurisdiction, while at the same time failing to grapple with Claimants' arguments and the facts underlying the claim. For this reason, Claimants urge the Tribunal to reject Mexico's arguments, which on their face do not stand up to logic.

A. Mexico fails to rebut dispositive factual issues raised by Claimants.

28. Mexico ignores key aspects set forth in the Claimants' Counter-Memorial that demonstrate clear violations of their fundamental rights of defense. Instead of

addressing the relevant record, Mexico chooses to emphasize email exchanges between Claimants' representatives, the Trustee, and legal advisors to try to suggest a coordinated "plan" against Mexico.[9] These exchanges, however, merely confirm Claimants' efforts to pursue a lawful mechanism to protect their interests and secure TV Azteca's compliance with its financial obligations under the debt Notes.

29. To assist the Tribunal, Claimants will outline key facts in the legal proceedings in Mexico that illustrate the denial of justice and the lack of due process rights experienced by Claimants—but which Mexico has to date chosen to ignore or minimize. These facts are fully outlined in paragraphs 45 to 79 of Claimants' Counter-Memorial and can be summarized as follows:

    a. A day before withdrawing a pending case from the U.S. District Court in New York concerning TV Azteca's failure to comply with its Note obligations, TV Azteca secretly initiated proceedings before the Sixty-Third Civil Superior Court in Mexico City. Neither TV Azteca nor the Superior Court provided any notice of the Mexican proceeding to Claimants, the other Noteholders, the Trustee, or the court presiding over the U.S. litigation. This was intended to obstruct U.S. litigation and block enforcement of the Notes.10

    b. TV Azteca asked the Mexican court to declare that the COVID-19 pandemic was a force majeure excusing TV Azteca from its obligations under the Indenture, including repayment of the Notes.11 Just five days later, the Sixty-Third Superior Court granted precautionary measures without a hearing or notifying the respondents, and later ruled that payments would be suspended until the World Health Organization (WHO) declared the pandemic over,12 thus depriving Claimants of the opportunity for a proper defense.

    c. Just six months later, on March 4, 2022, the Judiciary Council issued guidelines ordering the resumption of regular activities across the entities of the Mexico City Superior Court of Justice, effectively recognizing the end of the pandemic for judicial purposes.[13] However, the Sixty-Third Superior Court ignored these guidelines.

    d. The precautionary measures prohibit any attempts to remedy TV Azteca's multiple breaches under the Notes, and suspend its obligations arising

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[9] Respondent's Reply on Jurisdiction, at ¶ 18-20.

[10] Claimants' Counter-Memorial on Jurisdiction, at ¶ 45.

[11] Claimants' Counter-Memorial on Jurisdiction, at ¶ 46.

[12] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 47, 48, 51.

[13] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 55-56.

from them.[14] Judge Miguel Ángel Robles Villegas, who is widely known for his bias in favor of TV Azteca and Grupo Salinas, presided over the Sixty-Third Superior Court at all relevant times.[15]

e. On March 15, 2023, the Trustee filed for *amparo* against the precautionary measures, arguing that they constituted a form of final relief improperly granted by Judge Robles without a trial on the merits, and in violation of due process and the defendants' right to a defense.[16] However, on March 23, 2023, the Mexican Federal Court dismissed the *amparo* petition on procedural grounds, citing "failure to exhaust local remedies." Then, the Trustee filed an appeal before the Third Superior Appellate Court challenging the precautionary measures.[17] As of today, no ruling has been issued, and the court has stayed its decision pending TV Azteca's notification to all defendants—*something that has yet to occur, even now nearly three years following the issuance of the Injunction.*

f. By April 20, 2023, the Trustee submitted a response in the Mexican proceeding, along with a motion to dismiss the claim for lack of jurisdiction, invoking the exclusive jurisdiction of New York courts as provided in the Trust Agreement. On May 2, 2023, TV Azteca requested that the Sixty-Third Civil Superior Court reject the Trustee's response on the grounds that it was purportedly filed after the deadline. Although that timeliness allegation was inaccurate, Judge Robles accepted TV Azteca's request and rejected the Trustee's response.[18]

g. On May 8, 2023, the Trustee requested reconsideration to maintain its appearance and argue lack of jurisdiction. On May 15, Judge Robles "acknowledged" his error and accepted the response as timely.[19] Since the Trustee's appeal regarding the injunction was already pending before the Third Superior Appellate Court, Judge Robles transferred the Trustee's motion to dismiss to said court.

h. On May 5, 2023, the WHO declared that COVID-19 was no longer a global public health emergency. On May 9, the President of Mexico issued a decree ending the national health emergency. Based on these announcements, the Trustee filed a motion to annul the precautionary measures, as they were explicitly tied to the pandemic's duration. But on December 13, 2023, TV Azteca requested that the court pause

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[14] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 49-50.

[15] Claimants' Counter-Memorial on Jurisdiction, at ¶ 48.

[16] Claimants' Counter-Memorial on Jurisdiction, at¶ 57.

[17] Claimants' Counter-Memorial on Jurisdiction, at ¶ 60.

[18] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 62-63.

[19] Claimants' Counter-Memorial on Jurisdiction, at ¶ 63.

consideration of the motion due to alleged lack of jurisdiction because not all defendants had been notified. Although that purported condition was (and remains) entirely within TV Azteca's control, the court nevertheless granted TV Azteca's request.[20]

i. On January 8, 2024, Judge Robles ordered that the U.S. District Court for the Southern District of New York be officially notified of the Mexican proceedings, and requested that the U.S. court "refrain from issuing a decision" to avoid contradictory rulings. The Trustee in turn appealed the denial of its motion to annul the pandemic injunction. On July 8, 2024, the Third Superior Court of Appeals in Mexico confirmed Judge Robles' decision to maintain the injunction, stating that the injunction was not based solely on the pandemic itself, but on its impact on TV Azteca's ability to fulfill its obligations,[21] and also that lifting the injunction would deprive the underlying case of its subject matter.[22]

j. Thus, although the injunction explicitly stated that it would remain in effect only until the WHO declared the end of the pandemic, the Third Superior Appellate Court upheld Judge Robles' decision to maintain the injunction—even as the Court acknowledged that the pandemic had ended.

k. On January 30, 2024, the Third Superior Court of Appeals suspended judgment on the Trustee's jurisdictional challenge, keeping the injunction in place until TV Azteca serves all 35 defendants. That condition is solely in the control of TV Azteca. Later, the Trustee obtained an *amparo* vacating the suspension, but TV Azteca appealed and on July 3, 2024, a federal appeals court reinstated the suspension. That decision is final. Thus, unless TV Azteca elects to serve all defendants, the Trustee's clear-cut jurisdictional claim—based on the Indenture's New York forum clause—remains unresolved, and the injunction stays in effect indefinitely. As a result, TV Azteca is permitted to further abuse a flawed injunction process to block dismissal efforts and avoid its obligations, via the complicity of the Mexican courts, thereby continuing to deny U.S. investors fair treatment under NAFTA.[23]

l. As noted above, Judge Robles, who presided the Mexican Court Proceedings 995/2022, has a history of favoring TV Azteca and Grupo Salinas. In 2020, he granted an injunction blocking Diamond Films from enforcing claims against TV Azteca in a dispute outside of Mexico, as a provisional measure, as requested by TV Azteca. Also, on May 9, 2023, he

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[20] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 65-67.

[21] Claimants' Counter-Memorial on Jurisdiction, at ¶ 70-71.

[22] Claimants' Counter-Memorial on Jurisdiction, at ¶ 79.

[23] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 73-75.

issued another *ex parte* injunction—without notifying or giving opportunity of defense to the counterparties—allowing TV Azteca to withhold legally required financial disclosures as a publicly traded company.[24]

m. Mexican media have highlighted Judge Robles' favoritism toward TV Azteca. On May 12, 2023, a news article entitled *"TV Azteca has its 'friend judge'"* cited these and other cases as evidence of repeated judicial favoritism toward Grupo Salinas and its affiliates by Judge Robles. The fact that Judge Robles continues to enforce the injunction, despite the pandemic's (officially recognized) end, has also drawn media attention in Mexico. A news article entitled *"TV Azteca continues to be protected from its creditors despite the end of the pandemic"* cited a bankruptcy expert stating that the injunction should no longer be legally valid.[25] On March 9, 2024, La Reforma reported that under the pretext of COVID-19, Judge Robles continues to shield TV Azteca from U.S. creditors owed nearly US$500 million, with no interest paid in over three years.

30. The irrationality and procedural irregularities in this case highlight the due process violations suffered by Claimants. Mexico's approach in this dispute is to downplay these actions and dismiss them as merely inconsequential. However, Mexico fails to acknowledge how such judicial conduct systematically deprived Claimants of the opportunity to act promptly and defend their rights.[26] This denial of procedural fairness ultimately compelled Claimants to initiate this arbitration before the expiration of their rights to pursue a NAFTA violation claim.

B. The date that Opps II Master Fund and Sandpiper acquired the Notes is irrelevant because Claimants' investments were established prior to the termination of NAFTA.

31. NAFTA Article 1139 defines "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". In the present case, Cyrus and Contrarian qualify as investors of a Party under NAFTA's provisions:

a. *Claimants are organized, located and have their principal places of business in the United States.* As stated in the paragraphs 28 to 77 of the Claimants' Counter-Memorial, Cyrus and Contrarian are enterprises of the United States, since both are organized under the laws of the State of Delaware and have their principal places of business in New York, New York and Greenwich, Connecticut, respectively. These facts confirm their

[24] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 76-77.

[25] Claimants' Counter-Memorial on Jurisdiction, at ¶ 78.

[26] For the Tribunal's reference, Claimants provide an updated summary reflecting the current state of the Mexican proceedings at **C-0082**.

nationality and validate their condition as U.S. investors under NAFTA; and

b. *Due to its corporate structure, Claimants currently control and have controlled the Noteholders of the TV Azteca's Notes*. Mexico claims that the Notes are not "*owned* or *controlled, directly or indirectly,*" by Claimants, merely because Claimants are referred to as "investment managers" of Opportunities Funds and Sandpiper, respectively. Based on this assumption, Mexico mistakenly concludes that Claimants lack control over the Notes. However, and as discussed in Claimants' Counter-Memorial, this assumption misrepresents the nature of typical investment fund structures, as explained below.

32. In such investment structures, control is in fact exercised through the role of an "investment manager"—whether as a direct managing member or, as in the case at hand, pursuant to an investment management agreement. Under the relevant agreements, Claimants indisputably exercise control over the Noteholders. Thus, Claimants are fully entitled to act on behalf of the investment funds they manage.

33. Mexico further contends that Opps II Master Fund and Sandpiper acquired their Notes after June 30, 2020, with the sole intent of taking over TV Azteca. That is both incorrect and irrelevant: As explained, the pertinent fact is whether the investment was "established" prior to July 1, 2020. That occurred on August 9, 2017, when the debt was issued by TV Azteca under the terms of the Indenture Agreement.

34. Therefore, Claimants (i) are investors of a Party as defined under NAFTA and (ii) control the Noteholders of TV Azteca's Notes.

C. Mexico ignores the explicit definition of "investment" included in NAFTA and fails entirely to address Claimants' positions on the relevance of Claimants' holdings of debt securities.

35. Mexico argues that the investment in question does not qualify because the Notes were acquired after the expiration of NAFTA.[27] According to Mexico, the Notes were neither established nor acquired by an investor of another Party while NAFTA was in effect, and thus fail to meet the standard for a "legacy investment."

36. Claimants will address this misinterpretation of Mexico in our reply to Objection 3. However, Mexico's interpretation imposes an additional criterion for legacy investments under the USMCA that is not stipulated in the agreement.

37. As Claimants will address in our reply to Objection 3, Claimants meet each requirement of the definition of "legacy investment" under paragraph 6(a) of Annex 14-C:

[27] Respondent's Reply on Jurisdiction, at ¶ 16.

- Claimants have an "investment," i.e. the Notes under their control issued by TV Azteca, a Mexico-domiciled company, in 2017;
- Claimants are "investors" of "another Party," i.e., the United States,
- Claimants' investments were established prior to the termination of NAFTA on August 9, 2017, i.e., prior to July 1, 2020, when the debt was issued by TV Azteca under the terms of the Indenture; and
- Claimants' investments were in existence at the time of the entry into force of the USMCA, i.e. July 1, 2020.

38. In its Reply on Jurisdiction, Mexico relies on an inaccurate and fundamentally flawed understanding of the operational mechanisms of notes, debt securities, and the structure and governance of investment funds to make its arguments relating to whether Claimants have an "investment" or if they are "investor[s] of another Party.".[28] Specifically, Mexico engages in a convoluted attempt to confuse the Tribunal on the facts with respect to debt security holdings and the way in which investment funds operate in practice vis-à-vis debt securities.[29]

39. To be clear, investment managers use investment fund structures to pool capital from multiple investors to collectively purchase securities, offering a wider range of investment options, professional management, and lower fees compared to individual efforts. Debt securities, such as corporate bonds, represent loans made by investors to corporations in exchange for periodic interest payments and the return of the principal at maturity.[30]

40. As such, the definition of "investment" under NAFTA article 1139 includes in subparagraph (c) a "debt security of an enterprise… (ii) where the original maturity of the debt security is at least three years."[31] The Notes at issue in this dispute qualify as such a "debt security," and it is undisputed that their maturity is at least three years.

D. The witness statement submitted by Claimants in conjunction with the Counter-Memorial on Jurisdiction is consistent with the contemporaneous documents Mexico cites.

41. Mexico alleges that the witness statement produced by Claimants in conjunction with the Counter-Memorial on Jurisdiction does not provide accurate information on the

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[28] Respondent's Reply on Jurisdiction, at ¶¶ 22-30.

[29] Respondent's Reply on Jurisdiction, at ¶¶ 29-30.

[30] *See*, **C-0080,** Investopedia, *What Is an Investment Fund? Types of Funds and History,* available at https://www.investopedia.com/terms/i/investment-fund.asp (last visited June 30, 2025); **C-0081,** Investopedia, *What Is a Debt Security? Definition, Types, and How to Invest*, available at https://www.investopedia.com/terms/d/debtsecurity.asp (last visited June 30, 2025).

[31] NAFTA Article 1139.

negotiation of Annex 14-C of the USMCA, arguing that Mr. Smith's witness statement about the extension of NAFTA Chapter 11's substantive obligations under Annex 14-C of the USMCA is "directly contradict[ed]" by certain contemporaneous documents.[32] On the contrary, the contemporaneous documents cited by Mexico provide further support for Claimants' interpretation of the provision.

42. In response, Mr. Smith has provided a Second Witness Statement, which restates his understanding of the scope of Annex 14-C of the USMCA and highlights how the documents referenced in Mexico's Reply in fact reinforce the validity of his testimony in the First Witness Statement.

43. Mr. Smith clarifies in detail in his Second Witness Statement that documents accompanying his First Witness Statement align with and do not contradict any documents cited by Mexico in its Reply. In fact, Mr. Smith states: "My testimony is consistent with, and is not contradicted by, those or any other documentation relaying the negotiating history of Chapter 14 and its annexes and the Parties' contemporaneous understanding of the scope of Annex 14-C."[33]

E. Mexico's refusal to engage in consultations contradicts the purpose of NAFTA Articles 1118 and 1119, the well-known principle of *amicable* resolution.

44. Mexico contends that consultations under Article 1119 were no longer feasible once the request for arbitration was filed. However, Mexico fails to address Claimants' well-documented efforts to establish a negotiation period and suspend the arbitration proceedings immediately after registration. Mexico asserts that non-acceptance of the suspension rendered this requirement unmet, thereby alleging non-compliance with Articles 1118 and 1119.

45. Claimants provided a detailed account of their intent to negotiate and the related procedural history.[34] Mexico's unwillingness to allow consultations undermined the procedural purpose of Article 1119 and contradicts its own argument regarding lack of compliance.

46. Claimants cannot be penalized or denied access to NAFTA's protections as extended by Annex 14-C of the USMCA merely due to a supposed procedural error that was beyond their control. That purported error directly stemmed from the failure of the Mexican judiciary to ensure due process, including its failure to notify Claimants of legal proceedings in Mexico to which they were subject or to subsequently serve the injunction that resulted from those secret proceedings that were carried out without informing the affected entities. Furthermore, Mexico inflexibly refused an alternative approach that would align with the provisions of Article 1118 of NAFTA (making

[32] Respondent's Reply on Jurisdiction, at ¶ 32.

[33] Second Expert Witness Statement, Mr. Kenneth Patrick Smith Ramos, at ¶ 13.

[34] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 121-126.

clear that disputing parties "should first attempt to settle a claim through consultation or negotiation") and Article 1119 of NAFTA.

III. BASED ON THE PLAIN TEXT OF NAFTA AND THE USMCA, THE TRIBUNAL CATEGORICALLY HAS JURISDICTION TO HEAR THIS DISPUTE

A. Reply To Objection 1: Claimants Satisfied All Jurisdictional Requirements to Submit Their Claims Under NAFTA Chapter 11.

47. As previously stated in Claimants' Counter-Memorial on Jurisdiction,[35] Claimants have met all the requirements under NAFTA Chapter 11 to submit this dispute to arbitration. Mexico's Reply confirms the jurisdictional irrelevance of this procedural objection.

48. Even if Mexico were right that delivery of the Notice of Intent was untimely, Mexico agrees that there is no on-point precedent that necessarily renders that procedural defect a jurisdictional bar.[36] Claimants submit that because the Parties' consent to arbitrate is not affected by any such deficiency, it cannot deprive the Tribunal of jurisdiction.

49. Claimants reiterate here—yet again—that they demonstrated a commitment to attempting to resolve the dispute through amicable means, consistent with the underlying motivation behind Article 1118 of NAFTA. Mexico's repeated and admitted failure to engage with Claimants demonstrates that it was not deprived of due process rights. It had ample opportunity to engage in good faith negotiations with Claimants during a proposed 90-day pause of these proceedings, but elected not to do so. Finally, Claimants acted in good faith and are not at fault, as any deficiency is a result of an "organ" of Mexico – the Mexican court's own failure to alert Claimants in a timely manner to the September 2022 Injunction through proper service.

(1) The legal authorities cited in Mexico's Reply do not support Mexico's arguments or the propositions set forth.

50. Mexico claims that "No tribunal has ever been confronted with a complete failure to file a NOI timely, nor has any tribunal ruled that such noncompliance is excusable or a curable jurisdictional defect."[37] Claimants agree that this particular case presents a novel procedural context that warrants careful consideration by this Tribunal. However, Claimants emphasize that the cases that Mexico cites do not support its propositions. Context is important and, while the language that Mexico has selectively excerpted may appear to provide support for Mexico's arguments on their

[35] Claimants' Counter-Memorial on Jurisdiction, at ¶ 114-147.

[36] Respondent's Reply on Jurisdiction, at ¶ 63.

[37] Respondent's Reply on Jurisdiction, at ¶ 69.

face, Mexico uses the language frequently out of context and has distorted the relevant holdings to support its argument.

51. Specifically, Mexico's case citations deal with issues relating to *substantive* deficiencies, namely whether the *substantive* content of a Notice of Intent complied with formal requirements (which, here, the Claimants have indisputably met). Mexico's cited cases, however, do not address whether the timing of a Notice of Intent may constitute a deficiency of jurisdictional significance. Crucially, the cases do not pertain to any factually similar scenario in which exceptional conditions—such as a risk of irreparable harm caused by losing the very ability to bring a claim to remedy a violation of host State conduct that would have resulted from observing a 90-day cooling off period—could justify a flexible interpretation of Article 1119. Furthermore, the cases fail to evaluate circumstances wherein, like here, an investor demonstrated a good faith effort to comply with the 90-day cooling off period in principle through repeated attempts to engage in consultations and a self-imposed 90-day pause, only to encounter repeated rejection by the host State.

52. First, in *Methanex v. United States*, the tribunal considered the U.S. claim that Methanex failed to comply with Article 1119 of NAFTA by amending its claims beyond those included in its "original" notice of intent. There, over opposition of the U.S. government, the claimant filed an amended version of its statement of claim that included multiple additional complaints of discrimination.[38] This substantive change to the scope and number of asserted claims is factually distinct from the non-substantive timing question at issue in this arbitration.

53. Next, in *Merrill & Ring v. Government of Canada*, the tribunal there considered a motion to add an additional claimant as a disputing party in the arbitration, which implied modification of the submission of claim to arbitration under Article 1120. In other words, Canada's objection did not deal with the procedural formalities related to the Notice of Intent under Article 1119. [39]

54. In *Canfor Corporation v. United States of America*, the tribunal examined whether a separate article in NAFTA constituted a jurisdictional provision that would preclude

[38] **CL-0078**, *Methanex Corp. v. United States of* America, NAFTA/UNCITRAL, First Partial Award, August 7, 2002, at ¶ ¶ 10–12.

[39] **CL-0079**, *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, Decision on a Motion to Add a New Party, January 31, 2008, at ¶¶ 1-3.

the tribunal from hearing the claim. [40] The tribunal's decision did not concern procedural requirements related to a Notice of Intent under Article 1119. [41]

55. In *Bilcon v. Canada,* the tribunal examined a number of jurisdictional objections, including on whether: requirements under NAFTA Article 1101 were met; NAFTA's limitations period had been exceeded; a body was an "organ" of Canada; a loss was caused; and a claimant could be included on the basis of certain ownership or financial interests.[42] Clearly, none of these issues are relevant to notice of intent timing. The quotation cited by Mexico[43] is actually an introductory explanation provided by the tribunal, emphasizing that, overall and generally speaking, the protections granted to investors under Chapter 11 are exceptional and strictly contingent upon the consent of the NAFTA Parties. Neither that quoted language nor anything else in the decision of the tribunal is relevant to Mexico's jurisdictional objection here.

56. Thus, Claimants respectfully urge the Tribunal to look to the case precedents provided by Claimants, which more squarely address the issue that is core to this arbitration, and which support Claimants' request for the Tribunal to reject Objection 1.

(2) As set forth at length in the Counter-Memorial on Jurisdiction, Claimants satisfied all mandatory jurisdictional requirements to submit their claims under NAFTA.

57. Mexico's Reply fails to adequately respond to Claimants' clear position that they have satisfied each of the provisions under Chapter 11, including Article 1119. Mexico also fails to address Claimants' alternative argument that, even assuming *arguendo* that Claimants failed to satisfy certain procedural aspects of Article 1119, it would not result in the loss of the Tribunal's jurisdiction.[44] Claimants summarize these arguments below.

58. Claimants have satisfied each of the procedures under Chapter 11 to submit their claims to arbitration. Specifically, on June 28, 2023, Claimants sent the Notice of Intent to the Mexican official designated to represent Respondent in this arbitration,

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[40] **CL-0080**, *Canfor Corporation v. United States of America*, Tembec Inc. et. al. *v. United States of America* and Terminal Forest Products Ltd. *v. United States of America*, UNCITRAL, Decision on Preliminary Question, June 6, 2006, at ¶ 138-140.

[41] **CL-0080**, *Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, June 6, 2006, at ¶ 175, 273.

[42] **CL-0081**, *William Ralph Clayton, William Richard Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, at ¶ 230**.**

[43] Respondent's Reply on Jurisdiction, at ¶ 61.

[44] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 114, 116-137.

Mr. Alan Bonfiglio Ríos. Subsequently, on June 30, 2023, Claimants submitted the Request for Arbitration. These actions were carried out in accordance with the relevant procedural requirements of Article 1119 of NAFTA.[45]

59. Moreover, and relevant for the Tribunal's consideration of this objection, Claimants' proposal to implement a 90-day suspension following the registration of their Request for Arbitration represented the most feasible alternative to avoiding a permanent forfeiture of their ability to pursue a claim under NAFTA for denial of justice.[46] In this way, Claimants were able to both ensure the preservation of their ability to bring their claim under Annex 14-C prior to the expiration of the Transition Period – an ability that would have expired had Claimants strictly waited 90 days prior to submitting their Request for Arbitration – while affording Mexico sufficient time to consider Claimants' claim and to engage in consultations and discussions with Claimants, without having to simultaneously expend resources defending the early stages of an arbitration case. That Mexico did not avail itself of those opportunities does not negate the plain choice it had to do so.

60. During their self-imposed cooling-off period, Claimants made every reasonable effort to engage in good faith, through the appropriate legal channels and in substantial compliance with the procedural requirements in the spirit of Article 1118 and consistent with Article 1119, in the hope that common cause may be found with Mexico against TV Azteca and Grupo Salinas based on their disregard of their obligations to both Claimants as well as to Mexico. TV Azteca is not just a delinquent debtor that owes nearly $500 million to its Noteholders, but its parent entity Grupo Salinas is an adjudicated tax scofflaw to the detriment of the Mexican people.[47]

(3) Mexico's cited cases are not persuasive.

61. Mexico suggests in its Reply that the cases cited by Claimants are not persuasive because they are based on factual scenarios distinct from this case (leaving aside that Mexico itself has done the same in its Reply). However, the underlying *rationale* of the tribunals in the decisions cited by Claimants reaffirm the interpretation of Article 1119—as opposed to dealing with substantive issues unrelated to the timing considerations raised here. Specifically, those tribunals recognized that the strict compliance with requirements of Article 1119 do not necessarily constitute a jurisdictional prerequisite of consent under Article 1121, and the failure to comply does not automatically result in the loss of jurisdiction.[48]

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[45] Claimants' Counter-Memorial on Jurisdiction, at ¶¶119-126, 144.

[46] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 124-125, 127.

[47] **C-0004**, 03.20.2024 Salinas Group Owes 3.8 Billion – Bloomberg.

[48] *See*, e,g. **CL**-007, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, at ¶ 44; **CL-0009,** *Cargill, Incorporated v. United States of America*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, at ¶183; **CL-0010**, *Ethyl*

62. For example, in *B-Mex, LLC and others v. United Mexican States*, the tribunal found that Article 1119 "does not condition the Respondent's consent to arbitration in Article 1122," and the tribunal was not deprived of jurisdiction as a result of additional claimants' failure to issue a notice of intent.[49] The tribunal connects that result with the underlying purpose of Article 1119 to facilitate amicable negotiations among parties, reasoning:

> It is common ground that a failure to pursue such settlement discussions [encouraged by Article 1118] however is no bar to Treaty arbitration. That being so, the Respondent's reading of Article 1119 presents a logical challenge. On the Respondent's case, a claimant who fails to include certain information in a notice of intent would forfeit the right to Treaty arbitration. Yet a claimant who fails altogether to pursue the settlement effort that the notice of intent is intended to facilitate, would retain that right undiminished. If failing to pursue settlement discussions does not bar access to Treaty arbitration, then at least bald logic—and at this juncture the Tribunal would not put it higher than that— suggests that neither should a failure to comply with a step designed to facilitate such settlement discussions.[50]

63. Similarly, in *Crompton (Chemtura) Corp. v. Government of Canada*, the tribunal reasoned:

> NAFTA tribunals have interpreted these [Article 1121(1) and Article 1119] provisions rather broadly "within the context of the objective of NAFTA in establishing investment dispute arbitration in the first place."[51] As noted by the tribunal in *ADF. v. United States*, to which the Claimant refers, with respect to the requirements set forth in Article 1119(2):
>
> > "the notice of intention to submit to arbitration should specify not only 'the provisions of [NAFTA] alleged to have been breached' but also 'any other relevant procedures [of NAFTA].' **Which provisions of NAFTA may be regarded as also 'relevant' would depend on, among other things, what arguments are subsequently developed to sustain the legal claims made.** We find it difficult to conclude that failure on the part of the investor to set out an exhaustive list of 'other relevant provisions' in its

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Corporation v. Government of Canada, UNCITRAL, Award on Jurisdiction, 24 June 1998 at ¶¶ 73-76; **CL-0010**, *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order, 16 March 2006, at ¶¶ 4-7.

[49] **CL-0005**, *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, at ¶ 79.

[50] **CL-0005**, *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, at ¶ 113.

[51] **CL, 0010**, *Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), Award of 7 August 2000, at ¶ 26.

> Notice of Intention to Submit a Claim to Arbitration must result in the loss of jurisdiction to consider and rely upon any unlisted but pertinent NAFTA provision in the process of resolving the dispute."[52]

64. Tribunals have also declined to dismiss claims at the jurisdictional phase based on technical adherence to procedural formalities where doing so would undermine the object and purpose of NAFTA. For instance, in *Ethyl Corporation v. Government of Canada*, the tribunal concluded that "dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA."[53]

65. Considering these precedents, the Tribunal here should interpret Article 1119 with flexibility (as Claimants' cases demonstrate) rather than strict rigidity (as Mexico urges).[54] A cramped application of *when* the cooling off period must occur in light of extraordinary circumstances would jeopardize the object and purpose of NAFTA dispute settlement system on investment as outlined in NAFTA Article 1118. Other tribunals have confirmed that the 90-day period in NAFTA Article 1119 serves as a cooling-off period to encourage *amicable* resolution—not as a strict procedural barrier. The steps that Claimants took to act consistently with a self-imposed 90-day cooling off period enabled this purpose to be fulfilled in practice.

66. Claimants submit that a rigid application of procedural technicalities detached from the context and good-faith conduct of the disputing parties would effectively shield Mexico's misconduct. It would allow the Mexican State to continue enabling and protecting domestic enterprises—such as TV Azteca—at the expense of foreign investors, by tolerating and weaponizing institutional failures and corruption. Such a result would undermine the object and purpose of Chapter 11 of NAFTA, distort the balance of protections afforded to investors, and ultimately permit a denial of justice in favor of formalism detached from factual circumstances.

(4) Mexico's Reply cannot overcome the reality that Claimants were not formally served notice of the September 2022 Injunction until late June 2023.

67. Mexico further disputes the grounds that caused the delay in initiating this arbitration. Namely, Mexico challenges the following factual issues raised by Claimants in the Counter-Memorial: First, that Claimants did not receive formal notification of the Injunction until June 27, 2023, in the case of Cyrus, and June 29, 2023, in the case of Contrarian; and second, even taking into account Claimants' earlier informal constructive notice of the Injunction (which Claimants do not

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[52] **CL-0013**, *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, Award of 9 January 2003, at ¶ 134 (emphasis in the original).

[53] **CL-0008**, *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, at ¶¶ 73-76, 85.

[54] Respondent's Reply on Jurisdiction, at ¶59.

dispute), Claimants were not in a position to reasonably make decisions regarding the pursuit of a NAFTA claim prior to April 1, 2023.[55] To be clear, these factual issues are clearly reflected by the record and do not impact the persuasiveness of Claimants' arguments.

68. The Mexican court's delays in putting Claimants on both constructive and formal notice about the September 2022 Injunction made timely notice of this arbitration impossible. Claimants acted as quickly as possible in taking the necessary and reasonable steps to preserve their NAFTA remedy before Mexico's consent expired on July 1, 2023.[56]

69. Mexico's argument relies on the misinterpretation of Claimants' internal documents. Mexico contends that the documents show that Claimants were "aware of international treaty arbitration" a year before filing a Notice of Intent. [57] This argument is a clear misinterpretation of the evidence and appears to be a deliberate attempt to mislead the Tribunal by distorting the factual context and meaning of these documents.

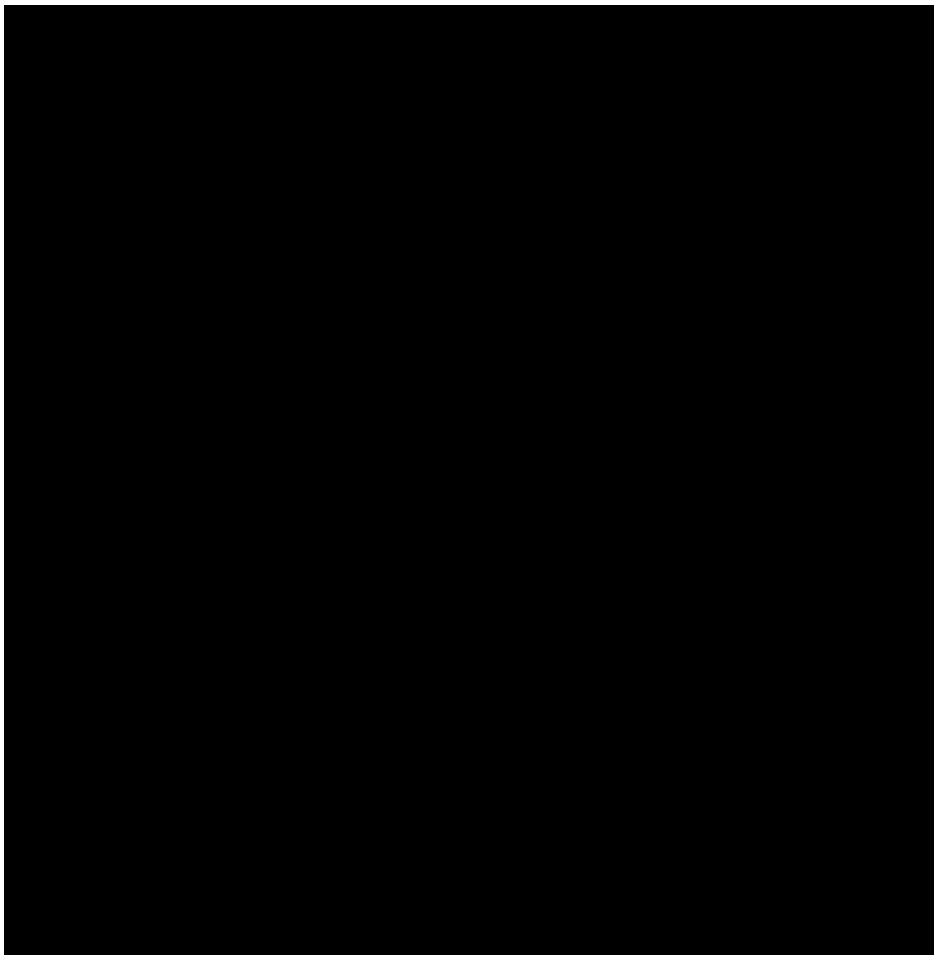
70. Mexico's claims that Claimants have engaged in a long-term plan and strategy seem to result from misinterpretation of an internal meeting agenda from February 2022 (i.e., before the September 2022 Injunction).[58] For the benefit of the Tribunal, we replicate this document in **Figure 1** contained in Exhibit **R-0019** below.

[55] Claimants' Counter-Memorial on Jurisdiction, at ¶115.

[56] Claimants' Counter-Memorial on Jurisdiction, at ¶143.

[57] Respondent's Reply on Jurisdiction, at ¶¶ 54-55.

[58] Respondent's Reply on Jurisdiction, at ¶ 19.



71. Mexico first utilizes this document to suggest that Claimants were already considering filing this arbitration well before the earliest possible constructive notice date. However, that is a factual and logical impossibility: the Injunction that forms the basis of the present denial of the justice claim did not take place until September 2022 (and this agenda formed the basis of a meeting seven months earlier, on February 25, 2022).

72. Mexico also bizarrely uses this document to support an accusation that Claimants have executed a long-term strategy for a TV Azteca "takeover."[59] However, this document shows only that Claimants were evaluating the courses of action available to them to remedy TV Azteca's breach of its clear financial obligations at the time—a fact that Claimants have never attempted to obscure in the course of this arbitration. The activity reflected in this agenda constitutes only what any reasonable investor would do in a scenario when considering whether there were any available avenues to pursue recovery against a delinquent debtor.

73. Documents produced by Claimants indisputably establish that, from September 2022 to June 27, 2023 (in the case of Cyrus), and from September 2022 to June 29, 2023

[59] Respondent's Reply on Jurisdiction, at ¶ 55.

(in the case of Contrarian), no formal notice was issued to Claimants regarding TV Azteca's lawsuit and the resulting injunction issued by the Sixty-Third Superior Court, until ***nine months*** after the Injunction was put into place. This was clearly insufficient time to arrange for a 90-day pause before the July 1, 2023 deadline to preserve Claimants' rights to file a NAFTA claim.

74. Nor were Claimants reasonably able to reach and undertake decisions to pursue a NAFTA claim prior to April 1, 2023 (i.e., 90 days prior to July 1, 2023), based on the service of process on the Trustee in late February 2023, the earliest possible date that the Claimants could have had informal constructive knowledge of the Injunction.[60]

75. Mexico's approach in this arbitration rests on a cruel irony: here, Mexico is choosing to discount the date of formal service of process of the Injunction, yet the Mexican court is refusing to proceed with its consideration of the Trustee's motion to dismiss for lack of jurisdiction until all defendants have been formally served. The Mexican court's insistence on formal service—a condition entirely within TV Azteca's control—ensures that the Injunction will remain in place, perhaps indefinitely, to benefit TV Azteca.[61]

(5) Claimants have consistently and in good faith made an effort to engage in amicable discussions, despite Mexico's failure to engage.

76. Claimants place value on the principle of good faith and the opportunity for the parties to engage in settlement discussions, as reflected in the underlying policies for Articles 1118 and 1119. Article 1118 sets forth the recommendation that the disputing parties "should" attempt to negotiate prior to initiating arbitral proceedings.[62] The version in Spanish of Article 1118 confirms this principle, where it states that the Parties "*intentarán primero dirimir la controversia por vía de consulta o negociación.*"[63]

77. Here, Claimants repeatedly extended their willingness to negotiate with Mexico and provided a thorough account of this procedural history in the Counter-Memorial on Jurisdiction.[64] First, in the Request for Arbitration, Claimants requested that the Secretary-General of ICSID suspend the proceedings for 90 days under Rule 54(7) of the ICSID Arbitration rules following the formal registration of the Request for

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[60] Claimants' Counter-Memorial on Jurisdiction, at ¶115.

[61] Claimants' Counter-Memorial on Jurisdiction, at ¶142.

[62] Article 1118 of NAFTA states in full: "The disputing parties ***should*** first attempt to settle a claim through consultation or negotiation." The version in spanish of the same article states: "Las partes contendientes ***intentarán*** primero dirimir la controversia por vía de consulta o negociación." In french the same provision refers: "Les parties contestantes ***devraient*** d'abord s'efforcer de régler une plainte par la consultation et la négociation." (emphasis added).

[63] Claimants' Counter-Memorial on Jurisdiction, at ¶121.

[64] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 121-126.

Arbitration to allow time for dialogue.[65] Mexico first objected to this request on July 5, 2023 and again on July 25, 2023.

78. Following the formal registration of the case on August 11, 2023, Claimants once again proposed a mutual suspension under Rule 54(1), and expressed their intention to observe a unilateral 90-day pause to facilitate good-faith discussions. However, Mexico rejected this initiative as well, maintaining its stance that consultations must occur strictly prior to the submission of the arbitration request. As such, Mexico treated the consultations as an essential precondition for consent rather than embracing the underlying principle embodied in the 90-day cooling off period.

79. On August 30, 2023, Mexico again insisted that under NAFTA Article 1118, consultations should take place before the filing of the Request for Arbitration, yet acknowledged that negotiation remains possible throughout the arbitration process.[66] Claimants maintained their stated commitment to a 90-day pause of the proceedings following registration and, in fact, refrained from further formal actions during this period. Despite these repeated attempts to foster dialogue, Mexico remained unyielding and dismissed all proposals for engagement.

80. In light of Claimants' demonstrated efforts, Mexico cannot now credibly claim that it was deprived of an opportunity to engage in negotiations to reach an amicable settlement. Claimants extended Mexico ample opportunity to consider the claims and engage in an amicable settlement for 90 days before the arbitration would proceed beyond the submission of the claim. Mexico simply rejected all of those efforts.

81. Finally, not only were Mexico's actions throughout this period at odds with the principle and purpose of the 90-day cooling off period under Article 1119, but Mexico subsequently took the extraordinary step of trying to use Claimants' self-imposed pause against them in order to secure a procedural advantage by moving to have the ICSID Secretary-General strip Claimants of their right to select an arbitrator.[67] That Mexico tried to cynically exploit Claimants' good faith efforts to observe a 90-day cooling off period, knowing full well the basis for Claimants' so-called "procedural inactivity," should extinguish any sympathies that the Tribunal may feel for Mexico's claims of injury and grievance in connection with Objection 1.

B. Reply To Objection 2: Claimants Have Clearly Established That They Are "Investors" Under NAFTA and Not Merely "Agents" of "Cayman Islands Funds"

82. As a threshold point regarding Claimants' response to Objection 2, Claimants respectfully dispute Mexico's assertion that Claimants did not adequately respond to

[65] Claimants' Request for Arbitration, at ¶ 30.

[66] Claimants' Counter-Memorial on Jurisdiction, at ¶ 125.

[67] **C-0068,** Respondent's request for ICSID to appoint Claimants' arbitrator.

its Objection 2 in the Counter-Memorial submission.[68] Claimants have very clearly addressed Mexico's Objection 2 on its terms.[69]

83. Regarding the substance of Claimants' opposition to Objection 2, Mexico may not like the facts or how NAFTA defines certain key terms, but Mexico cannot ignore NAFTA's relevant provisions and definitions as written, and it also cannot ignore the record. As established in the Counter-Memorial on Jurisdiction, Claimants are "investors of a Party" under NAFTA that have made an "investment," and thus are entitled to bring the pending claims against Mexico under Article 1116 for its breach of Article 1105: Minimum of Standard of Treatment.

84. Instead of grappling with these facts—which were provided in both the Request for Arbitration and Claimants' Counter-Memorial—Mexico continues to argue that the definition of "investment" under NAFTA is "inherently tied to the existence of an "investor" of a Party.[70] That may be so, but it does not in any way undermine that Claimants *are* investors.

85. Claimants will not try to restate Mexico's arguments as Claimants do not understand or agree with Mexico's fundamentally incoherent point. Suffice to say, Claimants have met their burden of establishing that they are "investors of a Party" under NAFTA pursuant to the text of the agreement and the undisputed facts on the record.

86. To be clear, Article 1139 defines "**investor of a Party**" as "**an enterprise of such Party**, that seeks to make, is making or has made an **investment**." Article 1139 further defines "**enterprise of a Party**" to mean "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there ." Both Claimants are organized under the laws of the United States with principal places of business in the United States, i.e., they are "enterprises" of the United States.

87. Article 1139 further defines "**investment**" to include a "**debt security** of an enterprise . . . where the original maturity of the debt security is at least three years."

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[68] Respondent's Reply on Jurisdiction, at ¶ 72.

[69] Mexico further claims in its Reply that Claimants have "changed their position" on their control of the investments and that this is "in effect a concession that none of the Claimants own or control the Cayman Island funds." Respondent's Reply on Jurisdiction, at ¶ 22. This is a blatant mischaracterization of Claimants' past submissions. Claimants have always asserted that they have control over the Notes (via their control of the Noteholders) as the basis for this claim. *See, e.g.*, Notice of Arbitration , at ¶ 22 ("The ***Notes*** held by the Noteholders ***under the Claimants' control*** qualify as 'investments' under NAFTA Article 1139."); Notice of Arbitration, at ¶ 25 ("The Claimants' efforts to recover the owed principal and interest on ***the Notes under their control*** is directly jeopardized by the injunction barring such efforts, issued by the Mexican court, in flagrant disregard of the Claimants' due process rights and in violation of Mexico's obligations . . ."). These statements are consistent with Claimants' Counter-Memorial on Jurisdiction at Section IV.A ("The ***Claimants Control Notes Issued by TV Azteca*** Under an Indenture").

[70] Respondent's Reply on Jurisdiction, at ¶ 73.

The "investment" at issue here are the 8.25% senior secured Notes issued on August 9, 2017, due in August 2024, by TV Azteca, an enterprise of Mexico.

88. Again here, Mexico does not challenge the facts or otherwise address this issue in its Reply. Indeed, Mexico does not even reference "debt security" at all within its ten pages of argumentation on this objection.

89. Finally, Article 1139 defines **"investment of an investor of a Party**" to mean "an investment owned or controlled directly or indirectly by an investor of such Party." Claimants control the Notes through their control of the Noteholders. As much as Mexico insists that NAFTA requires Claimants to have directly "made" the investments and to directly "own" the Notes, that position inconsistent with the plain text of NAFTA, which clearly contemplates that "investments" may be owned *or controlled* and can be held directly *or indirectly*. Indeed, multiple tribunals that have squarely considered this issue have endorsed Claimants' interpretation.[71] In fact, Mexico appears to accept this very proposition in paragraph 103 of the Reply ("Both NAFTA and the USMCA require that protected investments be owned or controlled, directly or indirectly, by a protected investor.").

90. Because it is sufficient for the Claimants to establish that they control the Notes via their control of the Noteholders, the Claimants have unquestionably established that they are "investors of a Party" who are entitled to submit claims under Article 1116.

91. Recognizing that it ultimately cannot prevail on its argument, Mexico alternatively contends that neither Claimant in fact controls their respective Noteholder. Again, this argument is not supported by the facts. To make matters worse, this argument demonstrates Mexico's fundamental lack of understanding regarding how investment managers and investment funds are structured and governed.

92. To review, as set forth in paragraphs 162 to 168 of the Counter-Memorial on Jurisdiction, Claimants control the Noteholders and thus Claimants indirectly control the Notes held by the Noteholders. Cyrus has the authority, vis-à-vis the Opps II Master Fund to: (a) invest and trade securities; (b) possess and exercise "all rights, powers, privileges, and other incidents of ownership or possession with respect to securities and other property owned by the Opportunities Funds"; (c) to purchase securities and hold them for investment; (d) to engage attorneys; (e) to enter into contracts for or in connection with investments in securities; and (f) to authorize any agent of Cyrus to act for on behalf of the Opportunities Funds. Specific to controlling claims for the Opps II Master Fund investments, Cyrus is authorized to: do any and all acts on behalf of Opps II Master Fund, and exercise all rights of Opps II Master Fund with respect to their interest in any person, including without limitation, the voting of Securities, participation in arrangements with creditors, the institution and

[71] *See, e.g.*, **CL-0016**, *S.D. Myers, Inc. v. Gov't of Canada*, UNCITRAL, Partial Award, 13 November 2018, at ¶ 225; **CL-0017**, *MAKAE Europe SARL v. Kingdom of Saudi Arabia*, ICSID Case No. ARB/17/42, Award of 31 August 2021.

settlement or compromise of suits and administrative proceedings, and other like or similar matters.[72] Those are precisely the actions that Cyrus has undertaken here.

93. Similarly, Contrarian is "solely responsible" for all decisions concerning Sandpiper vis-à-vis its control of Contrarian Funds L.L.C., which wholly owns Sandpiper. Under the Amended and Restated LLC Agreement of Contrarian Funds L.L.C., Contrarian is entitled to direct investments and to "exercise the power and authority to take any and all actions necessary, appropriate, proper, advisable, incidental or convenient to or for the furtherance of the purposes of" Contrarian Funds, L.L.C., including directing the actions of its wholly owned subsidiaries, e.g., Sandpiper.[73] Those are precisely the actions that Contrarian has undertaken here.

94. To describe the relationship of Cyrus to Opps II Master and of Contrarian to Sandpiper as simply administrative or akin to an "agent" is to fundamentally misunderstand and mischaracterize the role of investment managers like Cyrus and Contrarian vis a vis the investment vehicles under their control. To say, as Mexico does, that "there is no evidence that Claimants exercise ultimate de facto control over Opportunities, Sandpiper, and the Notes,"[74] belies reality – but for Claimants, the Noteholders would not exist, let alone have investors, make investment decisions, or have the capacity to bring claims for breaches of obligations against their investments, as the very fact of this arbitration demonstrates. Indeed, this is how most investment funds are commonly structured all around the world. Because Mexico's argument here is premised on a very fundamentally flawed understanding of the ownership and control structures at issue here, its arguments regarding jurisdiction cannot be credited.

95. Finally, for the reasons noted above, having an economic ownership interest in the Notes is not a prerequisite for the Tribunal to attribute the Notes as "investments" of Claimants. However, as Claimants already demonstrated in the Counter-Memorial on Jurisdiction, Claimants' ultimate parents/beneficial owners – who in turn respectively control Claimants – each hold an indirect economic stake in the Notes. Although Mexico attempts (without on-point authority) to make a big deal about the relative size of those economic stakes,[75] Mexico cannot deny that ownership interest nonetheless exists. To restate the information set forth in the Counter-Memorial on Jurisdiction – the ultimate parent of Cyrus owns [redacted] of Opps II Master Fund (and thus the Notes) and the ultimate beneficial owners of Contrarian collectively hold an

[72] **C-0072**, Cyrus Investment Management Agreement.

[73] **C-0014**, Sixth Amended and Restated Limited Liability Company Agreement of Contrarian Funds, L.L.C.

[74] Respondent's Reply on Jurisdiction, at ¶ 95.

[75] Respondent's Reply on Jurisdiction, at ¶ 76.

economic stake in each of the funds that indirectly own Sandpiper (and thus the Notes).[76]

96. For the reasons stated above, Claimants have clearly established that they are "investors of a Party" entitled to bring claims against Mexico under Article 1116 for Mexico's breach of its obligations under Article 1105: Minimum Standard of Treatment. Nothing set forth in Mexico's Memorial on Jurisdiction or Reply has been able to rebut this. The other issues raised by Mexico in its Reply are simply irrelevant and did not address the facts set forth by Claimants.

C. Reply To Objection 3: Claimants Have Valid "Legacy Investments" That Were Established for Nearly Three Years Before July 1, 2020.

97. Mexico argues that the Notes at issue do not qualify as "existing investments" because they were neither established nor acquired by Claimants while NAFTA was still in force.[77] Mexico, however, ignores Claimants' position that the Notes—debt securities—were issued by TV Azteca in August 2017, hence "established" before July 1, 2020.[78] As Claimants has previously stated, under USMCA Annex 14-C, an investment must have been "established ***or*** acquired" prior to this date; there is no requirement for it to be **both** established ***and*** acquired before USMCA took effect.[79]

98. Instead of grappling with this position, Mexico again attempts to deflect the weaknesses of its arguments by debating the interpretation of "investment of an investor of another Party" and the term "existence" under Annex 14-C. It argues that Claimants' interpretation affects the *effet utile* of Article 31 of the Vienna Convention. [80] However, Mexico's arguments miss the point. Claimants concur with Mexico on the importance of interpreting the relevant provisions of the USMCA and Annex 14-C in accordance with the principles outlined in the Vienna Convention (as Claimants do repeatedly to establish their own position in response to Mexico's fourth objection). But Mexico's interpretation of Annex 14-C imposes additional criteria not supported by the treaty's text, thus Mexico is itself contradicting the *effet utile* of the Vienna Convention.

99. In a recent decision in *Westmoreland Coal Company v. Canada*, the tribunal succinctly observed that the analysis required in the initial part of Paragraph 6(a) of Annex 14-C involves addressing two closely connected questions:

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[76] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 169-174.

[77] Respondent's Reply on Jurisdiction, at ¶ 100.

[78] Claimants' Counter-Memorial on Jurisdiction, at ¶ 179.

[79] Claimants' Counter-Memorial on Jurisdiction, at ¶ 179.

[80] Respondent's Reply on Jurisdiction, at ¶ 104.

> First, is there is an "investment of an investor" in the territory of a USMCA Party? Second, was that investment "established or acquired" while NAFTA was in force?[81]

100. In the current dispute, Claimants have satisfied both conditions. Specifically, the "investment" in question—the Notes issued by TV Azteca in 2017—are controlled by Claimants, entities organized under U.S. law (the "investors"). The investment at issue was established while NAFTA ***was in force*** and ***remained in existence*** as of the entry into force of the USMCA.

101. As described in the Counter-Memorial, Claimants' investments meet all the required condition to qualify as a "legacy investment" under section 6(a) of Annex 14-C of the USMCA:

a. The Notes under Claimants' control, issued by TV Azteca in 2017, qualify as an "investment" under article 1139 of NAFTA because they are a "a debt security of an enterprise…where the original maturity of the debt security is at least three years."

b. Claimants, as entities organized under Delaware law and headquartered in New York and Connecticut, are considered "investors" of the United States, a separate Party. Claimants exercise control of the Notes issued by TV Azteca.

c. The Notes, issued on August 9, 2017, were "established" almost three years before the termination of NAFTA on July 1, 2020, thus satisfying the timing criteria within Annex 14-C.

102. Mexico asserts in its Reply that the case of *Westmoreland Coal Company v Canada (III)* addressed a similar situation as in the present arbitration. This is incorrect. The facts in that case were distinct, and Mexico's references again demonstrate a misapprehension of Claimants' structures that significantly undermines the reliability of Mexico's argument here. There, the tribunal considered whether a claimant's "former interests" in an entity that had since changed ownership was "in existence" at the time that the USMCA entered into force.[82] The present case refers to a very different type of "investments"— i.e., debt securities (the Notes) that were brought into existence in 2017 and that are under the control of Claimants.

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[81] **CL-0082**, *Westmoreland Coal Company v. Canada (III)*, ICSID Case No. UNCT/23/2, Award, 17 December 2024, at ¶ 149. The Tribunal in Westmoreland Coal Company v. Canada (III) also confirmed that "Annex 14-C thereby enables investors to bring claims pursuant to Chapter 11 through the USMCA framework, notwithstanding the termination of NAFTA. Yet, due to its particular purpose, Annex 14-C imposes jurisdictional requirements in addition to those provided in Chapter 11 . . . [and] paragraphs 1 and 3 of Annex 14-C limit the USMCA Parties' consent to arbitration to claims for breaches of Chapter 11 that are made 'in accordance' with Chapter 11 within three years of NAFTA's termination and with respect to a 'legacy investment.'" *See, id.*, at ¶¶ 143-144.

[82] **CL-0082**, *Westmoreland Coal Company v. Canada (III)*, ICSID Case No. UNCT/23/2, Award, 17 December 2024, at ¶ 171.

103. Mexico also confusingly argues that Claimants must have "established" the debt at issue.[83] That argument on its face demonstrates a fundamental misunderstanding for how debt securities work. For avoidance of doubt, it is the investors who "acquire" the debt (i.e., the Claimants) and it is the issuer of the debt (i.e., TV Azteca) that establishes the debt. Mexico's argument that the investor who *holds* a debt security investment must also have *established* the debt security simply does not make sense.

104. Moreover, debt securities are tradeable commodities, as recognized by the tribunal in *Lion v. Mexico Consolidated*.[84] Mexico does not dispute findings from other tribunals that confirmed that a debt security remains a legitimate investment, irrespective of the specific entity holding it—nor does Mexico respond to Claimants' points relating to these cases. For example, in the landmark *Fedax NV v. Venezuela*, the tribunal held:

> although **the identity of the investor will change with every endorsement, the investment itself will remain constant, while the issuer will enjoy a continuous credit benefit until the time the notes become due.** To the extent that this credit is provided by a foreign holder of the notes, it constitutes a foreign investment which in this case is encompassed by the terms of the Convention and the Agreement. While specific issues relating to the promissory notes and their endorsements might be discussed in connection with the merits of the case, the argument made by the Republic of Venezuela that the notes were not purchased on the Venezuelan stock exchanges does not take them out of the category of foreign investment because these instruments were intended for international circulation….[85]

105. For this specific category of investments (debt securities), the time at which the investor acquires the investment is immaterial. The dispositive point lies in the fact that the investment was *established* before NAFTA's termination.

106. Rather than grappling with definitions squarely contained within the treaty and as discussed by previous tribunals—i.e., how the establishment of debt securities is relevant to the facts of this arbitration—Mexico instead uses its Reply to debate the meaning of "existence."[86] But Claimants have already established through documentary evidence that the Notes in question were "legacy" investments "in existence" at the time of the entry into force of the USMCA—including under

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[83] Respondent's Reply on Jurisdiction, ¶¶ 101, 103.

[84] **CL-0065**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, at ¶ 194. ("The Tribunal shares the Claimant's opinion that *pagarés no negociables* do not fit within the definition of "debt security" set forth in paragraph (c) 189 : debt securities are tradeable, while endorsement of *pagarés no negociables* is prohibited by law.")

[85] **CL-0029,** *Fedax NV v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, at ¶ 40 (emphasis added).

[86] Respondent's Reply on Jurisdiction, at ¶ 102.

Mexico's own cited definitions. Accordingly, the Tribunal should disregard Mexico's attempt to obscure the real issue here.

107. In light of the foregoing, Claimants have established that their investments qualify as "legacy investments" under the provisions of Annex 14-C of the USMCA.

D. Reply To Objection 4: Annex 14-C Does Not Limit its Application to Alleged Breaches That Occurred Prior to the Termination of NAFTA.

108. According to Mexico, it is not subject to the obligations set forth in NAFTA Article 1105 during the transition period provided by Annex 14-C, and has accused Claimants of relying on inferences from Annex 14-C, rather than the "plain meaning" of the text.

109. First of all, Claimants agree with Mexico that the Tribunal must be guided by the text of Annex 14-C and longstanding principles of treaty interpretation, i.e., proper interpretation is to be done by reviewing the text of the treaty, its context, and the object and purpose of the agreement, all without recourse to any presumed intention of the parties, pursuant to the principles under Articles 31 and 32 of the Vienna Convention.

110. However, where Mexico errs is that it misinterprets Annex 14-C's text. From the Claimants' perspective, while Mexico's argument is not new, it misinterprets Annex 14-C's text, the object and purpose of the USMCA, and the appropriate context of these provisions. This stance reflects Mexico's strategy to circumvent its obligations under Article 1105 of NAFTA as extended through the Transition Period by the USCMA.

111. Moreover, Mexico's interpretation unjustly limits the ability of foreign investors to exercise their right to arbitration as afforded under the governing treaties. Claimants have previously explained how the USMCA provides for a "smooth transition" from NAFTA to the USMCA, including via Annex 14-C's explicit treatment of the scope and protection with respect to investments established while the Parties were bound by NAFTA.[87]

112. While Mexico relies upon the majority decision in *TC Energy Corporation* to advance its position, the majority's (non-binding) decision of that divided tribunal resolved this question incorrectly. Indeed, the majority in *TC Energy* did not have the benefit of an expert witness who was a key participant of the negotiations of the USMCA and Annex 14-C specifically, as Claimants and the Tribunal do here.

113. Mr. Kenneth Smith, former lead negotiator of the USMCA for Mexico, has provided a Second Written Statement for the benefit of the Tribunal. His second statement states in part: "[A]t the time the USMCA was negotiated and concluded the Parties understood and intended for Annex 14-C to extend the protections of Chapter 11 of

[87] Claimants' Counter-Memorial on Jurisdiction, at ¶ 100. *See also* USMCA Article 34.1.

NAFTA to 'legacy investments', including both its arbitration mechanism and its substantive provisions, for three years following the USMCA's entry into force. And that the protection applied to both claims that arose prior to the entry into force of the USMCA and that arose following entry into force during that three-year window."[88] In fact, according to Mr. Smith, "The concept of separating the arbitration mechanism from NAFTA's substantive obligations when interpreting any references to extending NAFTA's 'arbitration mechanism' is an entirely post-hoc invention of the Parties that did not exist at the time the USMCA was negotiated and concluded."[89]

114. Rather than relying on the flawed majority decision in *TC Energy*, Claimants urge this Tribunal to consider the dissenting opinion issued in that case, in light of Mr. Smith's expert witness statements, to reach a decision that is more consistent with the text of the treaty. Based on an objective assessment of the terms, context, and purpose of the relevant provisions of the USMCA, including Chapter 14 and Annex 14-C, the Tribunal should conclude that "Annex 14-C does not limit its application to alleged breaches that occurred prior to the termination of NAFTA. Rather, it provides consent to arbitrate claims alleging a breach of an obligation of Section A of Chapter 11 with respect to legacy investments, without distinguishing between breaches that occurred before or after the termination of NAFTA." [90]

(1) The ordinary meaning of Annex 14-C confirms the Parties' consent to arbitrate claims alleging a breach of an obligation of Section A of Chapter 11 with respect to legacy investments, without distinguishing between breaches that occurred before or after the termination of NAFTA

115. Article 31 of the Vienna Convention on the Law of Treaties provides the legal framework for interpreting international agreements and provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In this section, Claimants show—yet again, as the Counter-Memorial dealt with at length—that the ordinary meaning of paragraphs 1 and 3 of Annex 14-C compels the conclusion that Mexico has consented to arbitrate claims under the substantive and procedural obligations of Chapter 11 of NAFTA that arise from actions taken during the Transition Period.

116. Mexico argues that the phrase "alleging *breach* of an *obligation* under: … Section A of Chapter 11"[91] implies that any violation must pertain to obligations that remain binding. Claimants agree that Mexico is only bound by obligations insofar as it

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[88] Second Expert Witness Statement of Kenneth Patrick Smith Ramos, at ¶ 19.

[89] Second Expert Witness Statement of Kenneth Patrick Smith Ramos, at ¶ 16.

[90] **CL-0037,** *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez, K.C., 12 July 2024, at ¶ 9.

[91] Respondent's Reply on Jurisdiction, at ¶ 117.

agreed to the terms of the treaty. However, according to Mexico, NAFTA's termination on July 1, 2020, released Mexico from its substantive obligations under NAFTA without citing any textual support for this specific point. This self-serving, *ex post facto* interpretation of the scope and meaning of Annex 14-C disregards provisions within the treaty that explicitly contemplate that certain NAFTA obligations will remain binding during the Transition Period.

117. A critical flaw in Mexico's position lies in its refusal to acknowledge that Annex 14-C does not expressly limit its applicability to substantive violations occurring before the entry into force of the USMCA. In fact, Annex 14-C is silent on this matter. By maintaining the Parties' consent to submit disputes to arbitration under Chapter 11 of NAFTA for a three-year transitional period, Annex 14-C ensures that foreign investors would retain the right to initiate arbitration under Section B of Chapter 11 for violations of Section A during this timeframe. Furthermore, Annex 14-C imposes no explicit restrictions concerning whether such violations must have occurred prior to NAFTA's termination or during the transitional period established.

118. Moreover, contrary to Mexico's assertions, paragraphs 1 and 3 of Annex 14-C clearly demonstrate that Mexico consented to arbitrate claims alleging breaches of Section A obligations during the three-year Transition Period. These provisions specify two temporal constraints:

    i. *First*, dispute resolution is confined to claims involving "legacy investments," which paragraph 6 of Annex 14-C defines as "investment[s] 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 date of entry into force of this Agreement."

    ii. *Second*, the consent to arbitration, as agreed among the USMCA Parties, is valid only for the three-year Transition Period.

119. Beyond these conditions, there is no explicit limitation on the actions that may lead to disputes submitted under Annex 14-C. Any attempt by Mexico to impose additional temporal restrictions is an unwarranted reinterpretation of the text and fails to align with the Annex's intended scope.

120. The dissenting opinion of Prof. Henri Alvarez in *TC Energy* correctly clarifies that:

> A legacy investment is defined in Annex 14-C 6 as an investment of an investor made during the period that NAFTA was in force and continues in existence at the date of entry into force of the USMCA. **Annex 14-C 1 provides consent with respect to legacy investments without any temporal limitation or requirement that the alleged breach of an obligation of Chapter 11, Section A must occur before the termination of NAFTA.** Rather, in its plain meaning 14-C 1 relates to all legacy investments and all claims alleging a breach of an obligation

> under NAFTA, Chapter 11, section A. Annex 14-C refers to legacy investments, not legacy claims, measures or disputes. In addition to the existence of the investment at the date of the entry into force of the USMCA, the only other temporal limitation is that consent to the submission of a claim to arbitration with respect to a legacy investment expires on 1 July 2023.
>
> Annex 14-C applies prospectively from the date of the entry into force of the USMCA, granting consent to arbitration for a period of three years from that date. **There is no requirement that the relevant measure or alleged breach of an obligation have occurred before the termination of NAFTA.** Had this been the intention of the Parties, it would have been simple to so provide expressly.[92]

121. While Mexico addresses the term "obligation" in its Reply, the *TC Energy* dissenting opinion also provides persuasive insight into that term as used within the context of Annex 14-C:

> It was common ground that Annex 14-C provided for the continued application of certain parts of NAFTA, Chapter 11 until 30 June 2023, despite the termination of NAFTA; Annex 14-C created a limited exception to the general rule that Parties are released from obligations under a treaty after its termination. **In these circumstances, it is not logical to find that the general rule prevails by separately considering the word "obligation" and imbuing it with the meaning ascribed by the majority. It is not disputed that NAFTA Chapter 11, Section A contains specific obligations. Grammatically, this provision must be read as a whole.** In these circumstances, the ordinary meaning of Annex 14-C is that the Parties consented to arbitrate claims that alleged "breach of an obligation under Section A of Chapter 11 (Investment) of NAFTA 1994". Here, Annex 14-C 1 provides consent to the submission of a legacy investment claim alleging a breach of an obligation under NAFTA Chapter 11 A, in accordance with Chapter 11, Section B. Annex 14-C 3 confirms that this consent expires three years after the termination of NAFTA.[93]

122. In conclusion, the ordinary meaning of the text of Annex 14-C of the USMCA, confirms that paragraphs 1 and 3 of Annex 14-C do not limit its application to alleged breaches that occurred prior to the termination of NAFTA. Moreover, an objective, textual interpretation of these provisions confirms that those paragraphs

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[92] **CL-0037,** *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez, K.C., 12 July 2024, at ¶¶ 5-6.

[93] |**CL-0037,** *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez, K.C., 12 July 2024, at ¶ 8 (emphasis added).

provide consent to arbitrate claims alleging a breach of an obligation of Section A of Chapter 11 with respect to legacy investments, ***without distinguishing*** between breaches that occurred before and after the termination of NAFTA.

(2) This Tribunal should apply the proper "context" of Annex 14-C of the USMCA when interpreting this provision.

123. Mexico identifies nine points in an attempt to read limitations into the treaty that do not exist.[94] These include claims regarding the Parties' alleged intentions to restrict the term "arbitration," along with references to provisions governing designated monopolies or state-owned enterprises, items that were addressed in Chapter 15 of NAFTA. Mexico contends that Annex 14-C, the contextual framework of the treaty provisions, and the Parties' intent to substitute NAFTA with the USMCA, are all unaffected by the term "without prejudice" from the USMCA Protocol. According to Mexico, this term—which preserves specific provisions referencing NAFTA during the Transition Period as outlined in Annex 14-C—should have no impact on the tribunal's interpretation. Mexico's position is fundamentally flawed and cannot be upheld based on proper consideration of the treaty context.

124. Several provisions of the USMCA provide significant contextual support for Claimants' interpretation and directly contradict Mexico's assertions. Although Mexico references many of these provisions, it distorts the context in an attempt to reach its desired conclusion.

125. First, the USMCA Protocol provides that upon entry into force the USMCA shall supersede the NAFTA, "***without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA*.**" Mexico asserts that this provision does not "carve out" Section A of Chapter 11 of NAFTA. Such an interpretation is illogical, however, as Annex 14-C is one of the provisions that directly reference NAFTA, making it evident that while the USMCA supersedes NAFTA in a specifically contemplated timeframe, it does not immediately eliminate all of the NAFTA provisions entirely. By using this language in the Protocol, the Parties took care to ensure that the fact that the USCMA would supersede NAFTA would not be interpreted as undoing the specific carve-outs that the Parties had negotiated, including under Annex 14-C. Annex 14-C clearly establishes a three-year Transition Period that allows investors recourse under NAFTA Chapter 11 arbitration for violations of that chapter.

126. Next, Mexico ignores the import of Footnote 20 to Annex 14-C.[95] Here, the USMCA Parties explicitly stated that NAFTA (including the substantive obligation under

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[94] Respondent's Reply on Jurisdiction, at ¶¶ 126-139.

[95] Footnote 20 of Annex 14-C provides as follows: "**For greater certainty, the relevant provisions in** Chapter 2 (General Definitions**), Chapter 11 (Section A) (Investment**), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to

Chapter 11 Section A) is the applicable law for resolving disputes under paragraph 1 of Annex 14-C that arise during the Transition Period.

127. Mexico also engages in a distorted analysis of Footnote 21. Footnote 21 is a carveout from the scope of paragraph 1 of Annex 14-C. A carveout only makes sense if Annex 14-C and Annex 14-E overlap in terms of time, damages, and the measures giving rise to the claims. Mexico's position is that there is no evidence that the Parties intended an overlap.[96] The basis of Mexico's objection is apparently that paragraph 1 of Annex 14-C applies only *retrospectively*, i.e., to measures that pre-date the entry into force of USMCA. However, Annex 14-E – the USMCA's ISDS mechanism contemplated for use by U.S. and Mexican investors against Mexico and the United States, respectively – applies only *prospectively*, i.e., to measures that post-dated the entry into force of USMCA. If Mexico were correct, then there could be no overlap (temporally or in terms of damages) in the claims that could be asserted under Annexes 14-C and 14-E, such that Footnote 21 would be rendered a nullity.[97]

128. In his Second Witness Statement, Mr. Smith recalls:

> Footnote 21 of Annex 14-C is very relevant. Its purpose is to clarify that, in the event that legacy investments have a claim under both NAFTA and the USMCA—i.e., if the breach occurred during the three-year transition period—the Parties did not extend their consent for such investors to use

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Investment, Cross-Border Trade in Services and Financial Services Chapters) **of NAFTA 1994 apply with respect to such a claim**."

[96] Respondent's Reply on Jurisdiction, at ¶ 137.

[97] In fact, in the dissenting opinion of Prof. Henri Alvarez in *TC Energy v. United States*, he refers to exchange of emails between former lead negotiator of Investment from the United States, Mr. Lauren Mandell to Mr. Khalil Gharbieh former USTR Director for Investment. The email from Mr. Mandell state as follows: "Regarding your question, **we intended the annex to cover measures in existence before AND after USMCA entry into force**. That could probably be clearer. I'd have to think about the best textual argument, but the one that immediately comes to mind rests on paragraph 3. If we were just intending to allow claims for pre-existing measures, we likely wouldn't have framed a three-year consent period -- we would have just defaulted to the statute of limitations in NAFTA Section B that would apply to claims for those measures. In other words, we would have omitted paragraph 3 altogether. The contrary argument -- the purpose of paragraph 3 was intended to alter the SOL for claims with respect to pre-existing measures, that's it, doesn't make a lot of sense. I think it's also significant that the title of the annex -- and the key concept in the annex -- references legacy investments, not legacy measures. If we were focused only on legacy measures, it would have been easy to expressly limit paragraph 1 accordingly, but we didn't**. Finally, I think footnote 21 probably helps as well. The whole point of the 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 pre-existing 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 framework." See, **CL-0037,** *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez, K.C., 12 July 2024, at ¶ 29 (emphasis added).

> Annex 14-C to bring the claim under NAFTA. Therefore, such investors are obliged to rely on the USCMA mechanism . . . If Annex 14-C only entitled investors to rely on NAFTA for claims that arose prior to the USMCA's entry into force, as Mexico now claims, Footnote 21 would be unnecessary because there would never be any claims that could be arbitrated under both NAFTA via Annex 14-C and the USCMA."[98]

129. Moreover, Article 14.2(3) of the USMCA provides as follows: "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."[99] The reference to Annex 14-C in this provision was added during the "legal scrub" based on documents produced by Mexico after the agreement had been negotiated and before it was signed. [100] However, Article 14.2(3) of USMCA does not modify or limit the temporal application of Annex 14-C. It merely confirms that Annex 14-C applies not only to acts that took place after the entry into force of USMCA, but also to acts that took place ***before*** the entry into force of USMCA, in effect solving for the opposite situation that the Claimants face here, i.e., the argument that Annex 14-C cannot purport to cover measures that took place prior to its entry into force.

130. Mexico further ignores the contextual support for Claimants' position provided by Article 34.1.1 of the USMCA, in which the USMCA Parties "recognize the importance of a smooth transition from NAFTA to this Agreement." This provision confirms that the USMCA Parties were not seeking an abrupt termination of the protections that NAFTA provided for investors. Contrary to Mexico's assertion, the omission of an explicit reference to Chapter 11 of NAFTA within Article 34 does not preclude its applicability. As this provision is found in Chapter 34, entitled "Final Provisions," which is intended to apply universally across all chapters of the Agreement, it is unnecessary for this provision to single out specific chapters. Therefore, Claimants' interpretation of paragraph 1 of Annex 14-C—allowing claims based on measures taken during the transition period—aligns entirely with that overarching objective of Article 34.1.1.

131. In sum, the context of Annex 14-C, it is clear that the USMCA Parties consented to arbitrate claims arising out of actions taken during the Transition Period.

(3) Claimants' reading of Annex 14-C comports with the object and purpose of the USMCA.

132. Mexico contends that the object and purpose of the USMCA was to replace NAFTA and to restrict the applicability of the investor-state arbitration mechanism. Claimants do not disagree that this was the *eventual* goal of the USMCA. However, this strict

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[98] Second Expert Witness Statement of Kenneth Patrick Smith Ramos, at ¶ 20.

[99] *See* USMCA Article 14.2(3).

[100] *See* **R-0024**.

reading directly contradicts provisions within the USMCA that expressly contemplate continuing certain provisions of NAFTA during the Transition Period.

133. As already discussed above and at length in Claimants' Counter-Memorial, under the terms of the USMCA Protocol—the very instrument that replaced NAFTA with USMCA—the replacement of NAFTA was "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[101]

134. There are numerous instances throughout USMCA that extend the substantive obligations of NAFTA during the Transition Period, ensuring that the protections afforded by Annex 14-C are applied retroactively following its entry into force for investors and investments that meet the relevant criteria. Therefore, Mexico's reliance on the mere replacement of NAFTA with USMCA as an overriding treaty objective without any exception does not accord with the rules of treaty interpretation, or the reality of the treaty negotiation.

135. In short, because Chapter 14 of the USMCA significantly circumscribes the instances in which investors are entitled to bring claims under the investor-State dispute settlement mechanism, it makes sense that the Parties would seek to provide a transition period for impacted investors. Accordingly, a transitional period was established, allowing investors from any of the USMCA Parties to invoke NAFTA Chapter 11 for three years following the entry into force of the new agreement. In this regard, Annex 14-C places no restrictions on whether the relevant measure or alleged breach of obligation occurred before or after NAFTA's termination, so long as it falls within the designated transitional period.

(4) The Parties' negotiating history confirms Claimants' interpretation of Annex 14-C.

136. Mexico argues that the Tribunal cannot use Mr. Smith's witness statement to "interpret" Annex 14-C, and that it can only be used to confirm Claimants' interpretation. Claimants do not disagree—Mr. Smith's first statement confirms Claimants' textual construction. Mexico attempts to cast Mr. Smith's testimony as "after-the-fact evidence, paid for by Claimants," and thus unreliable. While Mexico makes this spurious allegation about the truthfulness of Mr. Smith's testimony, it cites no legitimate reason that Mr. Smith's testimony should be viewed with skepticism. Mr. Smith served as the Chief Negotiator for Mexico's USMCA negotiation team, and in that role received all reports from other participants in the negotiation, provided directions to proceed with the technical negotiations, and was fully informed about the discussions within the investment group.

137. Mr. Smith provides a second witness statement that is filed in conjunction with this Rejoinder that directly addresses Mexico's flawed arguments.

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[101] **CL-0001**, Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America.

138. First, Mr. Smith clarifies that the additional documents submitted by Mexico do not contradict his testimony and in fact are aligned with it. Mr. Smith confirms that Mexico's position was to maintain substantive provisions of NAFTA's Chapter 11, and to improve them, as was done in the Trans-Pacific Partnership ("TPP") negotiations. Mexico always maintained that a modernization of NAFTA's Chapter 11 resulted from the negotiations of the investment chapter of the TPP, and the later Comprehensive and Progressive Agreement for Transpacific Partnership ("CPTPP") could be used as a template for the negotiation of the USMCA. [102]

139. Mexico also puts emphasis on a Mexican Senate Report that purportedly undermines Mr. Smith's position. This is yet another example of Mexico's attempt to distort the text and confuse the issues. Mr. Smith clarifies in his Second Witness Statement that "the report to the Senate simply reflects Mexico's position at the time that both the substantive and the arbitration procedures would be extended for three years once the USMCA came into effect."[103] Indeed, Claimants concur that the Parties "trilaterally agreed on a transition period for the arbitration mechanism of the current NAFTA, to keep it in effect for three years once the USMCA comes into force," as stated in the Report. This report does not preclude the extension of Chapter 11's substantive obligations during that same Transition Period.

140. Other documents relied upon by Mexico in its Reply are general and do not specify the scope of Annex 14-C.[104] However, none of those documents contradict Claimants' interpretation, as explained by Mr. Smith's Second Witness Statement. The Tribunal should thus utilize Mr. Smith's statements as confirmatory evidence in support of Claimants' position.

(5) The subsequent practice of USMCA Parties does not reflect binding or an accepted interpretation and is instead driven by the Parties' post-hoc defensive litigation strategies aimed at restricting access to the provisions outlined in Annex 14-C.

141. Mexico also claims the three Parties to NAFTA and USMCA have consistently confirmed and defended their agreement on the interpretation of Annex 14-C. Yet the evidence provided is merely "after-the-fact" evidence that shows Mexico and the other USMCA Parties have changed their interpretation of the scope of Annex 14-C in order to advantage their defense as respondents in legacy investment claims in the context of litigation under Annex 14-C. That the United States' representatives – an unquestionably talented and skilled set of lawyers – were able to convince the *TC Energy* tribunal to adopt their decidedly convoluted interpretation of Annex 14-C should not have bearing on the Tribunal's decision here. Mexico's interpretation –

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[102] Second Expert Witness Statement of Mr. Kenneth Patrick Smith Ramos, at ¶¶ 11-12.

[103] Second Expert Witness Statement of Mr. Kenneth Patrick Smith Ramos, at ¶ 17.

[104] *See, e.g.,* **R-0038** and **R-0039.**

which adopts the U.S. position from *TC Energy* – does not accord with an ordinary meaning of Annex 14-C.

142. Article 1128 allows NAFTA non-disputing Parties to "make submissions to a Tribunal on a question of interpretation of this Agreement." Those submissions, however, are not intended to be treated as binding interpretations of NAFTA. Where it is evident that the USMCA Parties have coordinated their positions on this topic for purposes of limiting their liability in arbitration proceedings, the views expressed in non-disputing party submissions should be treated with the appropriate skepticism they deserve under such circumstances.

143. Finally, Mexico fails entirely to address multiple specific points raised by Claimants in the Counter-Memorial that support Claimants' interpretation. For example, Claimants respectfully direct the attention of the Tribunal to Claimants' arguments regarding the language of other treaties signed by Mexico that contain similar provisions.[105]

144. Mexico also failed to address Claimants' points that the USMCA Parties explicitly considered and incorporated multiple temporal conditions relating to the legacy investment claims and explicitly placed limitations to the reach of those clauses, but not with respect to the timing of when the relevant measure giving rise to the claim must have occurred.[106]

E. Reply To Objection 5: The Tribunal Has *Ratione Materiae* Jurisdiction Because Claimants Have Demonstrated That They Have an Investment Within the Meaning of Article 1139 of NAFTA and Article 25 of the ICSID Convention.

145. Mexico unconvincingly argues that Claimants have not met their burden to establish jurisdiction because they have not demonstrated that they have an "investment" under Article 25 of the ICSID Convention. But Mexico misreads Claimants' position and misstates the relevant standards for analysis.

146. As a threshold matter, Claimants never suggest that Article 25 of the ICSID Convention is in conflict with Article 1139 of NAFTA. Instead, Claimants advance the position that as a *lex specialis*, Article 1139 provides the precise and specific definition of investment appropriate for this dispute—which Claimants have clearly satisfied. Indeed, because "investment" under Article 25 of the ICSID Convention is broad and inexhaustive, Claimants' ability to meet the more specific NAFTA definition also satisfies the requirement of Article 25, which simply require that the investor-State legal dispute must arise directly out of an "investment." There is no need, therefore, to resort to the *Salini* test for purposes of assessing whether an

[105] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 200-201.

[106] Claimants' Counter-Memorial on Jurisdiction, at ¶ 209.

"investment" exists in the given legal dispute pending before the Centre where the underlying treaty text provides an express definition for "investment."[107]

147. Rather than address Claimants' arguments that they meet the definition of "investment" under the definition of Article 1139[108] and thus Article 25 of the ICSID Convention, Mexico instead recycles its flawed position that Claimants are required to meet the test set forth in *Salini v. Kingdom of Morocco* under Article 25 of the ICSID Convention. Claimants therefore assume that Mexico agrees with Claimants that the NAFTA Article 1139 definition of investment is met in this case.

148. Mexico's criticisms of Claimants' cited legal authority in reference to the prioritization of more specific BIT definitions of investment as *lex specialis* also do not pass muster. Mexico takes issue with the fact that certain cases cited by Claimants in the Counter-Memorial were not adjudicated under NAFTA Article 1139.[109] While Mexico's observation is correct on its face, it overlooks a critical detail: in these cases, the tribunals found that the precise definition outlined in the relevant bilateral investment treaty should be considered first over the general definition included in Article 25. That a specific treaty's definition of investment should be considered before resorting to the *Salini* test is a principle of general application and is not specific to Article 1139 of NAFTA. Accordingly, precedents involving tribunals evaluating whether the disputed investment adhered to the definition specified within a given bilateral investment treaty before progressing to considerations under Article 25 (as the Tribunal here must do with reference to NAFTA Article 1139) are decidedly on point.[110]

149. Claimants reiterate that its showing that the investment at issue in this investor-State arbitration meets the definition of "investment" under Article 1139 of NAFTA satisfies the showing required under Article 25. This showing is enough for the Tribunal to find that is has *ratione materiae* jurisdiction, and Claimants urge the

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[107] **CL-0083,** *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, ¶ 245 "The definitions (of investment) under both treaties (NAFTA and USMCA) are quite broad and do not differ essentially from Article 25 of the ICSID Convention".

[108] Claimants' Counter-Memorial on Jurisdiction, at ¶¶ 246-248.

[109] Respondent's Reply on Jurisdiction, at ¶ 160.

[110] In *Abaclat v. Argentina*, for instance, the contested investment involved bonds and security entitlements. The tribunal initially confirmed that these met the definition of 'investment' set forth in the relevant BIT (which Claimant acknowledges is not NAFTA). The tribunal there specifically noted that a two-pronged test—as Mexico suggests is relevant in the present dispute —was not applicable. The tribunal did not apply the *Salini* factors because "the State Parties to the BIT have agreed to such a definition [of investment] in a treaty between them." **CL-0067**, *Abaclat et al. (Case formerly known as Gionanna a Beccara et al.) v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, at ¶ 369.

Tribunal to dispense with the remainder of Mexico's arguments on these grounds and dismiss Objection 5 in its entirety.

150. Mexico asserts that the criteria of the *Salini* test "... must be strictly complied with because consent is extremely important..."[111] Mexico's assertion is fundamentally flawed.[112] Precedents and past decisions from Arbitral Tribunals analyzing measures under the *Salini* test have consistently concluded that the application of these criteria requires a case-by-case, flexible approach. Precedents establish that (i) the determination of whether an investment exists must primarily rely on the intent of the parties, as expressed in investment instruments such as Bilateral Investment Treaties;[113] and (ii) the criteria or characteristics developed through the *Salini* test should be applied with adaptability to the specific context of each case. As the Tribunal in *Phillip Morris v. Uruguay* recognized:

> "The *Salini* test has received varied applications by investment treaty tribunals and doctrinal writings. In the Tribunal's view, **the four constitutive elements of the *Salini* list do not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction**. They are typical features of investments under the ICSID Convention, **not "a set of mandatory legal requirements**". As such, they may assist in identifying or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present case."[114]

151. Furthermore, as outlined in the Claimants' Counter-Memorial—which Mexico does not refute—the *Salini* test criteria are "mere examples and not necessary as elements that are requires for existence" as established in *M.C.I. v Ecuador*.[115] Mexico ignores previous precedents that qualified the criteria derived from Article 25 as

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[111] Respondent's Reply on Jurisdiction, at ¶163.

[112] Mexico supports its position citing the dissenting opinion of Professor Georges Abi-Saab in the case of *Abaclat and Others v. Argentine Republic*. See, Reply on Jurisdiction, at ¶ 163. Nonetheless, the tribunal's majority reached a contrary conclusion, which, as will be demonstrated in this section, reflects a correct interpretation of the application of the criteria under Article 25.

[113] See, for example Counter Memorial at ¶¶ 249, 251, 252.

[114] **CL-0069,** *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, at ¶ 206. (emphasis added)

[115] **CL-0068,** *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, at ¶ 165 ("The Tribunal states that the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence.")

guidelines.[116] In *Patel Engineering Limited v. Mozambique* in which the investment involved an equity investment in an enterprise and investment in the form of contracts, the Tribunal clarified that blind application of the *Salini Test* would result in inconsistent outcomes:

> "To be helpful, the application of any test should lead to analogous results, whatever the class of asset analyzed. **But a blind application of the *Salini* test to different classes of assets seems to yield inconsistent results.**
>
> **If the *Salini* test is chosen as yard stick for defining investments, no common profile seems to emerge that can be applied uniformly to all classes of assets**. Equity investment, debentures, ownership of real estate, concession contracts, construction contracts – each category seems to have its own and unique profile of contribution, risk and duration, and thus the *Salini* features are of limited assistance in trying to establish an objective and inherent concept for all classes of investment."[117]

152. Mexico also highlights that, when addressing the *Salini* test, the claimants referenced cases that were not adjudicated under Article 1139 of NAFTA.[118] However, Mexico overlooks a critical detail: in both *Salini v. Morocco* and *Abaclat v. Argentina*, the tribunals prioritized the precise definition outlined in the relevant bilateral investment treaty.

153. In *Abaclat v. Argentina* where the contested investment involved bonds and security entitlements. The tribunal initially confirmed that these met the BIT's definition. The Tribunal also noted that a double test – as suggested by Mexico in the present dispute[119] – did not apply in that case, and in fact the Tribunal did not analyze the four factors arising from the *Salini* test, showing the flexibility in its application. The tribunal concluded that "[t]he term 'investment' *per se* in Article 1(1) of the

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[116] See, Counter-Memorial on Jurisdiction, at ¶ 255, 184, 185 and 186. See, e.g. **CL-0070**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 108 ("[W]hile the Tribunal does not see the features of investments identified in *Salini* as a definitional test, nor does it believe that it is necessary to even look for those elements here absent any suggestion that the BIT's definition of investment is improperly overreaching, it has nevertheless considered the *Salini* elements in light of the Parties' extensive briefing of the issue.").

[117] **CL-0084**, *Patel Engineering Limited (India) v. Republic of Mozambique*, PCA Case 2020-21, Final Award, ¶¶ 305-306.

[118] Respondent's Reply on Jurisdiction, at ¶ 160.

[119] Respondent's Reply on Jurisdiction, at ¶ 161.

Argentina – Italy BIT can indeed be analysed in the same manner as the term 'investment' in Article 25 of the ICSID Convention (see §§ 362-367 above)…."[120]

154. Mexico relies on the Decisions on Jurisdiction from *Noble Energy v. Ecuador* and *Jan de Nul v. Egypt* to point out that the four criteria of the Salini Test "must be examined in their totality…."[121] Both decisions incorporate the same citation. However, Mexico minimizes the fact that established precedents consistently emphasize that each case must be evaluated based on its unique circumstances.[122]

(1) Even under the Salini Test, a debt security—as the investment at issue in this dispute—inherently involves risk.

155. The Claimants clearly articulated in their Counter Memorial that, even under the Salini Test, a Debt Security inherently involves risk. Mexico does not address the Claimants' argument that the terms and conditions outlined in the Offering Circular (**Exhibit R-0016**) explicitly refers to the "risk factors" associated with the Notes. Those risks, if they were to materialize, would impact the return of the investment to the investor. Additionally, Mexico does not refute the established precedent from arbitral tribunals that even in cases where contractual obligations are fulfilled, investment risk persists when an investor cannot be assured of the return on their investment, as recognized in *Romak v. Uzbekistan*.[123] Lastly, the existence of a fixed interest rate of 8.25% on the Notes does not eliminate the inherent risk of the investment tied to their acquisition.[124]

156. Mexico confines its analysis to asserting that the Notes involve only commercial risk, disregarding the fact that various types of risk have been examined by arbitral tribunals. Furthermore, Mexico fails to acknowledge that a risk arising from the non-fulfillment of a financial obligation can constitute a risk to the return on an investment. As observed by the Tribunal in *Manchester Securities Corporation v. Republic of Poland*:

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[120] **CL-0067,** *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/, Decision on Jurisdiction and Admissibility, 4 August 2011, at ¶ 371.

[121] Respondent's Reply on Jurisdiction, at ¶ 164.

[122] **CL-0085**, *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction of 6 August 2004, ¶ 53 In fact, the Decision on Jurisdiction in *Jan de Nul v. Egyp*t referred in footnote 25 to the tribunal's confirmation in the case of *Joy Mining Machinery Limited v. The Arab Republic of Egypt*: "…. To what extent these criteria are met is of course specific to each particular case as they will normally depend on the circumstances of each case." **CL-0086**, *Jan de Nul v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004.

[123] **CL-0072**, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, at ¶ 230.

[124] Respondent's Reply on Jurisdiction, at ¶166.

> The nature of the risk will depend on the type of investment. Tribunals have considered a variety of risks, from the existence of the dispute itself to risks inherent in long-term contracts or in the economic or political situation in the host State. In the instant case, the return to the Claimant was dependent on the success or failure of the economic venture. **While the amount of a loan and the interest rate may be known from the start, there is no certainty of the success of the investment to which the financial operation has contributed and on which payment of the interest and the amortization of the loan depend**. The dispute before the Tribunal attests to the risks of Manchester's investment.[125]

157. Furthermore, Tribunals have considered "risk" in a broader sense, including the risk associated with the political climate during the investment period. In *Ioannis Kardassopoulos v. The Republic of Georgia*, the Tribunal determined that "…. the risk component is satisfied in light of the political and economic climate prevailing throughout the period of the investment."[126]

(2) "Contribution" is a flexible concept and must be read in conjunction with the definition of investment under Article 1139.

158. In this case, the contributions made by the Claimants consisted of the acquisition to debt securities held by Noteholders under control of the Claimants.

159. Mexico asserts the applicability of a double-barreled test to analyze the existence of an investment.[127] However, such a test is not invariably necessary or appropriate, particularly where a Tribunal evaluates the "contribution" element of an investment.

160. Taking into account the different interpretations applied under Article 25 of the ICSID Convention, the Tribunal in *Abaclat v. Argentine Republic* – where the investment at issue refers to bonds and debt instruments, as in the present case – the Tribunal finds that the Claimants make a contribution upon acquiring the bonds and debt entitlements, with an expectation of receiving value in the form of monetary payment upon the debt's maturity. The Tribunal in *Abaclat v. Argentine Republic* further clarifies in paragraphs 365 and 366 that the intent of the Parties to protect

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[125] **CL-0087,** *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award [Redacted], 07 December 2018, at ¶ 374 (emphasis added).

[126] **CL-0088,** *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, at ¶ 117.

[127] Respondent's Reply on Jurisdiction, at ¶161.

such investments is explicitly upheld by the BIT, establishing the Claimants' contributions as investments generating protected value under the treaty.[128]

161. Mexico contends that the Claimants failed to address whether their investment contributed to Mexico's economic development.[129] It is evident that the acquisition of the Notes and the reasonable return on such investments, not only provided capital for TV Azteca to use in Mexico, but inherently contributed to fostering a favorable investment climate and promoting economic growth in Mexico. However, other Tribunals have excluded this criterion to avoid outcomes that undermine the goal of protecting private foreign investments, which is a key principle of the ICSID Convention. This is evident from the findings of other tribunals in *Quiborax S.A., Non Metallic Minerals S.A., and Allan Fosk Kaplún v. Plurinational State of Bolivia*; *Saba Fakes v. Republic of Turkey* and *Ickale Insaat Limited v. Turkmenistan.* [130]

162. In conclusion, as established in *Patel Engineering Limited v. Mozambique*, a rigid application of the *Salini test* may lead to inconsistent outcomes if applied indiscriminately across varying types of investments.[131]

163. Therefore, the Tribunal should dismiss Mexico's Objection 5 entirely.

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[128] The Tribunal concluded, "… there is no doubt that Claimants made a contribution: They purchased security entitlements in the bonds and thus, paid a certain amount of money in exchange of the security entitlements. The value generated by this contribution is the right attached to the security entitlements to claim reimbursement from Argentina of the principal amount and the interests accrued. As mentioned above (see §§ 352-361), this right is protected under Article 1(1) lit. (c) of the BIT". See, **CL-0067** *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 at ¶¶ 365-366.

[129] Respondent's Reply on Jurisdiction, at ¶ 168.

[130] **CL-0089,** *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, at ¶ 220. The Tribunal found: "The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong *Salini* test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment. For this reason and others, tribunals have excluded this element from the definition of investment…" In the same sense, other tribunals, such as the tribunal in *Saba Fakes v. Republic of Turkey* and *Ickale Insaat Limited v. Turkmenistan*, concluded that contribution to the host State's economic development is not in and of itself an independent criterion for the definition of an investment. See, **CL-0090**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, at ¶111; **CL-0091**, *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, at ¶ 290.

[131] **CL-0084** *Patel Engineering Limited (India) v. The Republic of Mozambique*, PCA Case Case No. 2020-21, Final Award, at ¶ 305.

F. Reply To Objection 6: The Tribunal Has *Ratione Temporis* Jurisdiction Over Contrarian and Cyrus' Claims.

164. Mexico's Reply and position on this objection betrays a fundamental misunderstanding of the organizational structure of Contrarian and the means through which the Notes it holds are transferred. In failing to grapple with the import of the ownership and control structure in this case, as with other objections, Mexico did not adequately respond to the facts presented both in Claimants' Counter-Memorial and in the documents produced by Claimants.

165. As Mexico correctly notes, the denial of justice occurred in September 2022. At that time, Contrarian controlled the Notes through another of its controlled entities, an affiliate and partial owner of Sandpiper, Contrarian Emerging Markets, L.P. The transfer of the Notes from one Contrarian controlled-entity to another Contrarian-controlled entity – Sandpiper – after the Injunction does not limit the Tribunal's jurisdiction, nor does Mexico assert any legal authority that would compel this outcome.

166. Indeed, the legal authority cited by Mexico with respect to *rationae temporis* jurisdiction does not address a factual situation in which an entity that indirectly controls an investment subsequently effects the transfer of that investment from one controlled entity to another of its controlled entities, as is the case in this scenario. The temporal limitations that Mexico is seeking to impose on the Tribunal's jurisdiction are simply not relevant to the facts at issue.

167. Accordingly, Contrarian has met its burden in showing the unbroken chain of control over the Notes both prior to and following the September 2022 Injunction.

168. With respect to Cyrus, Claimants refer the Tribunal back to its factual statement in the Counter-Memorial in which Claimants confirm that Mexico already conceded that Opps II Master Fund owned the notes when Mexico issued the Injunction in September 2022. Accordingly, Mexico's argument vis a vis Cyrus under Objection 6 is simply moot on its face.

G. Objection 7: The Tribunal Has *Ratione Voluntatis* Jurisdiction as the Waiver Submitted by the Claimants Complied with Article 1121 (1) (B) Of NAFTA.

169. Mexico dedicates nearly five pages to asserting that Article 1121 of NAFTA is a precondition for submitting a claim to arbitration—a point that was neither raised nor disputed by Claimants in their Counter-Memorial on Jurisdiction or any other written submission. Furthermore, Mexico fails to address the arguments put forth by Claimants in their Counter-Memorial and does not provide evidence to support its claim that the waiver is invalid.[132]

170. As Claimants addressed in their Counter-Memorial in response to the Memorial on Jurisdiction, Mexico's reasoning is circular, lacks substantiation, and does not

[132] Claimants' Counter-Memorial on Jurisdiction, at ¶ 266.

demonstrate in any meaningful way that Claimants' waiver is non-compliant with the requirements of Article 1121(1) of NAFTA. Mexico argues that Claimants failed to comply with the requirement of submitting waivers in accordance with NAFTA, claiming that the waivers improperly limit their scope[133] and that any defects in such waivers cannot be cured without the express consent of the Respondent. [134.]

171. Mexico suggests that Claimants waivers "open the door to further local proceedings, and therefore, to further opportunities for redress against Mexico."[135] This is a willful misreading of Claimants' waivers and blatant omission of the context from which the exceptions noted in the waivers are derived.

172. As a threshold matter, Claimants did not initiate any suit in Mexico against any party—the private dispute referenced was brought by TV Azteca against Claimants. Mexico is not a party to that suit.

173. NAFTA Article 1121 explicitly enables claimants to pursue, in domestic courts, declaratory relief that does not involve the payment of damages. Mexico selectively focuses on the initial portion of Article 1121 (1) (b), neglecting the critical exceptions, in an attempt to mislead this Tribunal.[136] In this proceeding, Claimants have explicitly clarified: "…this waiver does not apply to any current or future proceeding in Mexico related to the underlying private dispute involving TV Azteca, including file no. 995/2022 itself." [137] File no. 995/2022 (now re-designated as 203/2025) pertains to "Ordinary Commercial Proceedings" (Juicio Ordinario

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[133] Respondent's Reply on Jurisdiction, at ¶ 175.

[134] Respondent's Reply on Jurisdiction, at ¶ 176.

[135] Respondent's Reply on Jurisdiction, at ¶ 194.

[136] The Tribunal in *Feldman v. Mexico* correctly determined: "It appears that this Article, rather than confirming or repeating the classical rule of exhaustion of local remedies, envisages a situation where domestic proceedings with respect to q referred to in Article 1117 are either available or even pending in a court or tribunal operating under the law of any Party. In such case, Article 1121(2)(b) requires, for a recourse to arbitration to be open, that the disputing investor waive his right to initiate or continue the other domestic proceedings. Therefore, **in contrast to the local remedies rule, Article 1121(2)(b) gives preference to international arbitration rather than domestic judicial proceedings, provided that a waiver with regard to the latter is declared by the disputing investor. This preference refers, however, to a claim for damages only, explicitly leaving available to a claimant "proceedings for injunctive, declaratory or other extraordinary relief" before the national courts.** Thus, Article 1121(2)(b) and (3) substitutes itself as a qualified and special rule on the relationship between domestic and international judicial proceedings, and a departure from the general rule of customary international law on the exhaustion of local remedies. The thrust of such substitution seems to consist in making recourse to NAFTA arbitration easier and speedier**,** as opposed to the general pattern of opening up international arbitration to private parties as against third states." **CL-0092**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, at ¶¶ 71-73.

[137] **C-0073,** Cyrus Waiver; **C-0074**, Contrarian Waiver.

Mercantil), wherein "Precautionary Measures" were granted to TV Azteca pursuant to the Federal Code of Civil Procedures.

174. Tribunals have concluded NAFTA 1121 waiver is not absolute: "… The Article 1121(1)(b) waiver is not absolute; it permits the investor to seek injunctive and similar relief from the courts and administrative bodies of the disputing NAFTA Party." [138] These precautionary measures under a private commercial dispute falls under the exceptions outlined in Article 1121(1)(b), because they refer to "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages", confirming that the waiver submitted by the Claimants aligns fully with NAFTA requirements.

175. Next, the claims giving rise to the present arbitration involve a denial of justice claim for Claimants affected by the actions of the Sixty-Third Superior Court. Claimants stress again here—as in the Counter-Memorial—that they are not bringing, have not brought, and will not bring any claim against Mexico that is premised on the facts underlying this dispute. This assertion is consistent with the text of the waivers as submitted. Mexico has not raised any factual discrepancy to suggest that this is not the case.

176. The exceptions in the waivers, read on their face, do not reserve the right to bring claims against Mexico—despite Mexico's strained reading of the text. The purpose underlying the exceptions included in the waivers was merely to ensure that Claimants could continue to defend themselves against the proceedings brought by the private party, TV Azteca, in Mexico to pursue its denial of justice claim against Mexico. Mexico has not convincingly demonstrated that the Mexican court proceedings are sufficiently related to this claim against Mexico, i.e., "with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116" as required under NAFTA Article 1121.

177. Mexico also contends that "[s]hould the Injunction be lifted, or should the Claimants prevail in the court proceedings, they could receive a double benefit,…" [139] This is fundamentally flawed. It lacks substantive legal grounding and fails to exhibit logical coherence. For the benefit of the Tribunal, if the precautionary measures were lifted, as Mexico suggests, this would not give rise to a "double benefit." It would simply open the door to initiating new and complete separate private proceedings from case 995/2022, as the subject matter of that litigation pertains to TV Azteca's breach of contractual obligations, and would thus provide no recovery for the costs inflicted by the denial of justice on Claimants.

178. Consequently, the Tribunal should dismiss Mexico's seventh objection in its entirety.

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[138] **CL-0012**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on Harmac Motion, 24 February 2000, ¶ 16.

[139] Respondent's Reply on Jurisdiction, at ¶ 277.

H. Reply To Objection 8: The Tribunal Has Jurisdiction Over the Claim of Denial Of Justice Toward Contrarian and Sandpiper.

179. As with its Sixth Objection, Mexico fails entirely to grapple with the facts regarding the structure of ownership and control between Contrarian, related affiliate funds, and Sandpiper.

180. At the time Judge Robles issued the September 2022 Injunction, Contrarian was subject to the terms of the Injunction by virtue of its control over the Noteholders named in that lawsuit, one of whom subsequently transferred its Notes to Sandpiper Limited—another Contrarian-controlled affiliate. Thus Contrarian was directly impacted by the denial of justice that occurred in that proceeding and with respect to the same set of Notes it still indirectly controls via its control of Sandpiper, the entity to which Contrarian directed the Notes held by Contrarian Emerging Markets to be transferred.

181. As Mexico does not raise any new rebuttal in its Reply as to the facts established by Claimants, Claimants reincorporate herein the facts referenced above as to the ownership chain.

I. Mexico Waived its New and Untimely Inadmissibility Claim.

182. In its Reply on Jurisdiction, Mexico claims for the first time that Claimants' denial of justice claim is inadmissible because it was not "ripe" when Claimants filed their Request for Arbitration.[140] According to Mexico, "[a] claim for denial of justice in violation of Article 1105 of NAFTA can arise only once there is a final action by the State's judicial system as a whole."[141]

183. Mexico did not make this claim in its Memorial on Jurisdiction. In fact, Mexico's Memorial did not raise any issue of admissibility. Nor did Claimants present any new facts in their Counter-Memorial that could give rise to such an issue.

184. According to the ICSID Arbitration Rules:

> A memorial shall contain a statement of the relevant facts, law and arguments, and the request for relief. A counter-memorial shall contain a statement of the relevant facts, including an admission or denial of facts stated in the memorial, and any necessary additional facts, a statement of law in reply to the memorial, arguments and the request for relief. **A reply and rejoinder shall be limited to responding to the previous written submission and addressing any relevant facts that are new or could not have been known prior to filing the reply or rejoinder**.[142]

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[140] Respondent's Reply on Jurisdiction, at ¶ 210.

[141] Respondent's Reply on Jurisdiction, at ¶ 212.

[142] Rule 30(2), ICSID Arbitration Rules (emphasis added).

185. Mexico's new objection goes beyond the scope of the previous written submissions. There are no relevant facts that are new or that could not have been known prior to the filing of the Reply. Mexico makes no attempt to argue otherwise. Instead, it contends that this is a "threshold issue that the Tribunal should decide as a matter of judicial economy."[143] In support of this argument, Mexico cites *Apotex Inc. v. United States of America*.[144] However, the *Apotex* tribunal made no such determination. Although this is not apparent from Mexico's citation, the quoted passage does not originate from the tribunal itself, but rather from the oral submission of counsel for the respondent in that case.[145] The *Apotex* tribunal proceeded to consider the issue only because of the parties' "agreed basic principle."[146]

186. The two-round written submission stage is designed to ensure a fair, thorough, and efficient resolution process. It allows both parties to fully respond to factual and legal issues, thereby avoiding surprises or one-sided arguments. By submitting this new claim only on reply, Mexico has violated the principle of procedural fairness that underpins the arbitration rules.

187. Mexico's untimely inadmissibility claim is therefore inconsistent with the ICSID Arbitration Rules. The Tribunal should not consider this new objection and thus it should be disregarded.

IV. CONCLUSION

188. For the reasons explained above, the Tribunal should reject the entirety of the jurisdictional objections contained in Mexico's Memorial on Jurisdiction and Reply on Jurisdiction because Mexico has failed to set forth plausible arguments that address the particular facts under which this arbitration arises or that rebut the requisite showings of jurisdiction that Claimants have made herein.

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[143] Respondent's Reply on Jurisdiction, at ¶ 210.

[144] Respondent's Reply on Jurisdiction, at ¶ 210.

[145] Respondent's Reply on Jurisdiction, at ¶ 210, fn. 296.

[146] **CL-0062**, *Apotex Inc. v. United States*, ICSID Case No. UNCT/10/2, Award on Jurisdiction sand Admissibility, 14 June 2013, at ¶ 257.

189. Claimants respectfully request that the Tribunal order Mexico to compensate Claimants for all costs and attorney fees associated with the bifurcated stage of this arbitration.

DATED this 30th day of June 2025.

Respectfully submitted on behalf of Claimants,

[Signed]

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