UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES AND THE ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES,
ANNEX 14-C OF THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA
AND
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT 1994

TC Energy Corporation,
TransCanada PipeLines Limited

Claimants,

v.

The United States of America

Respondent.

ICSID Case No. ARB/21/63

CLAIMANTS' COUNTER-MEMORIAL ON RESPONDENT'S PRELIMINARY OBJECTION

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I. Executive Summary

1. In Annex 14-C ("Annex 14-C") of the United States-Mexico-Canada Agreement ("USMCA"), Respondent consented to arbitrate claims alleging that it breached Section A of Chapter 11 of the North American Free Trade Agreement ("NAFTA") (the "Section A obligations") with respect to legacy investments. Under paragraph 1 of Annex 14-C, investors holding legacy investments were required to submit such claims to arbitration in accordance with Section B of NAFTA Chapter 11. Under paragraph 3 of Annex 14-C, Respondent's consent extended through the three-year period after the termination of NAFTA ("transition period"). Through the filing of their Request for Arbitration ("RFA"), Claimants accepted Respondent's offer of arbitration and gave reciprocal consent. Claimants' claims meet each of the jurisdictional requirements of Annex 14-C. Claimants held legacy investments, submitted their claims during the transition period and in accordance with Section B of NAFTA Chapter 11, and alleged that President Joseph Biden's politically motivated decision to revoke the Presidential Permit ("2019 Permit") for the Keystone XL Pipeline ("KXL Pipeline") breached Respondent's Section A obligations. None of these points can be seriously disputed.

2. The text of Annex 14-C is clear on its face: Respondent consented to the arbitration of claims alleging that Respondent breached the Section A obligations during the transition period. Nevertheless, in its Memorial on Its Preliminary Objection ("Memorial"), Respondent argues that paragraph 1 of Annex 14-C permits claims only with respect to measures taken while NAFTA was in force, *i.e.*, before the start of the transition period. Therefore, Respondent says, the Tribunal may not hear Claimants' claims because Respondent revoked the 2019 Permit after NAFTA terminated. As Claimants show in this Counter-Memorial, Respondent seeks to insert a temporal limitation in Annex 14-C that is not there.

3. Respondent's objection begins and ends with its argument that, under a "general principle of intertemporal law," NAFTA does not apply to measures taken after the treaty terminated. Respondent misstates the true issue in dispute. The actual question before the Tribunal is whether paragraphs 1 and 3 of Annex 14-C of USMCA allow investors to submit claims alleging that Respondent's actions taken during the transition period breached the Section A obligations with respect to legacy investments. This is not an abstract question about the intertemporal

application of treaties but a concrete question about the effect of specific provisions of USMCA, the scope of the parties' arbitration agreement, and the parties' choice of applicable law.

4. Respondent recognizes—in fact vehemently argues—that consent is "paramount for" or the '"cornerstone' of" the Tribunal's jurisdiction.[1] What Respondent fails to recognize is that its consent to arbitration, combined with Claimants' acceptance of that offer and reciprocal consent, constitute an arbitration agreement. That arbitration agreement binds Respondent to arbitrate disputes under Annex 14-C and includes a choice of law—NAFTA—that is binding on the Tribunal and must be respected regardless of whether NAFTA would otherwise apply or whether NAFTA is otherwise in force.

5. Even apart from the parties' choice of law, the evidence is plentiful and manifest that the USMCA Parties agreed to allow claims under Annex 14-C arising from measures taken during the transition period. That conclusion follows naturally from the default rule under customary international law that treaties—including, in the present case, USMCA and Annex 14-C, in particular—apply prospectively to measures taken <u>after</u> the entry into force of the treaty. In addition:

- The text of the Protocol Replacing the North American Free Trade Agreement with USMCA ("USMCA Protocol") provides that the replacement of NAFTA with USMCA is "without prejudice" to those provisions in USMCA that refer to specific NAFTA provisions. Annex 14-C refers to Sections A and B of NAFTA Chapter 11, and thus preserves those obligations during the transition period with respect to legacy investments.

- Footnote 21 of Annex 14-C provides that an investor that is eligible to assert claims under Annex 14-E of USMCA may not assert claims under Annex 14-C. Arbitration under Annex 14-E is only available for claims in relation to measures taken <u>after</u> the termination of NAFTA. The carve out in Footnote 21 makes no sense unless Annex 14-C also applies to measures taken after the termination of NAFTA.

- Arbitration under paragraph 1 of Annex 14-C is only available for "legacy investments," which are defined to include only investments that existed at the start of the transition period. The natural implication of this definition is that paragraph 1 of Annex 14-C protects investments from actions taken during the transition period.

[1] *See* The United States of America's Memorial on Its Preliminary Objection, June 12, 2023 ("Respondent's Memorial on Preliminary Objection"), at para. 8 (footnote omitted).

- Statements made by the USMCA Parties contemporaneously with the negotiation and conclusion of USMCA, as well as statements of former USMCA negotiators after the agreement's conclusion, make it crystal clear that paragraph 1 of Annex 14-C permits claims arising from measures that a USMCA Party may take during the transition period.

6. On Respondent's side of the ledger, there is nothing. There is no provision in Annex 14-C or any other part of USMCA stating that paragraph 1 of Annex 14-C applies only to acts that pre-dated the entry into force of USMCA. There is no way to construe Respondent's interpretation of Annex 14-C in a way that does not lead to absurd results. There is no contemporaneous evidence that shows, when the USMCA Parties negotiated Annex 14-C, they intended to exclude claims in connection with actions taken during the transition period. And there is no merit to its legal argument regarding the intertemporal application of treaties as applied to this case.

7. Respondent makes various assertions, without evidence, about the USMCA Parties' intentions. Respondent does not provide any USMCA negotiating history, and it brushes aside contemporaneous statements of the USMCA Parties that contradict its position. Unlike Respondent, Claimants do not independently have access to the negotiating history, as the USMCA Parties have declared such documents confidential. Clearly, whatever negotiating history that exists is not helpful to Respondent or Respondent would have included it. In fact, as Claimants shall show, the few internal U.S. Government documents that Claimants have obtained in connection with the negotiation of USMCA undermine Respondent's objection. Claimants intend to request all relevant negotiating history during the discovery phase of this bifurcated proceeding.

8. The parties spent considerable time debating these issues in their submissions about whether to bifurcate Respondent's preliminary objection ("the bifurcation request stage"). Given that Respondent has repeated many of the arguments that it made during the bifurcation request stage, some repetition of Claimants' arguments is necessary in this submission. However, Claimants have sought to minimize the repetition by incorporating Claimants' earlier arguments and then further elaborating as appropriate to address the specific points Respondent has made in its Memorial.

9. This Counter-Memorial proceeds as follows:

- In Section II, Claimants demonstrate that they have met the jurisdictional requirements of the ICSID Convention and Annex 14-C.
- In Section III, Claimants show that, to the extent the Tribunal applies a burden of proof framework, Respondent bears the burden of proving its objection.
- In Sections IV - VI, Claimants show that, consistent with the ordinary meaning of paragraphs 1 and 3 of Annex 14-C, the context of those provisions, and the object and purpose of USMCA, claimants may submit claims arising from measures taken during the transition period.
- In Section VII, Claimants show that the supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties ("VCLT") confirm that claimants may submit claims arising from measures taken during the transition period.
- In Section VIII, Claimants show that equity requires the Tribunal to reject Respondent's preliminary objection.
- In Section IX, Claimants conclude.

II. Claimants Have Met the Jurisdictional Requirements of the ICSID Convention and Annex 14-C

10. While Respondent frames its preliminary objection as jurisdictional, its objection actually pertains to applicable law, not jurisdiction. The essence of Respondent's objection is that the Tribunal may not apply NAFTA to resolve claims in connection with measures taken during the transition period. As Professor Schreuer explains in his Legal Opinion accompanying this submission:

> Respondent's argument that the Tribunal has no jurisdiction over measures taken after the termination of the NAFTA on July 1, 2020, because NAFTA's substantive standards would no longer apply after that date, is the result of an impermissible commixture of jurisdiction and applicable law. The issues of jurisdiction and applicable law require separate analysis. In particular, the alleged non-applicability of certain relevant substantive rules of law does not determine jurisdiction.[2]

[2] Exhibit CER-1, Legal Opinion by Christoph Schreuer, Aug. 11, 2023 ("Schreuer Opinion"), at para. 44. Professor Schreuer also states that "Annex 14-C contains a clause on jurisdiction (paragraphs 1, 2 and 3) as well as a choice of the applicable law (paragraph 1, Article 1131 of NAFTA, and footnote 20). Jurisdiction extends to alleged breaches of NAFTA's substantive obligations with respect to legacy investments. The applicable law is determined as the

As discussed below, the question of applicable law is to be resolved under the terms of the parties' arbitration agreement (consummated through their consent to arbitration and Annex 14-C) and Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").[3] By contrast, questions of jurisdiction are governed by Article 25 of the ICSID Convention and the jurisdictional requirements of Annex 14-C.[4]

11. Respondent's expert, Richard Gardiner, agrees that the questions of applicable law and jurisdiction are distinct, and actually cites Professor Schreuer for exactly that proposition.[5] However, Mr. Gardiner then inexplicably asserts that the parties' choice of applicable law does "not mak[e] that law applicable to the acts and events in issue."[6] That is, of course, exactly what a choice of applicable substantive law does—it makes that law applicable to the acts that gave rise to the dispute. Claimants address this point in further detail in Section IV.B below and show that the parties have chosen NAFTA as the applicable substantive law. In the present Section, Claimants show that they have met the jurisdictional requirements of Article 25 of the ICSID Convention and Annex 14-C of USMCA.

12. Article 25(1) of the ICSID Convention provides that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing

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substantive obligations contained in Section A of Chapter 11 of NAFTA. To this extent, the obligations under NAFTA survive NAFTA's replacement by USMCA on July 1, 2020." *Id.* at para. 85.

[3] *See also* Exhibit CL-134, U.N. Conference on Trade and Development, *Dispute Settlement: International Centre for Settlement of Investment Disputes, 2.6 Applicable Law* (2003), at p. 5 ("[M]atters relating to the tribunal's jurisdiction under Article 25 are not governed by Article 42.").

[4] As Professor Schreuer explains in his Commentary: "[Article 25] contains requirements relating to the nature of the dispute (*ratione materiae*) and to the parties (*ratione personae*). The requirements relating to the nature of the dispute are that it must be of a legal nature and arise directly out of an investment. Those relating to the parties specify that one side must be a Contracting State . . . and the other a national of another Contracting State." Exhibit CL-135, Christoph Schreuer, *et al.*, *Schreuer's Commentary on the ICSID Convention* (3. ed. 2022) (excerpts) ("Schreuer, *Commentary on the ICSID Convention*"), at pp. 99-100 (internal cross-references omitted).

[5] Expert Report of Professor Richard Gardiner, June 9, 2023 ("Gardiner Opinion"), at paras. D.7-D.8.

[6] Gardiner Opinion at para. D.7.

> to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.[7]

All of the requirements of Article 25(1) of the ICSID Convention have been met in this case.

13. There is a legal dispute between the parties, as Claimants have alleged that Respondent breached the Section A obligations. That dispute arises directly out of Claimants' legacy investments. Claimants are Canadian persons, and Canada is an ICSID Contracting State. Respondent is also an ICSID Contracting State. Through Annex 14-C and Claimants' RFA, the disputing parties have consented in writing to submit the dispute to ICSID arbitration. Therefore, all requirements of Article 25 of the ICSID Convention have been met.

14. Claimants have also met the jurisdictional requirements of Annex 14-C. Annex 14-C, paragraph 1 of USMCA states as follows:

> Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
>
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
>
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
>
> (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994. [FN20] [FN21]
>
> [FN20] 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 Investment, Cross-Border Trade in

[7] Exhibit CL-14, Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature Mar. 18, 1965, entered into force Oct. 14, 1966 ("ICSID Convention"), at Art. 25(1).

> Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.
>
> [FN21] Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

Annex 14-C, paragraph 3 states that "[a] Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994."

15. As Claimants showed in their Observations and Rejoinder in connection with Respondent's bifurcation request (collectively, "Bifurcation Submissions"), paragraphs 1 and 3 of Annex 14-C state only four conditions for bringing a claim, all of which are met in this case:[8]

- First, the claim must be "with respect to a legacy investment."[9] As explained in the RFA, Claimants own and control legacy investments in connection with the KXL Pipeline.[10]
- Second, the claim must allege a breach of the Section A obligations.[11] As set forth in the RFA, Claimants have alleged that Respondent breached Articles 1102, 1103, 1105 and 1110 in Section A of NAFTA Chapter 11.[12]
- Third, the claim must be submitted "in accordance with Section B of Chapter 11 (Investment) of NAFTA."[13] Claimants submitted their claims in accordance with Section B of NAFTA Chapter 11, as explained in Claimants' RFA.[14]
- Fourth, the claim must be brought during the three-year transition period.[15] USMCA entered into force, and replaced NAFTA, on July 1, 2020.[16] Claimants submitted their

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[8] Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection, Feb. 10, 2023 ("Claimants' Observations on Bifurcation"), at para. 23; Claimants' Rejoinder Regarding Respondent's Request for Bifurcation, Mar. 22, 2023 ("Claimants' Rejoinder on Bifurcation"), at para. 25.

[9] Exhibit C-2, Agreement between the United States of America, the United Mexican States, and Canada, signed Nov. 18, 2018, entered into force July 1, 2020 ("USMCA"), at Annex 14-C, para. 1.

[10] Claimants' Request for Arbitration, Nov. 22, 2021 ("Claimants' Request for Arbitration"), at para. 76.

[11] Exhibit C-2, USMCA at Annex 14-C, para. 1.

[12] Claimants' Request for Arbitration at paras. 89-98.

[13] Exhibit C-2, USMCA at Annex 14-C, para. 1.

[14] Claimants' Request for Arbitration at paras. 72-82.

[15] *See* Exhibit C-2, USMCA at Annex 14-C, para. 3.

[16] Exhibit C-84, Office of the United States Trade Representative, "United States-Mexico-Canada Agreement," *available at* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last

claims to arbitration on November 22, 2021, prior to the expiration of the transition period.

16. Respondent has not contested any of these points, except to argue that Claimants have not alleged a breach of the Section A obligations because President Biden revoked the 2019 Permit during the transition period, after NAFTA terminated.[17] Respondent is plainly wrong. Claimants have explicitly alleged that Respondent breached the Section A obligations.[18]

17. Whether the Section A obligations are applicable to this dispute is a question of the parties' choice of law, which in turn is governed by Article 42 of the ICSID Convention, not Article 25 of the ICSID Convention. If the Section A obligations are applicable to the dispute (they clearly are), the question of whether President Biden's action did or did not breach those obligations is a question for the merits, not a question of jurisdiction.

III. To the Extent the Tribunal Applies a Burden of Proof Framework, Respondent Bears the Burden of Proving Its Objection

18. Respondent asserts that Claimants bear the burden of establishing the Tribunal's jurisdiction, and, therefore, "Claimants have the burden to establish the United States' consent to arbitrate this dispute."[19] Respondent misstates the applicable burden of proof, and, to the extent that any party bears the burden of proof, it is Respondent.

19. *First*, as discussed above, Respondent's objection does not actually pertain to jurisdiction but to the applicable law. Therefore, Respondent's argument that a claimant bears the burden of proof on jurisdictional matters is misplaced. In any case, Claimants have established that they have met the jurisdictional requirements of Article 25 of the ICSID Convention and Annex 14-C, as discussed in Section II.

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accessed Jan. 27, 2023); Exhibit C-85, Office of the United States Trade Representative, "USMCA To Enter Into Force July 1 After United States Takes Final Procedural Steps For Implementation," Apr. 24, 2020, *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation.

[17] *See* Respondent's Memorial on Preliminary Objection at para. 2.

[18] *See* Claimants' Request for Arbitration at paras. 89-98 (alleging that Respondent breached Articles 1102, 1103, 1105, and 1110 of the North American Free Trade Agreement ("NAFTA")).

[19] Respondent's Memorial on Preliminary Objection at para. 8.

20. *Second*, the burden of proof framework is not useful in the present case. As Professor Schreuer has explained in his Legal Opinion accompanying this submission:

> The International Court of Justice ("ICJ") as well as investment tribunals have declined to adopt a method whereby one of the parties carries the burden of proof in matters of jurisdiction. They have adopted a different approach to deciding whether jurisdiction exists. Under this method, the decision-maker looks at the preponderance of authority for or against jurisdiction.[20]

After reviewing relevant decisions of the ICJ and investor-state arbitration tribunals, Professor Schreuer concludes that:

> a focus on burden of proof is not the correct approach. The ICJ as well as investment tribunals have discarded the burden of proof approach and have adopted a method whereby the weight of legal arguments is decisive to establish jurisdiction. . . . [A]n ICSID tribunal must examine its jurisdiction *proprio motu* and is not bound by the parties' jurisdictional arguments or by any burden of proof attached to them.[21]

The burden of proof framework is particularly ill-suited for purposes of assessing Respondent's objection with respect to the interpretation of Annex 14-C, given that there are no jurisdictional facts in dispute and the question before the Tribunal is purely one of law.[22]

21. *Third*, to the extent that the Tribunal applies a burden of proof framework, the burden rests squarely with Respondent, not Claimants. As the moving party, Respondent bears the burden of proving its preliminary objection.[23] Respondent must show that Annex 14-C does not

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[20] Exhibit CER-1, Schreuer Opinion at para. 12.

[21] Exhibit CER-1, Schreuer Opinion at para. 20.

[22] *See* Procedural Order No. 2 at para. 35 ("[T]he jurisdictional objection . . . seems to <u>essentially rest on legal considerations</u>.") (emphasis added). Neither of the parties has disputed the facts related to Respondent's preliminary objection.

[23] *See*, *e.g.*, Exhibit CL-136, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, Dec. 10, 2014 ("*Fraport v. Philippines II*, Award"), at para. 299 ("Regarding burden of proof, in accordance with the well-established rule of *onus probandi incumbit actori*, the burden of proof rests upon the party that is asserting affirmatively a claim or defense. Thus, with respect to its objections to jurisdiction, Respondent bears the burden of proving the validity of such objections.") (citing Exhibit CL-137, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002, at para. 177; Exhibit CL-138, *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 1962 I.C.J. 6 (June 15) ("*Temple of Preah Vihear*, Judgment"), at pp. 15-16); Exhibit CL-139, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, at para. 318 ("The Tribunal

mean what it plainly says. Respondent argues that paragraph 1 of Annex 14-C allows claims only in connection with measures that pre-dated the entry into force of USMCA, and thus seeks to include a temporal limitation that is not in the text of Annex 14-C. As Professor Schreuer notes:

> The attempt to insert additional requirements for jurisdiction, not contained in treaties providing for consent to arbitration, is a common strategy of respondents. This is contrary to the accepted canon of treaty interpretation. Article 31(1) of the VCLT requires an interpretation of the 'terms of the treaty', not of the terms as supplemented by a party.[24]

In these circumstances, Respondent must carry the burden to prove its objection.

22. Requiring Respondent to bear the burden of proof is especially appropriate given that Respondent has declared the negotiating history for USMCA—including with respect to the provisions in Annex 14-C and the USMCA Protocol that are at issue in this arbitration—confidential and not accessible to Claimants or other members of the public through established channels such as the Freedom of Information Act ("FOIA").[25] Respondent is the only disputing

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considers that the burden of proof in respect of all jurisdictional objections and substantive defences lies with Egypt. The Tribunal concurs with the opinion of Professor Reisman, that it is a widely-accepted principle of law that the party advancing a claim or defence bears the burden of establishing that claim or defence.") (citing expert opinion of Professor Michael Reisman); Exhibit CL-140, *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, Feb. 21, 2014, at para. 66 ("[I]n terms of the present [*ratione temporis*] jurisdictional objection, the Respondent accepts the burden of proving that the 'legal dispute' arose before the critical date.").

[24] Exhibit CER-1, Schreuer Opinion at para. 31.

[25] According to the Office of the U.S. Trade Representative's ("USTR") website, "The United States, Canada and Mexico have agreed that the information exchanged in the context of the NAFTA negotiations, such as the negotiating text, proposals of each Government, accompanying explanatory material, and emails related to the substance of the negotiations, must remain confidential. Pursuant to this agreement, USTR has classified the materials. This means that they are not available under the Freedom of Information Act." Exhibit C-110, Office of the United States Trade Representative, "FOIA Library," *available at* https://ustr.gov/about-us/reading-room/freedom-information-act-foia/foia-library. As discussed further below, USTR has, through the FOIA process, given Claimants, through their counsel, access to certain internal U.S. Government materials, including a few emails and talking points, but has not provided the negotiating history. *See* Exhibit C-111, Email Exchange between Monique T. Ricker, FOIA Program Manager at USTR and Sidley Austin LLP regarding FOIA Request, June 27 – July 31, 2023; Exhibit C-112, FOIA Release Package Provided by USTR in Response to FOIA Request from Sidley Austin LLP of June 27, 2023. Moreover, USTR provided answers to certain FOIA requests that entirely avoided the requests' substance. For example, in response to requests for (1) "all records discussing whether or how investors may submit claims under Annex 14-C of USMCA in connection with measures that were proposed, imposed, taken, or continued on or after July 1, 2020"; and (2) "all records discussing whether or how investors may submit claims under Annex 14-C of USMCA in connection with energy-related measures that Mexico proposed, imposed, took, or continued on or after July 1, 2020," USTR evaded the obvious focus of the requests, responding to both that "[h]ow

party with access to this information, and yet it has not provided any documentation regarding the negotiation of the relevant USMCA provisions. In these circumstances, if any party bears the burden of proof, it is Respondent.

IV. The Ordinary Meaning of Annex 14-C Shows that Claimants May Submit Claims Arising from Measures Taken during the Transition Period

23. Article 31(1) of the VCLT 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 that the ordinary meaning of paragraphs 1 and 3 of Annex 14-C is that Respondent has consented to arbitrate claims arising from actions taken during the transition period. Claimants address the issues of context and object and purpose of the treaty in Sections V and VI of this Counter-Memorial, respectively.

24. In the subsections that follow, Claimants show that: (A) under standard rules of treaty interpretation, paragraph 1 of Annex 14-C applies prospectively to measures taken after the entry into force of USMCA; (B) the disputing parties have chosen NAFTA as the applicable substantive law of this arbitration, and the Tribunal is bound to apply that choice of law to resolve Claimants' claims; and (C) if the USMCA Parties had wanted to allow claims under paragraph 1 of Annex 14-C only with respect to measures that pre-dated the entry into force of USMCA, they would have said so in the text of the agreement.

A. Annex 14-C Applies Prospectively to Measures Taken After USCMA Entered into Force

25. Through paragraphs 1 and 3 of Annex 14-C, Respondent consented to arbitrate claims alleging that it breached the Section A obligations. According to Article 28 of the VCLT,

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to file claims is addressed in the Annex itself." Exhibit C-113, Email Exchange between Monique T. Ricker, FOIA Program Manager at USTR, and Sidley Austin LLP regarding FOIA request, June 27 – Aug. 10, 2023 (emphasis added). Even the small set of documents that USTR did provide was heavily redacted and did not include many internal U.S. Government communications. The agency withheld, *e.g.*, "documents that are related to the negotiations of the U.S.-Mexico-Canada Agreement (USMCA) because communications and explanatory materials are properly classified at the confidential level under a confidentiality agreement between the governments of the United States, Canada and Mexico"; "proposed language submitted by Canada as well as draft text and accompanying comments from the Department of State (DoS) and explanatory notes sent to the International Trade Commission (ITC)"; and "communications with DoS and the ITC because the redacted information is both pre-decisional and deliberative." Exhibit C-111, Email Exchange between Monique T. Ricker, FOIA Program Manager at USTR and Sidley Austin LLP regarding FOIA Request, June 27 – July 31, 2023.

"[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Thus, the default presumption is that, absent an express agreement to the contrary (there is no such agreement in the present case), Annex 14-C applies only to "acts or facts" that occur, or measures taken, after the entry into force of USMCA. Respondent seeks to invert the principle set forth in Article 28 of the VCLT by arguing that Annex 14-C of USMCA allows a claimant to assert a claim only in connection with acts or facts that occurred, or measures that were taken, before the entry into force of USMCA.[26]

26. Paragraphs 1 and 3 of Annex 14-C contain only two temporal limitations. First, dispute settlement is limited to claims related to 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." Second, the USMCA Parties' consent to arbitration expires at the end of the three-year transition period. There is otherwise no temporal limitation on the acts that might give rise to a dispute that may be submitted to arbitration under Annex 14-C. Respondent is trying to insert a temporal limitation that simply is not there.

27. Any ambiguity regarding the temporal application of Annex 14-C relates to whether paragraph 1 of Annex 14-C allows claims for damages arising from measures that pre-date the entry into force of USMCA.[27] The parties included Article 14.2(3) of USMCA to resolve this ambiguity. There, the USMCA Parties clarified that Annex 14-C applies to all disputes in

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[26] Notably, Respondent does not refer at all to Article 28 of the VCLT in its Memorial, nor do Mr. Gardiner or Mr. Ascensio in their legal opinions.

[27] For example, according to Professor Sean Murphy, "BITs often provide that their protections extend not just to new investments, which were made after entry into force of the BIT, but also to investments already existing in the host country as of that date. Such a provision might be construed as meaning that the BIT operates retroactively to protect against governmental measures that were taken against such investments prior to entry into force of the BIT but investor–State tribunals generally have not reached such a conclusion," and instead applied the BIT only to measures taken after the BIT entered into force." Exhibit CL-141, Sean D. Murphy, "Temporal Issues Relating to BIT Dispute Resolution," 37 *ICSID Review* 51 (2022), at p. 73. A legacy investment "exist[] in the host country as of the" date of entry into force of USMCA, and so Annex 14-C, paragraph 1 could be construed to apply to acts that predated the entry into force of USMCA.

existence during the transition period, including disputes arising out of acts or facts that pre-dated the entry into force of USMCA.[28] Article 14.2(3) of USMCA does not modify or limit the temporal application of Annex 14-C.[29] It merely confirms that Annex 14-C applies not only to acts that took place after the entry into force of USMCA (which is the default presumption), but also to acts that took place before the entry into force of USMCA.

B. The Disputing Parties Have Chosen NAFTA as the Applicable Law, and that Choice Is Binding on the Tribunal, Regardless of Whether NAFTA Would Otherwise Apply

28. Respondent argues that the Tribunal's jurisdiction is founded on consent,[30] and that the USMCA Parties did not consent to be bound by NAFTA after NAFTA terminated. Respondent misreads the consent provision in Annex 14-C.

29. Annex 14-C, combined with Claimants' acceptance of Respondent's offer of arbitration, constitutes an arbitration agreement. In fact, under Respondent's own reasoning, Annex 14-C constitutes an entirely new arbitration agreement rather than a continuation of the arbitration agreement contained in NAFTA Chapter 11. According to Respondent, "the consent in Paragraph 1 of Annex 14-C is valid, despite the termination of the NAFTA and the consequent withdrawal of the Parties' consent to arbitration of NAFTA claims reflected in NAFTA Article 1122."[31]

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[28] Article 14.2(3) 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." Exhibit C-2, USMCA at Art. 14.2(3). The exception for Annex 14-C was apparently added during the "legal scrub" after the agreement had been negotiated but before it was signed. According to USTR talking points dated November 28, 2018, "Article 14.2(3) (Scope): The original text stated that the Investment Chapter does not apply to acts/events that occurred prior to entry into force of the USMCA, consistent with the default Vienna Convention rules. In the scrub, we clarified that there is one exception: Annex 14-C (the grandfather provision) allows investors to bring ISDS claims with respect to legacy investments where the alleged breach took place before entry into force of the USMCA." Exhibit C-114, Email Exchange among USTR Personnel, "RE: Call Tomorrow Morning," attaching "Talking Points on Scrub Items in USMCA," Nov. 28, 2018, at p. 1 of attachment.

[29] Article 14.2(3) begins with the phrase "[f]or greater certainty," which the United States has explained (in the context of its discussion of Footnote 20 of Annex 14-C) "signals that the text it introduces reflects the understanding of the United States and the other treaty party or parties of what the provisions of the agreement would mean even if the text following the phrase were absent." Respondent's Memorial on Preliminary Objection at n.43.

[30] Respondent's Memorial on Preliminary Objection at para. 8.

[31] Respondent's Memorial on Preliminary Objection at para. 42.

30. In Annex 14-C, the disputing parties agreed to apply NAFTA to disputes under paragraph 1 of Annex 14-C for the duration of the transition period. The parties' choice of law is part and parcel of their arbitration agreement.[32] As Professor Schreuer has explained in his treatise *Principles of International Investment Law*:

> Many treaty provisions that offer investor-State arbitration, such as the [Energy Charter Treaty] and some BITs, also contain provisions on applicable law. By taking up the offer of arbitration, the investor also accepts the choice of law clause contained in the treaty's dispute settlement provision. In this way the treaty's provision on applicable law becomes part of the arbitration agreement between the host State and the foreign investor. In other words, the clause on applicable law in the treaty becomes a choice of law agreed by the parties to the arbitration.[33]

The disputing parties' choice of NAFTA as the governing law renders Respondent's arguments about the intertemporal application of NAFTA irrelevant.

31. Claimants submitted their RFA pursuant to the ICSID Convention. Article 42(1) of the ICSID Convention provides, in relevant part, that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties."[34] Accordingly, the disputing parties' choice of "rules of law," as specified in their arbitration agreement, is binding on the

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[32] *See also* Exhibit CL-142, Yas Banifatemi, "The Law Applicable in Investment Treaty Arbitration," in Katia Yannaca-Small, ed., *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2018), at p. 488 ("[T]he arbitration agreement contained in an investment treaty is deemed to be stipulated by the contracting states for the benefit of their investors. Any agreed mechanism in the arbitration agreement, including the law applicable to the dispute, is therefore deemed to be chosen directly by the parties to the arbitration. . . . [A]lthough consent to arbitration [through a BIT] is dissociated in time, the parties to the arbitration are still presumed to have given their *common consent* to arbitration at the time the investor accepts the host state's general consent by filing the request for arbitration. . . . This mechanism has been readily recognized in case law and is today well established.") (internal footnotes omitted) (emphasis in original). As Dr. Banifatemi explains, "The possibility was envisaged during the negotiation of the Washington Convention with respect to the situation where the law applicable to a dispute is specified in a State legislation or in a bilateral treaty . . . ." *Id.* at p. 488, n.7 (citing Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, December 16–20, 1963, Document No. 25, in II Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention 267 (ICSID Publication 1968) ("The Chairman remarked that . . . it was likewise open to the parties to prescribe the law applicable to the dispute. Either stipulation could be included in an agreement with an investor, in a bilateral agreement with another State, or even in a unilateral offer to all investors, such as might be made through investment legislation.")).

[33] Exhibit CL-143, Rudolf Dolzer, Ursula Kriebaum, & Christoph Schreuer, *Principles of International Investment Law* (3d. ed. 2022) (excerpts), at pp. 417-18.

[34] *See* Exhibit CL-14, ICSID Convention at Art. 42(1).

Tribunal.[35] Failing to apply such rules of law would not only violate Article 42(1) of the ICSID Convention but would be grounds for annulment of any award.[36] As stated by the *ad hoc* committee in *MINE v. Guinea*, "the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function."[37]

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[35] *See also* Exhibit CL-144, Regional Consultative Meetings of Legal Experts on Settlement of Investment Disputes, "Chairman's Report on Issues Raised and Suggestions Made With Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and National of Other States," July 9, 1964, in *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-1 (1968), at p. 569 (in connection with Article IV, Section 4 of the Preliminary Draft Convention, which indicated that the parties may agree to the applicable law, Chairman Broches stated that it "is in keeping with the consensual character of the Convention and generally accepted in international arbitration, that the parties can control the rules by which an arbitral tribunal is to arrive at a decision of the dispute which they have submitted to it. If the parties have agreed on the law to be applied by the tribunal . . . the tribunal is bound by that agreement.").

[36] *See* Exhibit CL-135, Schreuer, *Commentary on the ICSID Convention* at p. 1268 ("Non-application of the law agreed by the parties [pursuant to Article 42 of the ICSID Convention] or of the law determined by the residual rule in Art. 42(1) goes against the parties' agreement to arbitrate and may constitute an excess of powers."). *See also id.* at p. 1285 ("[T]he provisions on applicable law are essential elements of the parties' agreement to arbitrate and constitute part of the parameters for the tribunal's activity . . . . Their violation may amount to an excess of powers."); Exhibit CL-134, U.N. Conference on Trade and Development, *Dispute Settlement: International Centre for Settlement of Investment Disputes, 2.6 Applicable Law* (2003), at p. 33 ("*Ad hoc* Committees have determined that the failure to apply the proper law may constitute an excess of powers and a ground for annulment. Therefore, a negligent application of Article 42 can lead to a decision of nullity."); Exhibit CL-145, Giudittta Cordero Moss, "Chapter 31: Tribunal's Powers Versus Party Autonomy," in Peter Muchlinski, Federico Ortino, & Christoph Schreuer, eds., *The Oxford Handbook of International Investment Law* (2008), at p. 1215 ("The treaty establishing arbitration may contain instructions in respect of the law to be applied by the tribunal to the merits of the dispute. Violation of these rules does not necessarily simply amount to an error in the merits of the award. Disregard of treaty rules on applicable law is a violation of the duties established by the treaty in respect of the conduct of the proceedings and, in particular, in respect of the legal standard against which the disputed facts shall be measured. Given the significance of the applicable law for the outcome of the dispute, such violation may be considered as a serious procedural irregularity or an excess of the power conferred on the tribunal. Both are grounds for invalidity and refusal of enforcement of the award . . . .").

[37] Exhibit CL-146, *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case. No. ARB/84/4, Decision on Annulment, Dec. 14, 1989, at para. 5.03. *See also* Exhibit CL-131, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, June 5, 2007, at para. 45 ("The relevant provisions of the applicable law are constitutive elements of the Parties' agreement to arbitrate and constitute part of the definition of the tribunal's mandate."). In previous NAFTA arbitration proceedings, Mexico argued that "[t]he jurisdiction of arbitral tribunals established under Section B of Chapter Eleven is created and governed by Chapter Eleven itself, and, thus, is subject to any limitations set forth therein. An Arbitral Tribunal must, therefore, act in accordance only with such rules if it is to exercise properly the jurisdiction conferred upon it." Exhibit CL-147, *Methanex Corporation v. United States of America*, UNCITRAL, Article 1128 Submission of the United Mexican States, Feb. 11, 2002, at p. 3. It similarly argued that "[u]nder Article 1131(1) and (2), a Tribunal must decide the issues in dispute in accordance with the NAFTA and applicable rules of international law and any interpretation of the Commission. Any interpretation forms part of the governing law from which a Tribunal cannot derogate without acting in excess of jurisdiction." *Id.* at p. 2.

32. It requires no great interpretive exercise to conclude that the parties have chosen NAFTA as the substantive law governing this proceeding. In the sections that follow, Claimants show that: (1) parties have complete freedom to choose whatever applicable substantive law they wish in their arbitration agreement; (2) the parties in the present proceeding chose NAFTA as the applicable substantive law; and (3) that choice is binding on the Tribunal even though NAFTA has been superseded by USMCA.

1. Parties Have Complete Freedom to Choose the Applicable Substantive Law for Resolving Their Dispute

33. Article 42(1) of the ICSID Convention provides parties with maximum flexibility to choose the rules of law governing the substance of a dispute.[38] As the former Secretary-General of ICSID, Ibrahim Shihata, and the former Deputy Secretary-General of ICSID, Antonio Parra, have written, "under the ICSID Convention parties enjoy . . . 'full' autonomy in respect of the selection of the applicable substantive law."[39] According to the *ad hoc* committee in *MINE*, Article 42(1) "grants the parties to the dispute unlimited freedom to agree on the rules of law applicable to the substance of their dispute and requires the tribunal to respect the parties' autonomy and to apply those rules."[40]

[38] Article 35(1) of the UNCITRAL Arbitration Rules similarly states, in relevant part, that "[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute." Exhibit CL-148, UNCITRAL Arbitration Rules (2021), at Art. 35(1).

[39] Exhibit CL-149, Ibrahim F.I. Shihata & Antonio R. Parra, "Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention," 9 *ICSID Review* 183 (1994), at p. 189 (emphasis added) (footnote omitted). The authors cite to a 1989 Resolution of the Institute of International Law, which stated: "The parties have full autonomy to determine the procedural and substantive rules and principles that are to apply in the arbitration." Exhibit CL-150, The Institute of International Law, Resolution on Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises, Sept. 12, 1989, at Art. 6 (p. 3). Messrs. Shihata and Parra further explain that "[b]y referring to agreed 'rules of law,' the ICSID Convention opens up other possibilities [than the law of a specific jurisdiction]. . . . These . . . include the submission of the parties' relationship to rules common to two or more national legal systems, to combinations of national and international law or to a law frozen in time or subject to certain modifications" Exhibit CL-149, Ibrahim F.I. Shihata & Antonio R. Parra, "Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention," 9 *ICSID Review* 183 (1994), at p. 189.

[40] Exhibit CL-146, *MINE v. Guinea*, Decision on Annulment at para. 5.03 (emphasis added). *See also* Exhibit CL-151, "Summary of the Proceedings of the Legal Committee, December 7, Morning," Dec. 30, 1964, in *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-2 (1968), at p. 803 (Chairman Broches indicated that he "would propose that the first part of the first sentence of paragraph (1) be replaced by the following sentence: 'The Tribunal shall decide disputes submitted to it in accordance with such rules of law as shall have been agreed upon between the parties'. That would indicate that in the normal case one would expect the parties to choose the applicable law and would reflect the normal practice in the field of foreign investment agreements."). *See also*

34. The principle of party autonomy is enshrined in arbitration rules around the world, including not only the ICSID Arbitration Rules, but also the UNCITRAL Arbitration Rules, the Arbitration Rules of the International Chamber of Commerce, and the Arbitration Rules of the Stockholm Chamber of Commerce Arbitration Institute.[41] As Yves Derains and Eric Schwartz wrote in *A Guide to the ICC Rules of Arbitration*:

> The freedom of the parties to choose the law to be applied to the merits of the dispute is widely accepted. As noted by one ICC Arbitral Tribunal: "The principle of autonomy—widely recognized—allows the parties to choose any law to rule their contract, even if not obviously related to it." Thus, the Arbitral Tribunal does not ordinarily have to assess whether the parties' choice as regards the applicable law is well founded or has any particular connection with the subject matter of the dispute. It has only to respect it.[42]

In short, the parties to a dispute may choose any applicable substantive law that they wish, and that choice is binding on the arbitral tribunal.

2. The Disputing Parties Have Chosen NAFTA as the Applicable Substantive Law

35. In the present case, the disputing parties' arbitration agreement designated NAFTA as the applicable substantive law of this dispute in at least three different ways.

Exhibit CL-152, Note by A. Broches, General Counsel, transmitted to the Executive Directors, "Settlement of Disputes between Governments and Private Parties," Aug. 28, 1961, in *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-1 (1968), at p. 9 ("It is characteristic of arbitration that the parties are free in the choice of the law to be applied by arbitrators.").

[41] *See* Exhibit CL-148, UNCITRAL Arbitration Rules (2021), at Art. 35 ("The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute"); Exhibit CL-153, ICC International Court of Arbitration Rules (2021), at Art. 21(1) ("The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute."); and Exhibit CL-154, SCC Arbitration Rules (2023), at Art. 27(1) ("The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties."). Exhibit CL-155, "Chapter 1: Applicable Law Chosen by the Parties," in Emmanuel Gaillard & John Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at Section 1421 (p. 785) ("Virtually all modern arbitration laws recognize that, in international situations, the parties are free to determine the law applicable to the merits of the dispute which the arbitrators are to resolve. This principle, traditionally referred to as the principle of party autonomy, is binding on the arbitrators.").

[42] Exhibit CL-156, Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* (2005), at p. 238.

36. *First*, on its face, paragraph 1 of Annex 14-C provides for arbitration of claims alleging a breach of the Section A obligations, stating that:

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

As Professor Schreuer explains, "Paragraph 1 of Annex 14-C provides for jurisdiction for claims relating to legacy investments alleging breach of *inter alia* Section A of Chapter 11 (Investment) of NAFTA. This definition of a tribunal's jurisdiction in terms of the NAFTA's substantive protections represents an implicit choice of Section A of NAFTA Chapter 11 as the applicable law."[43]

37. *Second*, paragraph 1 of Annex 14-C allows arbitration of claims submitted in accordance with Section B of NAFTA Chapter 11. Section B of NAFTA Chapter 11 includes Article 1131(1), titled "Governing Law," which provides that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[44] As explained in the Statement of Administrative Action accompanying the U.S. legislation implementing NAFTA, "Articles 1131 and 1132 address the substantive law

[43] Exhibit CER-1, Schreuer Opinion at para. 72.

[44] In *Pope & Talbot v. Canada*, Canada took the position that "[a] tribunal established under Section B of Chapter Eleven has only such jurisdiction as has been conferred upon it by that Section. Chapter Eleven Tribunals have been conferred jurisdiction to resolve disputes in accordance with the NAFTA, the applicable rules of international law, and any interpretation by the Free Trade Commission . . . . The Tribunal's task is limited to that set out in Article 1131(1): to 'decide the issue in dispute in accordance with this Agreement and applicable rules of international law' and in accordance with any applicable interpretation." Exhibit CL-157, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Canada's Reply to the Tribunal's Letter Regarding the Interpretation of NAFTA Article 1105 by the NAFTA Commission, Oct. 1, 2001, at p. 2. In *Chemtura v. Canada*, the United States argued that "[u]nder Article 1131, Chapter Eleven tribunals are required to apply governing law . . . ." Exhibit CL-158, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Submission of the United States of America, July 31, 2009, at para. 4. The United States also agreed with the position of Canada that a refusal to comply with the governing law "would be an act in excess of the governing law jurisdiction that is vested in the Tribunal under Article 1131." *Id.* at paras. 6-7.

to be applied in arbitral proceedings. Article 1131(1) provides that arbitral tribunals are to decide questions in accordance with the NAFTA and applicable international law rules."[45]

38. *Third*, 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 Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.[46]

Thus, the USMCA Parties have explicitly stated in Annex 14-C itself that NAFTA is the applicable law for resolving disputes under paragraph 1 of Annex 14-C.[47]

39. When an investment treaty includes an express provision on the choice of applicable law (as the USMCA Parties have done through paragraph 1 of Annex 14-C, as confirmed by Footnote 20, and in Article 1131 of NAFTA), the acceptance of the offer of arbitration includes

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[45] Exhibit C-115, North American Free Trade Agreement Implementation Act, Statement of Administrative Action, Nov. 4, 1993, at p. 148.

[46] *See* Exhibit C-2, USMCA at Annex 14-C, n.20 (emphasis added).

[47] Exhibit CER-1, Schreuer Opinion at para. 78 ("Reduced to its essentials, footnote 20 states that the substantive protections for investments under the NAFTA (Chapter 11, Section A) apply to a dispute concerning a legacy investment under Annex 14-C."). Respondent agrees that Footnote 20 confirms that NAFTA is the applicable substantive law of this dispute, stating that "Footnote 20 carefully and explicitly limits the post-termination application of the provisions mentioned therein to a claim that is submitted pursuant to the consent provided in Paragraph 1 of Annex 14-C." Respondent's Memorial on Preliminary Objection at para. 49. *See also* Reply to Claimants' Observations on the Request for Bifurcation of Respondent United States of America, Mar. 2, 2023 ("Respondent's Reply on Bifurcation"), at para. 19 (asserting that the USMCA Protocol "requires only that [Footnote 20 and paragraph 1 of Annex 14-C] be given effect, despite the NAFTA's termination, for purposes of adjudicating certain specified claims. Thus, the consent embodied in paragraph 1 to the submission of certain NAFTA claims to arbitration—and the application of the relevant NAFTA provisions to those claims—must be honored, even though the termination of the NAFTA, which lacked a survival clause, would otherwise have barred investors from bringing such claims.") (emphasis added). Here, again, Respondent concedes that the choice of NAFTA as the applicable law must apply to resolve claims asserted under Annex 14-C. Further, as Mr. Gardiner acknowledges, when the phrase "for greater certainty" appears in a successor treaty that covers the same subject matter as its predecessor, "it may be included to reflect solutions to issues under the predecessor treaty that have been subject to debate, the express clarification of which forms part of the bargain of the later treaty." Gardiner Opinion at para. C.5 (emphasis added). Use of the phrase "for greater certainty" here "express[ly] clarif[ies]" that the relevant provisions in Chapter 11 Section A of NAFTA apply with respect to a claim under Annex 14-C.

an agreement on that choice of law.[48] As Professor Schreuer further explains in his Legal Opinion, "In the present case, Claimants have accepted the clause on applicable law in paragraph 1 and in footnote 20 to Annex 14-C by bringing their Request for Arbitration under the ICSID Convention and Annex 14-C. It follows that there is an agreement between the parties that the substantive protections for investments under NAFTA (Chapter 11, Section A) apply to the present dispute."[49]

40. This interpretation of Annex 14-C is grounded in the VCLT. As Respondent recognizes,[50] Article 70(1) of the VCLT provides that, upon a treaty's termination, the treaty parties may agree to continue to perform certain obligations under that treaty.[51] Through Annex 14-C, the USMCA Parties agreed to continue to perform the Section A obligations with respect to legacy investments for the duration of the transition period. As Professor Schreuer explains:

> By virtue of Annex 14-C paragraph 1, Article 1131 of NAFTA, and footnote 20, NAFTA's substantive protections continue to apply to legacy investments during the transition period, provided the claim is brought before July 1, 2023. To this extent, NAFTA continues to apply even after its termination because the parties have so agreed in Annex 14-C. In terms of Article 70 of the VCLT, through Annex 14-C, the parties have, in accordance with Article 70(1)(a) of the

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[48] As Professor Schreuer has explained (in an article that Respondent's expert, Mr. Gardiner, has himself cited and relied upon): "Some treaties offering consent to arbitration contain their own rules on applicable law. A rule on applicable law in a treaty that offers consent to arbitration becomes part of the arbitration agreement. Acceptance by the investor of the offer of consent to jurisdiction in the treaty includes the acceptance of the clause on applicable law, leading to an agreed choice of law. Tribunals have confirmed that treaty clauses of this type were the basis for an agreement on choice of law between the host State and the investor." Exhibit RG-8, Christoph Schreuer, "Jurisdiction and Applicable Law in Investment Treaty Arbitration," *McGill Journal of Dispute Resolution*, Vol. 1:1 (2014), at pp. 11-12 (citing *Goetz and Five Belgian Shareholders of AFFIMET v. Burundi*, ICSID Case No ARB/95/3, Award, Feb. 10, 1999, 15 *ICSID Rev* 457, *ORIL IIC* 16, at para. 94; and *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004, 44 *ILM* 138, at para. 76 ("By accepting the offer of Argentina to arbitrate disputes related to investments, Siemens agreed that this should be the law to be applied by the Tribunal. This constitutes an agreement for purposes of the law to be applied under Article 42(1) of the Convention.").

[49] Exhibit CER-1, Schreuer Opinion at para. 79.

[50] *See* Respondent's Memorial on Preliminary Objection at para. 12.

[51] Exhibit RL-16, Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series*, vol. 1155 ("VCLT"), at Art. 70(1) ("Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty . . . .") (emphasis added).

> VCLT, 'otherwise agreed' to continue to be subject to NAFTA after its termination.[52]

41. Respondent concedes that, at a minimum, Annex 14-C continued Section B of NAFTA Chapter 11 for the duration of the transition period.[53] However, Respondent fails to recognize the implications of that position. In its Memorial, Respondent includes a chart comparing the consent provisions in Section B of NAFTA Chapter 11 and Annex 14-C of USMCA, and concludes that the consent provisions "are not part of the substantive obligations detailed in NAFTA Chapter 11, Section A."[54] However, Respondent cherry-picked provisions from USMCA and NAFTA, as the chart Respondent provided does not include either Article 1131 of Section B of NAFTA Chapter 11 or Footnote 20 of Annex 14-C. A more complete chart, which includes the choice of law provisions in both NAFTA and Annex 14-C, appears on the next page.

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[52] Exhibit CER-1, Schreuer Opinion at para. 87.

[53] Respondent states that, through Annex 14-C, the USMCA Parties consented "that, for three years after the termination of the NAFTA, investors with 'legacy investments' alleging NAFTA breaches could continue to utilize the broader investor-State dispute resolution mechanism set out in Section B of NAFTA Chapter 11." Respondent's Memorial on Preliminary Objection at para. 30. Elsewhere, Respondent states that Annex 14-C "extended the period for bringing a claim alleging a breach of the NAFTA, consistent with the provisions it mirrored in NAFTA Chapter 11, Section B." *Id.* at para. 71.

[54] Respondent's Memorial on Preliminary Objection at paras. 67-68.

NAFTA	USMCA Annex 14-C
Article 1122(1) Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. Article 1116 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises) . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach. (Emphasis added)	 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994 . . . . (Emphasis added)
Article 1122(2) The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;	 2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) . . . for written consent of the parties to the dispute . . . .
Article 1131: Governing Law 1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. (Emphasis added)	Footnote 20 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 Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim. (Emphasis added)

42. The above chart, which accurately reflects the scope of the USMCA Parties' consent to arbitration, shows clearly that the disputing parties have chosen NAFTA as the applicable substantive law.

3. The Tribunal Must Apply NAFTA as the Applicable Law to Resolve the Dispute, Even If NAFTA Is Not Otherwise in Force

43. Respondent argues that the parties could not have chosen NAFTA as the law governing disputes that arose during the transition period because NAFTA was not in force at that time.[55] As Claimants have shown, the USMCA Parties extended the Section A obligations for three years with respect to legacy investments. However, even assuming a complete termination of all substantive provisions in NAFTA, Respondent's position is not correct. There is no requirement that the law chosen by the parties must otherwise be in force. As ICSID has explained:

> Article 42(1) of the Convention provides that a Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. The parties are free to agree on rules of law defined as they choose. They may refer to a national law, international law, a combination of national and international law, or a law frozen in time or subject to certain modifications.[56]

Article 42(3) of the ICSID Convention even authorizes a "Tribunal to decide a dispute *ex aequo et bono* if the parties so agree." Thus, parties could direct a tribunal to resolve a dispute based on what the tribunal determines is equitable, without reference to any particular law.

44. In the context of this dispute (or indeed, any dispute submitted pursuant to Annex 14-C), the parties have chosen NAFTA as the applicable law, and the Tribunal must apply that rule of law even if NAFTA is no longer in force. As Professor Schreuer has explained in his seminal Commentary on the ICSID Convention:

> The parties are . . . free to declare applicable the rules of a treaty that is not in force or of a non-binding code of conduct. Although the

[55] *See* Respondent's Memorial on Preliminary Objection at para. 82.

[56] *See* Exhibit CL-159, ICSID, Model Clauses, Section V "Applicable Law" *available at* http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/model-clauses-en/13.htm (emphasis added). *See also* Exhibit CL-135, Schreuer, *Commentary on the ICSID Convention* at p. 822 ("Art. 42(1), first sentence, refers to 'rules of law' rather than to systems of law. Therefore, it is generally accepted that the parties are not restricted to accepting an entire system of law *tel quel*, but are free to combine, to select, and to exclude rules or sets of rules of different origin.") (internal footnotes omitted).

> term "rules of law" might indicate that parties can choose only existing legal rules, there is nothing to stop them from adopting their own rules by reference to a document, which by itself is not binding.[57]

45. A report prepared for the United Nations Commission on Trade and Development ("UNCTAD Report") confirms this point, explaining that, under the ICSID Arbitration Rules:

> Article 42(1) first sentence refers to "rules of law" rather than systems of law. . . . The parties are . . . allowed to set aside certain aspects of a chosen system of law from its application to the relationship, or to declare applicable rules derived from a treaty not yet in force or another non-binding instrument.[58]

More broadly, the UNCTAD Report explains that the term "'[r]ules of law'. . . allows the application of rules derived from international conventions and uniform laws—even if they are not in force—, parts of different legal systems or provisions of laws that are no longer in force as well as restatements or compilations, such as the UNIDROIT Principles of International Commercial Contracts."[59]

46. The same is true under the UNCITRAL Arbitration Rules and under the UNCITRAL Model Arbitration Law. (Annex 14-C and NAFTA Chapter 11 allow a claimant, in its discretion, to submit disputes under the UNCITRAL Arbitration Rules instead of the ICSID Arbitration Rules). As David Caron and Lee Caplan explained in their Commentary on the UNCITRAL Arbitration Rules:

> The "rules of law" need not be in force. Indeed, it was exactly with the purpose of enabling a tribunal to apply, for example, a convention not yet in force that the Model Law employs the words "rules of law chosen by the parties" instead of simply referring to "law." As party autonomy is the overriding principle in the application of the UNCITRAL Rules, the parties' choice of a "law" not in force should be respected to the extent possible. Accordingly,

[57] Exhibit CL-135, Schreuer, *Commentary on the ICSID Convention* at p. 823 (emphasis added).

[58] Exhibit CL-134, U.N. Conference on Trade and Development, *Dispute Settlement: International Centre for Settlement of Investment Disputes, 2.6 Applicable Law* (2003), at p. 8 (emphasis added).

[59] Exhibit CL-160, U.N. Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration, 5.2 The Arbitration Agreement* (2005), at pp. 53-54 (emphasis added).

> a convention not in force, but which has been designated as applicable law, should be applied . . . .[60]

As the above quotation indicates, the legislative history of the UNCITRAL Model Law is clear that, because the parties have autonomy to choose the applicable law, they are free to choose "rules such as those in an international convention not yet in force."[61]

47. The *CSOB v. Czech Republic* case provides an illustrative example of how this principle has been applied. In that case, the tribunal was faced with an agreement that specified a bilateral investment treaty ("BIT") as the governing law, despite the fact that, according to the tribunal, the BIT had never entered into force.[62] The tribunal concluded as follows:

> Pursuant to Article 42(1) of the ICSID Convention, "The Tribunal shall decide the dispute in accordance with such rules of law as may be agreed by the parties". An implied submission to international law can be seen in Article 7(4) [of the contract] where it is stated that the [contract] shall be governed by the BIT, in addition to the laws of the Czech Republic . . . . [B]y referring to the BIT . . . the Parties intended to incorporate the arbitration clause of Article 8 of the BIT into the [contract]. As the reference to the BIT in Article 7(4) is not limited to this particular provision, such incorporation into the [contract] is equally pertinent in respect of any other provision of the BIT that may be relevant for the interpretation and application of the [contract].[63]

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[60] Exhibit CL-161, David D. Caron & Lee M. Kaplan, *The UNCITRAL Arbitration Rules: A Commentary* (2013) (excerpts), at p. 116 (emphasis added).

[61] *See* Exhibit CL-162, "Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, 3-21 June 1985," A/40/17 (1985), at para. 234 ("It was understood that parties might agree in their contracts to apply rules such as those in international conventions not yet in force.") (emphasis added). *See also* Exhibit CL-156, Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* (2005), at p. 235 (noting that "[f]or the drafters of the UNCITRAL Model Law, the expression 'rules of law' . . . was interpreted relatively narrowly as embracing [national laws, as well as] 'rules embodied in a convention or similar legal text elaborated on the international level, even if not yet in force.'" (emphasis added) (citing Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, 1989, at pp. 766-68).

[62] Exhibit CL-123, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, at para. 43 ("The Tribunal accordingly holds that the uncertainties relating to the entry into force of the BIT prevent that instrument from providing a sound basis upon which to found the parties' consent to ICSID jurisdiction.").

[63] Exhibit CL-124, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, Dec. 29, 2004, at para. 63.

The *CSOB* tribunal thus confirmed that disputing parties are free to choose a treaty as the applicable law, even if that treaty is not otherwise in force. Respondent's own expert, Richard Gardiner, discusses the *CSOB* case in his treatise on treaty interpretation.[64] There, he recognizes that the tribunal found that, because the underlying contract indicated that it was to be governed by the BIT, the parties were bound by the consent provision in the BIT, even though the BIT never entered into force.[65]

48. In light of the parties' choice of NAFTA as the applicable substantive law of this arbitration, the Tribunal is bound to apply that rule of law to resolve Claimants' claims. It does not matter whether, under the principle of intertemporal application of treaties, NAFTA would otherwise apply. In the context of this dispute, NAFTA applies.

C. If the USMCA Parties Had Intended to Preclude Claims Under Article 14-C Arising from Measures Taken during the Transition Period, They Would Have Said So in the Text

49. If the USMCA Parties had intended to exclude claims arising from measures taken during the transition period from the scope of paragraph 1 of Annex 14-C, then they would have needed to say so explicitly. That is particularly true, given the presumption that Annex 14-C applies prospectively, not retrospectively.[66] The USMCA Parties included no such limitation.

50. In other treaties that dealt with a similar situation (*i.e.*, in situations where a new treaty replaced an old treaty),[67] the treaty parties were explicit when they wanted to allow disputes under the old treaty only with respect to claims, acts, or facts that arose before termination of the

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[64] *See* Exhibit CL-163, Richard Gardiner, *Treaty Interpretation* (2015) (excerpts) ("Gardiner, *Treaty Interpretation*"), at pp. 47-51.

[65] *See* Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 50 ("A provision in the consolidation agreement between the claimant and the Slovak Republic referring to the agreement being governed by the BIT did satisfy the requirement for consent (even though the BIT was not in force) as it made the arbitration provision in the BIT part of the contract in the consolidation agreement.").

[66] *See* Section IV.A above.

[67] Respondent cites USMCA Party model bilateral investment treaties with sunset clauses to support the proposition that Annex 14-C does not apply to measures taken during the transition period. *See* Respondent's Memorial on Preliminary Objection at paras. 72-74. As Claimants explained in their Bifurcation Submissions, however, these model bilateral investment treaties do not address the issue implicated by Respondent's preliminary objection: how one treaty (*e.g.*, USMCA) can extend the obligations of another treaty (*e.g.*, NAFTA). *See* Claimants' Rejoinder on Bifurcation at para. 51.

earlier treaty. In their Bifurcation Submissions, Claimants provided numerous examples of "replacement treaties" (*i.e.*, treaties that superseded earlier BITs). These examples included the following:

- the Comprehensive Economic and Trade Agreement ("CETA");[68]
- the Mexico-EU Agreement in Principle ("Mexico-EU Agreement");[69]
- the Canada-Peru Free Trade Agreement;[70]
- the Canada-Panama Free Trade Agreement;[71]
- the Australia-Mexico side letter in connection with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") (the "Australia-Mexico Side Letter").[72]

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[68] Exhibit CL-37, Comprehensive Economic and Trade Agreement between Canada and the European Union, signed Oct. 30, 2016, provisionally entered into force Sept. 21, 2017 ("CETA").

[69] Exhibit CL-68, European Commission, "EU-Mexico agreement: The Agreement in Principle," Investment Chapter, Apr. 21, 2018, *available at* https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en.

[70] The Canada-Peru Free Trade Agreement suspended the application of the pre-existing Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (the "Canada-Peru FIPA"), but explicitly preserved investors' ability (for fifteen years after the Canada-Peru Free Trade Agreement's entry into force) to bring claims only with respect to "any breach of the obligations of the [Canada-Peru FIPA] that occurred before the entry into force of this Agreement." Exhibit CL-35, Free Trade Agreement Between Canada and the Republic of Peru, signed May 29, 2008, entered into force Aug. 1, 2009, at Art. 845(2) (emphasis added).

[71] Article 9.38(2) of the Canada-Panama Free Trade Agreement states that "[n]otwithstanding [the suspension of the Treaty between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments ("Canada-Panama FIPA")], the [Canada-Panama FIPA] remains operative for a period of 15 years after the entry into force of this Agreement for the purpose of any breach of the obligations of the [Canada-Panama FIPA] that occurred before the entry into force of this Agreement. During this period the right of an investor of a Party to submit a claim to arbitration concerning such a breach shall be governed by the relevant provisions of the [Canada-Panama FIPA]." Exhibit CL-36, Free Trade Agreement Between Canada and the Republic of Panama, signed May 14, 2010, entered into force Apr. 1, 2013, at Art. 9.38(2) (emphasis added).

[72] In their side letter in connection with the signing of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), Australia and Mexico terminated their bilateral investment treaty (the Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments ("IPPA")), but provided that the IPPA would "continue to apply for a period of three years from the date of termination to any investment . . . which was made before the entry into force of the [CPTPP] for both Australia and the United Mexican States with respect to any act or fact that took place or any situation that existed before the date of termination. . . . A claim under Article 13 (Arbitration: Scope and Standing and Time Periods) of the IPPA may only be made within three years from the date of termination and only with respect to any act or fact that took place or any situation that existed before the date of termination." *See* Exhibit CL-38, Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Mar. 8, 2018 ("Australia-Mexico Side Letter") (emphasis added).

51. Each of these replacement treaties terminated or suspended earlier BITs but continued to allow claims to be asserted under the old BITs. In each case, the replacement treaty included a temporal limitation that expressly allowed claims under the superseded BITs only in connection with actions taken before the BITs terminated or were suspended.[73] Claimants cited the replacement treaties to show that, when treaty parties seek to impose a temporal limitation like the one Respondent is advocating, they directly and explicitly state in the replacement treaty that claims may be asserted under the old BIT only in relation to actions that took place while the old BIT was in force. Again, no such limitation appears in Annex 14-C, and there is no other indication in the text of USMCA that a temporal limitation was intended.[74]

52. Respondent attempts to distinguish these examples in two ways, neither of which helps its position. *First*, Respondent alleges that, in certain of the examples (not including CETA and the EU-Mexico Agreement, which Claimants will address later in this section), the replacement treaties expressly maintained the obligations of the underlying BIT in force, and so a temporal limitation was necessary so as not to allow claims arising from measures that occurred after the BIT terminated. By contrast, Respondent alleges, Annex 14-C does not extend the substantive obligations of NAFTA.[75] Thus, Respondent simply assumes the answer it wants by asserting that Annex 14-C did not extend the substantive obligations of NAFTA. However, as Claimants have shown, Annex 14-C continued the Section A obligations for a period of three years.

[73] *See* Claimants' Observations on Bifurcation at para. 24, discussing Article 34.1 of USMCA, and examples from the Canada-Peru Free Trade Agreement, the Canada-Panama Free Trade Agreement, CETA, and the Australia-Mexico Side Letter.

[74] Respondent's expert, Mr. Ascensio, argues that Annex 14-C is similar to the legal instruments at issue in the *Ambatielos* case. Expert Report of Professor Hervé Ascensio, June 8, 2023, at para. 14. In that case, a 1926 treaty replaced an 1886 treaty. *See* Exhibit HA-8, *Ambatielos Case (Jurisdiction) (Greece v. United Kingdom)*, Judgment, 1952 ICJ Reports (July 1), at p. 36. The ICJ found that claims based on the 1886 treaty were permitted after 1926 under the terms of a Declaration agreed between the treaty parties, but implied that claims were limited to claims arising out of acts that occurred when the 1886 treaty was in force. *See id.* at p. 45. However, the facts of that case were vastly different from the present case. Unlike Annex 14-C, the Declaration did not create a separate arbitration agreement that allowed claims to be brought during a transition period. Instead, it simply stated that the 1926 treaty did "not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886." *Id.* at p. 43. Thus, the Declaration did not create a cause of action but merely indicated that the 1926 treaty did not prejudice pre-existing causes of action. As the ICJ explained, "the United Kingdom Government, before proceeding to the signature of the Treaty of 1926, asked for an assurance that the Hellenic Government would not regard 'the conclusion of the Treaty' as prejudicing certain claims of British subjects based on the older Treaty." *Id.*

[75] *See* Respondent's Memorial on Preliminary Objection at para. 5.

53. *Second*, Respondent argues that, with respect to each of the examples that Claimants cited, the terminated BITs included sunset clauses.[76] According to Respondent, the replacement treaties included an explicit temporal limitation because, without such a provision, the sunset clauses in the terminated BITs would have continued to apply. Given that NAFTA did not contain a sunset clause, Respondent argues, there was no need for a similar temporal limitation in Annex 14-C.[77] As Claimants showed in their Bifurcation Submissions, Respondent's argument misrepresents the text of the replacement treaties.[78]

54. Given Respondent's continued attempts to confuse this issue, a minimum amount of repetition of Claimants' argument is necessary. In summary, specific provisions in the replacement treaties fully abrogated the sunset clauses of the earlier BITs.[79] Then, in entirely separate provisions, the replacement treaties imposed a temporal limitation that limited claims under the terminated BITs to acts that pre-dated the termination of those BITs.[80] The temporal limitations in the replacement treaties were not necessary to abrogate the sunset clauses in the terminated BITs.[81] The temporal limitations were imposed for an entirely differently purpose, namely, to limit the claims that could be asserted under the terminated treaties.[82]

55. Rather than repeat Claimants' earlier points in full, we will focus on two illustrative agreements—CETA and the Mexico-EU Agreement. Each of these treaties included provisions terminating earlier BITs. Then, in separate provisions, they included temporal limitations that allowed claims under the earlier BITs only in connection with actions that took place while those BITs were in force. By contrast, USMCA does not contain any analogous temporal limitation on the claims that could be asserted under paragraph 1 of Annex 14-C.

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[76] *See* Respondent's Memorial on Preliminary Objection at para. 79.

[77] *See* Respondent's Memorial on Preliminary Objection at para. 79.

[78] *See* Claimants' Observations on Bifurcation at para. 24; Claimants' Rejoinder on Bifurcation at paras. 52-59.

[79] *See* Claimants' Rejoinder on Bifurcation at paras. 52-58.

[80] *See* Claimants' Rejoinder on Bifurcation at paras. 52-58.

[81] *See* Claimants' Rejoinder on Bifurcation at paras. 52-58.

[82] *See* Claimants' Rejoinder on Bifurcation at paras. 52-58.

56. CETA was signed just two years before USMCA was signed. As Claimants explained in their Bifurcation Submissions, when CETA fully enters into force, it will terminate earlier BITs between Canada and various EU Member States.[83] CETA will allow investors to bring claims under the old BITs, but only with respect to measures that were taken when the BITs were in force.[84] The operative provision in CETA is Article 30.8.

57. Claimants provided the following table in their Bifurcation Submissions but replicate it here for ease of reference. The table compares Article 30.8(1)-(2) of CETA with analogous provisions in USMCA:

CETA	USMCA
1. The [earlier BITs between Canada and EU Member States] shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the agreements listed in Annex 30-A shall take effect from the date of entry into force of this Agreement. [Article 30.8(1) of CETA]	1. Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA. [USMCA Protocol]
2. Notwithstanding paragraph 1, a claim may be submitted under an [earlier BIT between Canada and an EU Member State] in accordance with the rules and procedures established in the agreement if: (a) <u>the treatment that is object of the claim was accorded when the agreement was not suspended or terminated</u>; and (b) no more than three years have elapsed since the date of suspension or termination of the agreement. [Article 30.8(2) of CETA (emphasis added)]	1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under . . . Section A of Chapter 11 (Investment) of NAFTA 1994. . . . 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994. [Paragraphs 1 and 3 of Annex 14-C of USMCA]

The CETA and USMCA texts are similar, except that Annex 14-C of USMCA does not include a provision analogous to Article 30.8(2)(a) of CETA limiting claims to measures that pre-dated the entry into force of the new agreement.

[83] *See* Claimants' Observations on Bifurcation at para. 24.

[84] Exhibit CL-37, CETA at Art. 30.8(2)(a).

58. As Claimants explained in their Bifurcation Submissions, CETA Article 30.8(1) fully abrogates the earlier BITs, including their sunset clauses, by providing that the earlier BITs "shall cease to have effect, and shall be replaced and superseded by this Agreement."[85] Article 30.8(2) is not necessary to override the sunset clauses in those earlier BITs because Article 30.8(1) already does so. Once CETA enters into force, investors will have access to the earlier BITs—"[n]otwithstanding" the termination of the earlier BITs per Article 30.8(1)—solely by virtue of Article 30.8(2), not because of the (abrogated) sunset clauses in the earlier BITs. Without Article 30.8(2)(a), investors could bring claims under the earlier BITs with respect to measures taken before or after the entry into force of CETA. With the inclusion of Article 30.8(2)(a), investors may challenge only measures taken before the BITs ceased to have effect. Again, by contrast, the USMCA Parties did not include any analogous temporal limitation in Annex 14-C of USMCA.

59. Respondent buries its discussion of CETA in a footnote, stating that "the legacy BITs terminated by the CETA all had survival clauses."[86] Respondent then feebly argues that, "[e]ven if the CETA Parties intended Article 30.8(1) to abrogate the legacy BITs' survival clauses, this does not exclude the possibility that Article 30.8(2)(a) was intended as further confirmation that the survival clauses would not be honored to their full extent."[87] However, if "further confirmation" were needed (it was not), Article 30.8(2)(a) would not provide such confirmation, as it does not address, modify, or abrogate the survival clauses in the earlier BITs.

60. Respondent also inexplicably asserts that "Claimants' argument with respect to CETA Article 30.8 also fails because the CETA Parties were not attempting to allow for claims based on alleged breaches postdating the termination of the Parties' legacy BITs."[88] However, that is precisely the point Claimants are making. The CETA parties did not want to "allow for claims based on alleged breaches postdating the termination of the Parties' legacy BITs," and that is why they included an explicit temporal limitation in Article 30.8(2). If the USMCA Parties had

[85] Exhibit CL-37, CETA at Art. 30.8(1).

[86] Respondent's Memorial on Preliminary Objection at n.80.

[87] Respondent's Memorial on Preliminary Objection at n.80.

[88] Respondent's Memorial on Preliminary Objection at n.80.

wanted to include an analogous temporal limitation in paragraph 1 of Annex 14-C, they would have done so. They did not.

61. The second example that Claimants shall address here is the Mexico-EU Agreement, which was concluded in April 2018, the same year that USMCA was signed. Respondent does not discuss the temporal provisions in this agreement at all, not even in a footnote. The Mexico-EU Agreement takes the same approach as CETA, but it is even clearer that the temporal limitation on disputes under the old BIT is entirely separate from the provisions abrogating the sunset clauses in earlier BITs. The relevant text is provided in the table below:

Mexico-EU Agreement	**USMCA**
1. On the date of entry into force of this Agreement, the agreements between Member States of the European Union and Mexico listed in Annex YY (Agreements between the Member States of the European Union and Mexico) including the rights and obligations derived therefrom [FN18] <u>shall cease to have effect and shall be replaced and superseded by this Agreement</u>. <u>[FN18] For greater certainty, the provisions for termination under Article XX (Termination) of this Chapter shall on the date of entry into force supersede the corresponding provisions on termination of the Agreements [which included the BITs' sunset clauses] listed in Annex YY.</u> [Article 22.1 of the Investment Chapter of the Mexico-EU Agreement (emphasis added)]	1. Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA. [USMCA Protocol]
3. Notwithstanding paragraph[] 1 . . . a claim may be submitted pursuant to an agreement listed in Annex Y (Agreements between the Member States of the European Union and Mexico), in accordance with the rules and procedures established in that agreement, provided that: (a) <u>the claim arises from an alleged breach of that agreement that took place prior to the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement ceases to have effect pursuant to paragraph 1 prior to the date of entry into force of this Agreement</u>; and (b) no more than three years have elapsed from the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement ceases to have effect pursuant to	1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under . . . Section A of Chapter 11 (Investment) of NAFTA 1994. . . . 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994. [Paragraphs 1 and 3 of Annex 14-C of USMCA]

Mexico-EU Agreement	USMCA
paragraph 1, from the date of entry into force of this Agreement until the date of submission of the claim. [Article 22.3 of the Investment Chapter of the Mexico-EU Agreement (emphasis added)]	

62. The footnote appended to Article 22.1 in the Mexico-EU Agreement is crystal clear that the sunset provisions in the earlier BITs are fully abrogated. The footnote is introduced with the phrase "for greater certainty," which, again according to Respondent, signals that the provision is merely for clarification and does not change the substance of the treaty.[89] The footnote thus confirms that the sunset provisions in the earlier BITs have simply been wiped away. And yet, Article 22.3 still provides that investors can only make use of the dispute settlement provisions in the earlier BITs in connection with measures taken prior to the entry into force of the new treaty. Article 22.3 had nothing to do with terminating the sunset clauses of the earlier BITs. It was designed only to impose a temporal limitation on claims, and, again, no analogous limitation appears in Annex 14-C.

63. To reiterate, if the USMCA Parties had intended to allow claims only in connection with measures taken before the termination of NAFTA, they would have done so (and they clearly knew how to do so). An express statement would have been necessary to overcome the presumption of prospective application of the agreement and would have been in line with the approach that two of the USMCA Parties (Canada and Mexico) took in their contemporaneous agreements.[90]

[89] *See* Respondent's Memorial on Preliminary Objection at para. 48, n.43.

[90] In his treatise on treaty interpretation, Respondent's expert, Richard Gardiner, wrote that "courts and tribunals often make comparisons between wording of a treaty in issue and that in other treaties without indicating any basis in the Vienna rules for this. If, however, the comparable treaty provisions were part of a line of treaties in some sense linked such as by subject matter, and even more so if reference was made to them in the preparatory work, they may be treated as part of the history and warrant consideration as part of the circumstances of conclusion." Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 400.

V. The Context of Paragraph 1 of Annex 14-C Shows that Claimants May Submit Claims Arising from Measures Taken during the Transition Period

64. Under Article 31(1) of the VCLT, any interpretation of paragraph 1 of Annex 14-C must take into account the context of that provision. In fact, context is no less important than the ordinary meaning of the terms of the treaty.[91] The context of paragraph 1 of Annex 14-C confirms that the USMCA Parties consented to arbitrate claims arising out of actions taken during the transition period.

65. In the following subsections, Claimants discuss four points regarding the context of paragraph 1 of Annex 14-C. First, as discussed in subsection A, Footnote 21 of Annex 14-C makes it clear that paragraph 1 of Annex 14-C applies prospectively to measures taken after the termination of NAFTA. Second, in subsection B, Claimants discuss the USMCA Protocol, which shows that, with respect to a dispute under paragraph 1 of Annex 14-C, the USMCA Parties intended to continue to apply the provisions of NAFTA for the duration of the transition period. Third, in subsection C, Claimants show that the definition of "legacy investment" reflects an intention to allow claims in connection with measures taken during the transition period. Fourth, in subsection D, Claimants show that Article 34.1 of USMCA does not support Respondent's preliminary objection.

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[91] Exhibit CL-32, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II ("VCLT Commentary"), at pp. 219-20 ("[T]he application of the means of interpretation in the article would be a single combined operation. All the various elements [*i.e.*, ordinary meaning, context, and object and purpose of the treaty], as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 [*i.e.*, Article 31 in the final version of the VCLT] is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule."). As other commentators have noted, the "various means mentioned in Article 31 [ordinary meaning, context, and object and purpose] are all of equal value; none are of an inferior character. As the singular in the heading 'General Rule' indicates, all means will be considered in one and the same, single process of application. No one particular means mentioned in Article 31 dominates the others." Exhibit CL-164, Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) (excerpts), at p. 435.

A. Footnote 21 of Annex 14-C Shows that the USMCA Parties Consented to Arbitration of Claims Arising from Measures Taken during the Transition Period

1. Respondent's Interpretation of Annex 14-C Renders Footnote 21 Meaningless and Does Not Accord with the Text or Common Sense

66. Footnote 21 of Annex 14-C provides as follows:

> Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

As Claimants explained in their Bifurcation Submissions, Footnote 21 is a carveout from the scope of paragraph 1 of Annex 14-C.[92] 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. Respondent's interpretation of paragraph 1 of Annex 14-C makes such overlap impossible. The basis of Respondent's objection is that paragraph 1 of Annex 14-C applies only <u>retrospectively</u>, *i.e.*, to measures that pre-date the entry into force of USMCA. However, Annex 14-E applies only <u>prospectively</u>, *i.e.*, to measures that post-dated the entry into force of USMCA. If Respondent 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 not have been necessary.[93]

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[92] Claimants' Observations on Bifurcation at para. 31; Claimants' Rejoinder on Bifurcation at para. 36.

[93] *See* Exhibit CL-32, VCLT Commentary at p. 219 ("When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."). Respondent asserts that it does not matter if its interpretation of Footnote 21 deprives that provision of any meaning because the USMCA Parties did not choose to "bind themselves to apply the NAFTA's substantive investment obligations after the NAFTA's termination." Respondent's Memorial on Preliminary Objection at para. 56. As established in Section IV.B above, however, that is precisely what the USMCA Parties did through paragraphs 1 and 3 of Annex 14-C, as confirmed by Footnote 20. Respondent then argues that the principle of *effet utile* does not permit the "radical revision that Claimants propose." Respondent's Memorial on Preliminary Objection at para. 56. Claimants do not propose a "radical revision." *See* Section IV above. Giving effect to Footnote 21 does not require any revision to the text of Annex 14-C. Indeed, as Respondent's legal expert, Mr. Gardiner, observes, interpreting a treaty in good faith means that "an interpretation of a term should be preferred which gives it some meaning and role rather than one which does not." Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 168.

67. Respondent's position is not only counterintuitive but produces absurd results. According to Respondent, an investor that is eligible to submit any claim under Annex 14-E is prohibited from asserting any claim (even a wholly unrelated claim) under Annex 14-C.[94] In other words, Respondent argues, Footnote 21 deals with a category of investors, not a category of claims.[95] This approach does not accord with the text or context of the treaty.

68. *First*, Annex 14-E applies to the most-favored category of investors under USMCA, *i.e.*, certain infrastructure-related investors that hold specific kinds of government contracts.[96] Respondent has itself quoted statements from the former U.S. Trade Representative, Ambassador Robert Lighthizer, indicating that USMCA was intended to preserve investor-state dispute settlement and the full scope of traditional investor protections for precisely this category of investors.[97] Unlike investors who may assert claims under Annex 14-D of USMCA, investors covered by Annex 14-E are not limited to claims for discrimination or direct expropriation, but instead may assert claims in arbitration for breaches of any of the substantive obligations contained in the investment chapter in USMCA. Yet, Respondent's position is that, "[u]nder Footnote 21, Annex 14-E investors—who are afforded broader recourse to investor-State dispute settlement under the USMCA than other Chapter 14 investors—are ineligible for the extended three-year period to bring NAFTA Chapter 11 claims under Annex 14-C."[98] In other words, according to Respondent, it is precisely the most-favored category of investors—and only this category among all categories of investors who may hold legacy investments[99]—that would be

[94] *See* Respondent's Memorial on Preliminary Objection at paras. 53-54.

[95] *See* Respondent's Memorial on Preliminary Objection at paras. 53-54.

[96] *See*, *e.g.*, Exhibit CL-165, OECD, Directorate for Financial and Enterprise Affairs Investment Committee, "Freedom of Investment Roundtable 29: Summary of Discussion," Doc. No. DAF/INV/WD(2019)16/FINAL, Nov. 6, 2019, at para. 25 ("The US noted that the ISDS provisions were the result of 14 months of negotiations between the Parties, including detailed assessments of offensive priorities and defensive sensitivities. The sectors identified [in Annex 14-E] for the maintenance of broad ISDS are sectors in which US investors have and intend to have significant long-term capital-intensive investments in Mexico. A heightened need for ISDS protection was therefore identified for these sectors.").

[97] Respondent's Memorial on Preliminary Objection at n.102.

[98] Respondent's Memorial on Preliminary Objection at para. 53. Similarly, in his Legal Opinion, Mr. Gardiner states that "[t]he exclusion in footnote 21 is one that is specific to a certain class of investor, excepting from consent any legacy claim by an investor that has contractual relations with the putative respondent state such as would make the investor eligible to bring claims under Annex 14-E." Gardiner Opinion at E.3.

[99] Investors need not hold legacy investments to be covered by Annex 14-E, but certain Annex 14-E investors may hold legacy investments.

precluded from asserting claims under Annex 14-C for acts that pre-dated the entry into force of USMCA. This is not and cannot be correct.

69. *Second*, there is nothing in the ordinary meaning of Footnote 21 that compels the interpretation Respondent puts forward. Respondent pins its argument on the fact that Footnote 21 refers to "an investor of the other Party that is eligible to submit claims" under Annex 14-E.[100] However, those terms do not require an interpretation in which an investor that is eligible to submit any claims whatsoever under Annex 14-E—even claims wholly unrelated to the acts that gave rise to potential Annex 14-C claims—is prevented from submitting claims under Annex 14-C. The more natural and logical interpretation—and the interpretation that corresponds with simple common sense—is that the "claims" that Footnote 21 references and the "claims" that paragraph 1 of Annex 14-C references overlap. Footnote 21 would then ensure that an investor cannot claim the same damages in connection with the same measures under both Annex 14-C and Annex 14-E. This reading aligns with the structure of the provision. Footnote 21 is appended to paragraph 1. It is therefore natural to read the reference to claims in Footnote 21 as bearing a relationship to the claims referenced in paragraph 1.

70. *Third*, even if the literal text of Footnote 21 could be read to refer to categories of investors rather than specific claims, that literal interpretation must be adjusted to reflect the context, particularly given that (as discussed in the next section) Respondent's interpretation would lead to an absurd result. While Respondent's expert, Mr. Gardiner, argues in his Legal Opinion that context "cannot change the ordinary meaning" of the text,[101] he has taken the opposite position outside the context of this arbitration. In his treatise, he has concluded that "context is an aid to selection of the ordinary meaning and a modifier of any over-literal approach to interpretation."[102] He has further concluded that, "[w]here purely grammatical analysis produces an untenable result, the narrowly grammatical interpretation may have to be

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[100] Respondent's Memorial on Preliminary Objection at para. 53 (citing Exhibit C-2, USMCA at Annex 14-C, n.21) (internal quotations omitted).

[101] Gardiner Opinion at n.7. The only citation Mr. Gardiner provides for his assertion is a quote from Vattel. *See id.* Yet, in his treatise, Mr. Gardiner explained that this very quotation is part of a larger passage that has been "heavily criticized" and is not in line with the VCLT. Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 182. *See also id.* at p. 182, n.77 (quoting Emer de Vattel, *The Law of Nations*, 1758, at § 274).

[102] Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 197. *See also id.* at p. 185.

ignored,"[103] and that "too often 'ordinary meaning' . . . is taken as a separate, or even the sole, interpretative element without its immediately associated reference to context and to object and purpose . . . ." [104]

71. In his Legal Opinion, Mr. Gardiner concedes that "[t]he context in which [Footnote 21] is located might be thought to suggest that the note refers to exclusion of a particular putative legacy dispute."[105] If he were to follow the guidance of his own treatise, he would then have concluded that this understanding should play a central role in the interpretation of Footnote 21. However, he veers away from that conclusion, asserting that "[t]he wording [of Footnote 21] clearly indicates otherwise" and that Footnote 21 refers to categories of investors rather than types of claims.[106] Mr. Gardiner thus resorts to the same "over-literal approach to interpretation" that—outside the context of this arbitration—he previously condemned.

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[103] *See also* Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 208.

[104] Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 162. In the same chapter of his treatise, Mr. Gardiner favorably cites the tribunal in *Aguas del Tunari*, which stated that "the Vienna Convention does not privilege any one of these three aspects of the interpretation method [*i.e.*, ordinary meaning, context, and object and purpose]. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics . . . ." *See also id.* at p. 189 ("If, for example, a dictionary . . . or a common understanding of a term, produces an apparently incontrovertible meaning, it is still necessary to locate this in its context to see if the result could be different from what the ordinary meaning produces."). Mr. Gardiner even cited with approval a decision of the European Court of Human Rights, which held that despite the "unqualified meaning the [terms of the treaty] ordinarily have in both of the Court's official languages. . . . It nevertheless remains to be determined whether, as the Government contended, the context as well as the object and purpose of the provision in issue negative the literal interpretation." *Id.* at p. 190. According to Mr. Gardiner, "The Court found the meaning of 'free' to be unambiguous, but nevertheless (in application of the Vienna rules) went on to investigate whether there were any circumstances that might displace the clear meaning of 'free'. . . ." *Id.* at pp. 189-90. Respondent's second expert, Hervé Ascensio, similarly warns against a literal interpretation of the treaty text, writing that, "[h]ere is the main guideline: textual interpretation. This does not mean a literal interpretation because the context, broadly understood in Article 31(2), and the object and purpose of the treaty interact with the ordinary meaning of the terms under interpretation. These elements must be assessed altogether, which leaves room to adapt to the specificities of each kind of treaty, whether because of its content or because of its configuration according to the number of parties, the nature of obligations or the beneficiaries of the rights." Exhibit HA-2, Hervé Ascensio, "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", 31 *ICSID Review – Foreign Investment Law Journal* 366 (2016), at p. 386. He similarly wrote that "it would be too narrow an understanding to restrict interpretation to an examination of terminology and to the use of dictionaries. They may even prove deceptive when treaties use broad terms such as 'treatment' or 'protection'. Terms acquire a meaning when confronted with other terms of the same text and with the spirit of the text, here referred to under the expression 'object and purpose'." *Id.* at p. 370.

[105] Gardiner Opinion at C.11.

[106] Gardiner Opinion at C.11.

2. Respondent's Interpretation of Footnote 21 Produces Absurd Results

72. Rejecting an "over-literal" interpretation is particularly appropriate in the present case, given that the approach that Respondent advocates would produce manifestly absurd or unreasonable results.[107] In order to understand why, it is important to understand what the term "eligible" means in Footnote 21. Footnote 21 refers to investors who are "eligible to submit claims to arbitration under paragraph 2 of Annex 14-E." To be eligible to submit a claim for an alleged breach of Chapter 14 of USMCA under paragraph 2 of Annex 14-E:

i. the claimant must be able to allege a breach of an obligation under Chapter 14 of USMCA;

ii. the claimant must be a party to a covered government contract ("CGC") or "engaged in activities in the same covered sector in the territory of the respondent as an enterprise of the respondent that the claimant owns or controls directly or indirectly and that is a party to a [CGC]";[108]

iii. the respondent must be "a party to another international trade or investment agreement that permits investors to initiate dispute settlement procedures to resolve an investment dispute with a government";[109] and

iv. the claimant must have "incurred loss or damage by reason of, or arising out of, that [alleged] breach."[110]

Respondent does not contest these points.[111] As discussed in further detail below, points (i) and (iv) are particularly important in that, before an investor can be eligible to submit a claim under

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[107] *See* Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 185 (quoting *South West Africa (Liberia v. South Africa)*, 1962 Preliminary Objections, Judgment, I.C.J. Reports 319 (Dec. 21), at p. 336 for the proposition that "the rule of interpretation according to the natural and ordinary meaning of the words employed 'is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.'"). Mr. Gardiner then explains that "the main thrust of the extract [from the *South West Africa* decision] is that the ordinary meaning is the starting point of an interpretation, but only if it is confirmed by investigating the context and object and purpose, and if on examining all other relevant matters (such as whether an absurd result follows from applying a literal interpretation) no contract-indication is found, is the ordinary meaning determinative." *Id.* at p. 185.

[108] *See* Exhibit C-2, USMCA at Annex 14-E, para. 2(a)(i)(A)(1)-(2).

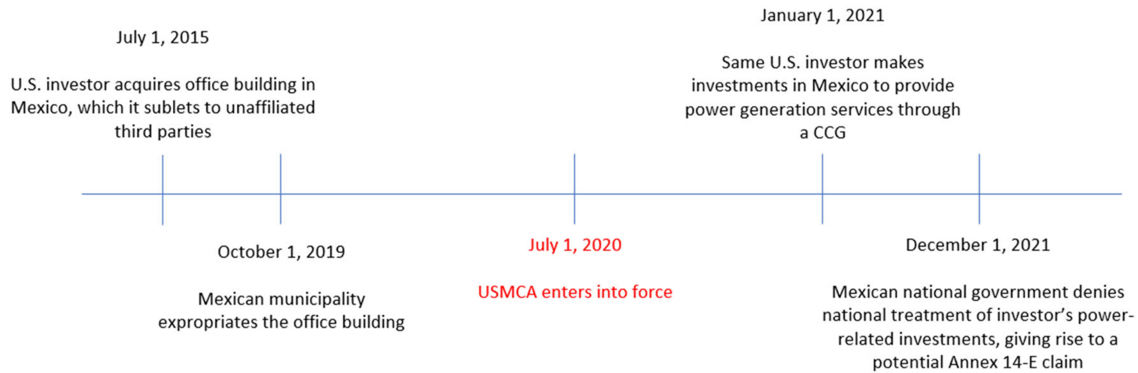
[109] *See* Exhibit C-2, USMCA at Annex 14-E, para. 2(a)(i)(B).

[110] *See* Exhibit C-2, USMCA at Annex 14-E, para. (2)(a)(ii).

[111] In its Memorial, Respondent states that "Annex 14-E is only open to investors that enter into government contracts in specific sectors, such as oil and gas and power generation." Respondent's Memorial on Preliminary Objection at para. 53. Then, in a footnote, Respondent recognizes that, in order to be "eligible" to submit a claim under Annex 14-E, "[a]n investor must also be able to allege a breach of Chapter 14 of the USMCA, as well as loss

Annex 14-E, the respondent government must engage in an act that allegedly breaches Chapter 14 of USMCA and causes the investor to incur loss or damage.

73. With that background, consider the following fact pattern:



74. Respondent's theory would produce the following results:

- If the investor submitted a claim under NAFTA for the expropriation of the office building ("Claim 1") before USMCA entered into force, then the investor could continue that claim and (after December 1, 2021) initiate a separate claim under Annex 14-E in connection with the discriminatory treatment of its power generation-related services ("Claim 2").

- If the investor did not submit Claim 1 before USMCA entered into force, the investor could still submit Claim 1 under Annex 14-C, but only before Mexico breached USMCA on December 1, 2021, giving rise to Claim 2. It could then also submit Claim 2.

- Once Mexico breached USMCA on December 1, 2021, giving rise to Claim 2, the investor could no longer submit Claim 1, even though Claim 1 is wholly unrelated to Claim 2.

75. This arbitrary result cannot be what the USMCA Parties intended. There is no logic to denying an investor a claim for expropriation of an office building (Claim 1) simply because the investor may be able to bring an entirely unrelated claim in respect of an entirely unrelated investment, for unrelated damages that occurred in an entirely different time period (Claim 2).

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or damage 'by reason of, or arising out of, that breach,' in order to submit a claim to arbitration under Annex 14-E." *Id.* at n.50.

76. Furthermore, the practical consequence of Respondent's interpretation is that the Mexican government itself would be stripping the investor of its right to initiate a claim for expropriation of the office building (Claim 1) under Annex 14-C by denying the investor national treatment in connection with its power-related assets (Claim 2). In other words, the investor would suddenly be prohibited from asserting a claim under Annex 14-C only because Mexico made the investor "eligible" to assert a claim under Annex 14-E by engaging in a second breach, wholly unrelated to the first breach, that violated the investor's rights under USMCA. This result is not only absurd but also invites abuse. A USMCA Party could expropriate a $1,000 investment during the transition period (thus making the investor eligible to submit a claim under Annex 14-E) in order to strip the investor of a $1 billion claim under Annex 14-C.

77. Perhaps recognizing the difficulty of arguing that there need not be any overlap whatsoever in the claims that could be asserted under Annex 14-C and Annex 14-E, Respondent also argues that Footnote 21 might come into play when, "for example, a claimant alleg[es] that one of the USMCA Parties adopted a wrongful measure prior to the NAFTA's termination which continues after the USMCA entered into force (and is also wrongful under the USMCA)."[112] This continuing act theory does not save Respondent.

78. *First,* it is noteworthy that Respondent has changed tack. In its own bifurcation submissions, Respondent argued that Footnote 21 was intended to deal with, for example, a "continuing breach" that spanned the period before and after USMCA entered into force.[113] Claimants showed in their Bifurcation Submissions that there can be no continuing breach unless Annex 14-C extends the Section A obligations and allows claims arising out of measures taken during the transition period.[114] Thus, Respondent's argument defeated its own objection. Respondent has now implicitly acknowledged this problem and refocused its argument on the example of a continuing act.[115]

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[112] Respondent's Memorial on Preliminary Objection at para. 51.

[113] *See* Respondent's Reply on Bifurcation at para. 31.

[114] *See* Claimants' Rejoinder on Bifurcation at paras. 38-42.

[115] *See* Respondent's Memorial on Preliminary Objection at para. 51.

79. *Second*, Respondent offers its continuing act theory only as an example, not an essential part of the application of Footnote 21.[116] In fact, if Respondent were to argue that Annex 14-C applies only when there is a continuing act, then it would contradict its position that Annex 14-E applies to categories of investors, not categories of claims.

80. *Third*, Respondent's continuing act theory does not resolve the absurdities inherent in Respondent's position. Under Respondent's theory, the investor would forfeit any claim under Annex 14-C if the breaching USMCA Party extended the breaching act into the termination period, rather than ending it prior to the entry into force of USMCA. Thus, again, the investor would be deprived of its ability to assert a claim only because the breaching USMCA Party perpetuated and worsened the damage the investor suffered. Perversely, the breaching USMCA Party could thereby limit its own liability by continuing its bad act. Claimants further elaborated on the absurdities inherent to Respondent's position in their Bifurcation Submissions.[117] We incorporate those arguments by reference here.

B. The USMCA Protocol Shows that the USMCA Parties Intended to Allow Claimants to Submit Claims under Paragraph 1 of Annex 14-C Arising from Measures Taken during the Transition Period

81. Paragraph 1 of the USMCA Protocol states that, "[u]pon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[118] As Claimants showed in their Bifurcation Submissions, the only way to avoid prejudice to the USMCA provisions that refer to provisions of NAFTA is to give effect to those NAFTA provisions.[119] In the context of paragraphs 1 and 3 of Annex 14-C, this means giving effect to the referenced obligations in Sections A and B of NAFTA Chapter 11 for three years after the termination of NAFTA with respect to legacy investments.

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[116] *See* Respondent's Memorial on Preliminary Objection at para. 51.

[117] *See* Claimants' Rejoinder on Bifurcation at paras. 43-44.

[118] Exhibit R-1, Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, at para. 1.

[119] *See* Claimants' Observations on Bifurcation at paras. 27-28.

82. Respondent's response is to assert that, through the USMCA Protocol, the USMCA Parties replaced NAFTA with USMCA. Therefore, according to Respondent, NAFTA can no longer apply.[120] This response is no answer at all. Under the USMCA Protocol, the replacement of NAFTA with USMCA came with the express condition that the replacement is "without prejudice" to the "provisions set forth in the USMCA that refer to provisions of the NAFTA." Even Respondent acknowledges that the "'without prejudice' language accomplishes precisely what it says, ensuring that those parts of the USMCA that refer to the NAFTA are effective despite the fact that the NAFTA was itself terminated."[121] Paragraph 1 of Annex 14-C refers to Sections A and B of NAFTA Chapter 11. Therefore, under Respondent's own logic, the Protocol ensures that, in the context of a dispute under paragraph 1 of Annex 14-C, those provisions "are effective despite the fact that the NAFTA was itself terminated."

83. Respondent then falls back to the issue of the parties' consent.[122] However, once again, its argument is self-defeating. According to Respondent, the provisions of NAFTA that are referenced in USMCA "must, in accordance with the USMCA Protocol, be permitted to function as written, despite the termination of the provisions of the NAFTA to which those references relate."[123] According to Respondent, this means, most notably, that the consent provision in Annex 14-C must "function as written" despite the termination of NAFTA. According to Respondent, through paragraph 1 of Annex 14-C, the USMCA Parties consented to arbitration "under the dispute resolution framework in NAFTA Chapter 11, Section B."[124] Respondent then states that "[t]he 'without prejudice' language in the USMCA Protocol ensures that this consent is given force. It eliminates the possibility of any dispute over whether the consent in Paragraph 1 of Annex 14-C is valid, despite the termination of the NAFTA and the consequent withdrawal of the Parties' consent to arbitration of NAFTA claims reflected in NAFTA Article 1122."[125]

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[120] *See* Respondent's Memorial on Preliminary Objection at para. 34.

[121] Respondent's Memorial on Preliminary Objection at para. 5.

[122] *See* Respondent's Memorial on Preliminary Objection at paras. 42.

[123] Respondent's Memorial on Preliminary Objection at para. 41.

[124] Respondent's Memorial on Preliminary Objection at para. 42.

[125] Respondent's Memorial on Preliminary Objection at para. 42.

84. What Respondent again fails to recognize is that its consent to arbitration forms part of an arbitration agreement, and, as discussed in Section IV.B above, through that arbitration agreement, the disputing parties chose NAFTA as the applicable substantive law for resolving disputes under Annex 14-C. We will not repeat that full discussion here, except to note again that Section B of NAFTA Chapter 11 includes, among other things, Article 1131 (Governing Law), which provides that "[a] Tribunal established under [Section B of NAFTA Chapter 11] shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[126] That choice of applicable law must be (in Respondent's words) "given force . . . despite the termination of the NAFTA,"[127] and the Section A obligations must be applied to the merits of Claimants' claims.

C. The Definition of "Legacy Investment" Reflects an Intention to Allow Claims Arising from Measures Taken during the Transition Period

85. Through Annex 14-C, Respondent consented to arbitrate disputes related to legacy investments. The definition of "legacy investment" reflects a clear intention to allow claims under paragraph 1 of Annex 14-C arising from measures taken during the transition period.

86. Paragraph 6 of Annex 14-C defines the term "legacy investment" as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement."[128] Thus, paragraph 1 of Annex 14-C permits claims only with respect to investments that existed at the start of the transition period. As Claimants showed in their Bifurcation Submissions, this unusual approach reflects an intention to allow the arbitration of claims arising from measures taken during the transition period.[129] Claimants incorporate that discussion here.

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[126] Exhibit C-1, North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, signed Dec. 17, 1992, entered into force Jan. 1, 1994, at Art. 1131.

[127] Respondent's Memorial on Preliminary Objection at para. 42.

[128] Exhibit C-2, USMCA at Annex 14-C, para. 6.

[129] Claimants' Observations on Bifurcation at paras. 33-34; Claimants' Rejoinder on Bifurcation at para. 61.

87. The definition of legacy investment means that claims cannot be submitted under paragraph 1 of Annex 14-C in connection with investments made while NAFTA was in force but which did not exist when USMCA entered into force. There is no explanation in the text of Annex 14-C as to why the USMCA Parties chose to exclude investments that did not exist on the date USMCA entered into force. Furthermore, Respondent has provided no intelligible explanation and has not provided any negotiating history to illuminate the reasoning. We do know, however, that excluding even a subset of investments made when a preceding agreement was in force is (to Claimants' knowledge) a unique arrangement among replacement treaties.

88. For example, the replacement treaties that Claimants have cited allow claims under the terminated BITs for any investments that were made while the terminated BIT was in force, even if those investments did not exist at the time the BIT was terminated or the replacement treaty entered into force. If Annex 14-C were intended to allow claims only with respect to measures that pre-dated the termination of NAFTA, then one would have expected that it would have followed the same approach, but it did not. Instead, it required that the investments exist when USMCA entered into force. The implication is that the USMCA Parties intended to protect those investments from government measures taken during the transition period.[130]

[130] In its Memorial, Respondent asserts that "the limitation on consent provided by the 'legacy investment' definition only makes sense with respect to measures taken *before* the USMCA entered into force," because the definition of legacy investments *excludes* investments that no longer existed when USMCA entered into force. *See* Respondent's Memorial on Preliminary Objection at para. 29. Respondent again does not explain why an investment must have existed upon the entry into force of USMCA to constitute a legacy investment. As Claimants showed in their Bifurcation Submissions, the most plausible reason is to ensure the continued protection of investments that were acquired or established before USMCA's entry into force during the transition period. *See* Claimants' Rejoinder on Bifurcation at para. 61.

89. By contrast, for example, the Dominican Republic-Central America Free Trade Agreement ("CAFTA-DR")[131] and the U.S.-Morocco Free Trade Agreement[132] allowed claims under the preceding BITs (1) for investments that existed when the free trade agreement entered into force in connection with actions taken before or (during a transition period) after the entry into force of the free trade agreement; or (2) for disputes that arose prior to the date when the free trade agreement entered into force, regardless of whether the investments existed on that date. The first category is analogous to the claims that Annex 14-C allows in connection with legacy investments. The second category is analogous to Respondent's interpretation of Annex 14-C, despite the fact that Annex 14-C contains no such temporal limitation.

D. Article 34.1 of USMCA Does Not Support Respondent's Objection

90. Respondent notes that, in Article 34.1 of USMCA, the USMCA Parties agreed that certain provisions of NAFTA would continue to apply.[133] Respondent then jumps to the conclusion that, because Article 34.1 does not refer explicitly to NAFTA Chapter 11, the USMCA Parties did not intend to extend the obligations of Chapter 11.[134] Not only is

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[131] As explained in Claimants' Observations on Bifurcation, in connection with CAFTA-DR, the United States and Honduras suspended the dispute settlement provisions of their earlier bilateral investment treaty ("BIT") but, for a period of 10 years from the date of entry into force of CAFTA-DR, they continued to allow claims to be brought under the BIT (i) "in the case of investments covered by the [BIT] as of such date" or (ii) "in the case of disputes that arose prior to that date and that are otherwise eligible to be submitted for settlement" under the dispute settlement provisions of the BIT. Claimants' Observations on Bifurcation at n.59. *See also* Exhibit CL-48, Letter from Shaun Donnelly, U.S. State Department to Norman Garcia, Honduras Ministry of Industry and Commerce Regarding Relationship of CAFTA-DR to U.S.-Honduras BIT, Aug. 5, 2004. Category (i)—which is analogous to claims brought by holders of legacy investments under Annex 14-C—applies to measures taken before or after the entry into force of CAFTA-DR. Category (ii) is retrospective and applies only to disputes that arose prior to the suspension of the BIT. Annex 14-C contains no analog to category (ii).

[132] The U.S.-Morocco Free Trade Agreement took a similar approach with respect to the U.S.-Morocco BIT, as CAFTA-DR took with respect to the U.S.-Honduras BIT. *See* Exhibit CL-49, United States-Morocco Free Trade Agreement, signed June 15, 2004, entered into force Jan. 1, 2006 ("U.S.-Morocco FTA"), at Art. 1.2. The free trade agreement suspended the U.S.-Morocco BIT's investor-state arbitration provisions, except with respect to (i) investments that were covered by the U.S.-Morocco BIT as of the FTA's entry into force and (ii) disputes that had arisen before the FTA's entry into force and that were otherwise eligible for submission to arbitration under the U.S.-Morocco BIT. *See id.* at Art. 1.2.3-4. With respect to categories (i) and (ii), the U.S.-Morocco BIT's arbitration provisions applied for 10 years from the FTA's entry into force. *See id.* at Art. 1.2.4. Category (i) is analogous to the transition period applicable to legacy investments in Annex 14-C. Category (ii) contains a temporal limitation with no analogue under Annex 14-C.

[133] *See* Respondent's Memorial on Preliminary Objection at para. 59.

[134] *See* Respondent's Memorial on Preliminary Objection at para. 59.

Respondent's logic faulty, but it is internally contradictory and ignores the full text of Article 34.1.

91. *First*, the fact that Article 34.1 does not expressly reference NAFTA Chapter 11 is meaningless. Buried in footnote 58 of its Memorial, Respondent itself recognizes that Article 34.1 is not a complete list of NAFTA provisions that USMCA extended and that other approaches were taken in other parts of USMCA for extending substantive NAFTA obligations. Annex 14-C is just such an approach.[135]

92. *Second*, Respondent ignores Article 34.1.1 of USMCA, in which the USMCA Parties "recognize the importance of a smooth transition from NAFTA to this Agreement."[136] This provision confirms that the USMCA Parties were not seeking an abrupt termination of protections that NAFTA provided. Interpreting paragraph 1 of Annex 14-C to allow claims arising from measures taken the transition period is fully consistent with that objective.

93. *Third*, Respondent's reliance on the panel report in *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*[137] is misplaced, and the reasoning in that decision supports Claimants' position, not Respondent's. The *Crystalline Silicon* case had nothing to do with Annex 14-C, USMCA Chapter 14, or NAFTA Chapter 11. Instead, it was about certain safeguard measures that the United States had imposed on imports of crystalline silicon photovoltaic cells from Canada. Canada argued that there was a "continuity of obligations" that allowed the panel to "tak[e] into account facts and events that took place prior to the USMCA's entry into force in assessing the United States' compliance with its USMCA obligations."[138]

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[135] Specifically, Respondent notes that Chapter 4, footnote 82 of USMCA refers to a transition period that "may include providing . . . treatment" of certain NAFTA provisions to eligible passenger vehicles and light trucks, while Annex 14-C does not refer to "providing treatment." *See* Respondent's Memorial on Preliminary Objection at para. 59, n.58. The point that Respondent is attempting to make is not clear. Footnote 20 to Annex 14-C clarifies that the Section A obligations "apply" to claims brought during the transition period. Exhibit C-2, USMCA at Annex 14-C, n.20. Those substantive obligations relate to the treatment of investors and investments.

[136] Exhibit C-2, USMCA at Art. 34.1.1.

[137] Respondent's Memorial on Preliminary Objection at para. 59 & n.59.

[138] Exhibit RL-59, *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report (Feb. 1, 2022), at para. 39 (footnotes omitted).

94. The panel first affirmed the importance of the USMCA Protocol, stating that, "upon the entry into force of the USMCA, the NAFTA came to an end, 'but without prejudice to those provisions set forth in USMCA that refer to the provisions of NAFTA.'"[139] The panel then confirmed that "[i]t would have been possible for the Parties to have inserted a provision in the USMCA providing for the continuation of all obligations under the NAFTA as obligations under the USMCA."[140] The panel concluded that there was no provision in USMCA that incorporates the NAFTA obligations at issue in that dispute.[141] This conclusion does not assist Respondent because the USMCA Parties did provide for the continuation of Sections A and B of NAFTA Chapter 11 through Annex 14-C. Thus, incorporation and extension of those obligations are fully consistent with the panel's reasoning in *Crystalline Silicon*.[142]

VI. Claimants' Interpretation of Annex 14-C is Consistent with the Object and Purpose of USMCA

95. Claimants showed in their Bifurcation Submissions that interpreting Annex 14-C to allow claims arising from measures taken during the transition period is consistent with the object and purpose of the USMCA, as contemplated by Section 31(1) of the VCLT. Claimants incorporate the relevant sections of their Bifurcation Submissions by reference and will not repeat them here.[143]

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[139] Exhibit RL-59, *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report (Feb. 1, 2022), at para. 41.

[140] Exhibit RL-59, *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report (Feb. 1, 2022), at para. 41.

[141] Exhibit RL-59, *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report (Feb. 1, 2022), at para. 41.

[142] Respondent also draws unwarranted inferences from Article 34.1's reference to Chapter 19 of NAFTA. Respondent recognizes that, in Article 34.1.4 of USMCA, the USMCA Parties agreed that NAFTA Chapter 19 would apply to "binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement." As Claimants noted in their Bifurcation Submissions, Article 34.1.4 includes an express temporal limitation that restricts the application of the specified provision of NAFTA to a period before USMCA entered into force. *See* Claimants' Observations on Bifurcation at para. 24. No analogous temporal limitation appears in Annex 14-C. Respondent argues that Article 34.1.1 had to include a temporal limitation because, under that same provision, Chapter 19 of NAFTA would continue to apply. Respondent's Memorial on Preliminary Objection at para. 60. This distinction does not help Respondent, given that, under Annex 14-C, the parties agreed that Section A of NAFTA Chapter 11 would continue to apply to disputes during the three-year transition period.

[143] *See* Claimants' Observations on Bifurcation at Section III.B.3; Claimants' Rejoinder on Bifurcation at Section III.A.

96. For the reasons set forth below, Respondent's arguments regarding the implications to be drawn from the object and purpose of USMCA are without merit. *First*, Respondent argues that the object and purpose of USMCA was to replace NAFTA.[144] If Respondent is implying that it would be contrary to the object and purpose of USMCA to continue any provision of NAFTA, that is simply not true. As already discussed, 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." Furthermore, as Respondent readily admits, there are numerous instances throughout USMCA that extend the substantive obligations of NAFTA.[145] Therefore, Respondent's reliance on the replacement of NAFTA with USMCA as an overriding treaty objective does not further Respondent's cause.

97. *Second*, Respondent argues that allowing claims under paragraph 1 of Annex 14-C in connection with measures taken during the transition period would not promote transparency and predictability.[146] The implication seems to be that maintaining the existing NAFTA protections —rather than abruptly terminating them—would somehow create instability. Respondent tries to make sense of this counterintuitive position by asserting that "having just one set of substantive obligations apply to the Parties and investors after the USMCA's entry into force—rather than two differing sets of obligations for a period of three years, as Claimants propose—provides far greater clarity, transparency, and predictability."[147] Respondent fails to acknowledge that the USMCA Parties clearly thought of that and expressly addressed the issue in Footnote 21 to Annex 14-C. As discussed, Footnote 21 was specifically designed to ensure that there would be no overlap between NAFTA and USMCA in connection with specific claims. Furthermore, pursuant to Footnote 20 of Annex 14-C, if a dispute were brought under paragraph 1 of Annex 14-C, only NAFTA's substantive standards would apply in the context of that dispute.

98. In any case, the USMCA Parties do not appear to have been especially concerned about overlapping obligations. For example, Canada and Mexico were each subject to overlapping

[144] *See* Respondent's Memorial on Preliminary Objection at para. 61.

[145] *See* Respondent's Memorial on Preliminary Objection at para. 59, n.58.

[146] *See* Respondent's Memorial on Preliminary Objection at para. 63.

[147] Respondent's Memorial on Preliminary Objection at para. 63.

obligations under NAFTA and the investment provisions in CPTPP. CPTPP entered into force in December 2018,[148] a year and a half before USMCA entered into force and NAFTA terminated. Canada and Mexico made no provision to eliminate the overlap between CPTPP and NAFTA during that period, nor have they sought to eliminate the overlap between CPTPP and USMCA. In fact, under Article 1.2 of USMCA, "[e]ach Party affirms its existing rights and obligations with respect to each other under the WTO agreement and other agreements to which it and another Party are party."[149]

VII. Supplementary Means of Interpretation Under Article 32 of the VCLT Confirm that Annex 14-C Allows Claims for Damages Arising from Measures Taken during the Transition Period

99. Article 32 of the VCLT provides that "[r]ecourse may be had to supplementary means of interpretation . . . in order to confirm the meaning resulting from the application of article 31."[150] As Claimants have shown in Sections IV - VI above, a good faith interpretation of Annex 14-C in line with Article 31 of the VCLT demonstrates that Annex 14-C covers claims for damages arising from measures taken during the transition period. Supplementary means of interpretation under Article 32 of the VCLT confirm this interpretation.[151] First, contrary to Respondent's position, contemporaneous U.S. Government documents show that the three-year transition period under Annex 14-C does not, and was not intended to, correspond to the limitations period in NAFTA Chapter 11 (subsection A). Second, statements by the USMCA Parties, U.S.

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[148] Exhibit CL-166, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed Mar. 8, 2018, entered into force Dec. 30, 2018.

[149] Exhibit C-2, USMCA at Art. 1.2.

[150] Exhibit RL-16, VCLT at Art. 32.

[151] In its Memorial, Respondent urges the Tribunal not to refer to supplementary means of interpretation to confirm the interpretation of Annex 14-C reached under VCLT Article 31, suggesting that doing so would be inappropriate. *See* Respondent's Memorial on Preliminary Objection at para. 64, n.69. However, as Respondent's own expert, Mr. Gardiner, explains: "[T]he preparatory work of the Vienna Convention effectively confirms the propriety of examining the preparatory work, without precondition, of any treaty whose interpretation is in issue and sets this in the context of 'the unity of the process of interpretation'. Recourse to preparatory work is always permissible under the Vienna rules to 'confirm' the meaning reached by the general rule in article 31." Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 354 (emphasis added). Respondent's exhortation is unsurprising because, as shown in this Section, USCMA's negotiating history (to the extent such history has been made available) reinforces the fact that Annex 14-C allows claims arising from measures taken during the transition period and underscores the fabricated, *post hoc* nature of Respondent's interpretation.

Government advisors, and former USMCA negotiators show that Annex 14-C allows claims for damages arising from measures taken during the transition period (subsection B).

A. The Three-Year Transition Period Does Not, and Was Not Intended to, Correspond to the Limitations Period in NAFTA Chapter 11

100. In its Memorial, Respondent repeats the argument it made during the bifurcation stage that the three-year transition period in Annex 14-C was designed to correspond with the three-year limitations period for initiating a claim under NAFTA.[152] There is no evidence that the USMCA Parties intended such a correspondence.

101. *First*, as Claimants have explained twice,[153] and now explain for a third time, there is no correspondence between the transition period and the NAFTA limitations period. Under NAFTA, the limitations period begins "from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." The investor might have acquired knowledge of loss or damage long past the time when USMCA entered into force. The transition period under Annex 14-C would then expire before the three-year limitations period in NAFTA. Respondent argues that it would be impractical to accommodate a situation in which the investor acquired knowledge of its loss after the entry into force of USMCA.[154] However, any such impracticality simply reinforces the fact that the USMCA Parties did not intend for the three-year transition period to mirror the three-year limitations period.

102. *Second*, while Respondent has submitted no negotiating history or other material that would shed light on the USMCA Parties' intentions (despite being the only disputing party in a position to do so), Claimants have obtained certain email exchanges and other internal U.S. Government materials ("FOIA Materials").[155] The FOIA Materials contain a discussion among

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[152] Respondent's Memorial on Preliminary Objection at para. 70.

[153] Claimants' Observations on Bifurcation at paras. 41-43; Claimants' Rejoinder on Bifurcation at paras. 29-31.

[154] In its Memorial, Respondent argues that it would be impractical to "address[] this specific scenario, which would require an effectively indefinite extension of the USMCA Parties' consent to arbitration with respect to legacy investment claims." Respondent's Memorial on Preliminary Objection at para. 70, n.73.

[155] *See* Exhibit C-112, FOIA Release Package Provided by USTR in Response to FOIA Request from Sidley Austin LLP of June 27, 2023.

Lauren Mandell (at the time, the lead U.S. negotiator of the USMCA investment chapter), C.J. Mahoney (at the time, Deputy U.S. Trade Representative at the Office of the U.S. Trade Representative ("USTR")), and Daniel Bahar (at the time, the Assistant U.S. Trade Representative for Services and Investment) that disproves Respondent's assertion that the transition period was designed to align with the limitations period in NAFTA Chapter 11.

103. The discussion among Messrs. Mandell, Mahoney, and Bahar focused on when the "grandfather" period should begin under Annex 14-C and how long that period should last, given that there could have been some delay between the signing and entry into force of USMCA.[156] They were debating whether to begin the transition period at a time that was linked to USMCA rather than the termination of NAFTA.

104. The discussion among Messrs. Mandell, Mahoney, and Bahar is reproduced below and begins with an exchange that took place three days before USMCA was signed. As the excerpt shows, their discussion surveyed a range of options, including starting the transition period from the date of ratification of USMCA, the date of signature of USMCA, or some other starting point. They even considered a transition period that would last up to six years.[157] Notably absent from this discussion was any reference to the three-year limitations period in NAFTA Chapter 11.

> [Mr. Mahoney, email from November 27, 2018, 10:10 am]: "What if we said . . . that the old system is grandfathered for 3 years from the last ratification, or, if the agreement does not enter into force within 3 years, at entry into force. That way, if there is a delay in entering into force because of, say, labor issues, that doesn't mean that there's a longer grandfather period for ISDS."[158]
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> [Mr. Mandell, email from November 27, 2018, 11:33 am]: "Thanks, C.J. My initial reaction is that it's a complicated alternative that may raise questions about our assumptions/math. An alternative

[156] *See* Exhibit C-116, Email Exchange between C.J. Mahoney, Lauren Mandell, and Daniel Bahar, "RE: grandfather trigger," Nov. 27, 2018.

[157] *See* Exhibit C-116, Email Exchange between C.J. Mahoney, Lauren Mandell, and Daniel Bahar, "RE: grandfather trigger," Nov. 27, 2018, at email from Lauren Mandell at 11:33 AM (p. 2 of PDF) ("An alternative approach would be to say something like: 3 years from entry into force, or 5/6 years from signature, whichever is sooner.").

[158] Exhibit C-116, Email Exchange between C.J. Mahoney, Lauren Mandell, and Daniel Bahar, "RE: grandfather trigger," Nov. 27, 2018, at email from C.J. Mahoney at 10:10 AM (p. 2 of PDF).

approach would be to say something like: 3 years from entry into force, or 5/6 years from signature, whichever is sooner. Essentially adding a safeguard in the event EIF takes longer than anticipated. Either of these approaches could suggest to stakeholders/Hill that we're contemplating potentially lengthy delays before entry into force, which presumably could create its own issues."[159]

[Mr. Mahoney, email from November 27, 2018, 11:44 am]: "Suggesting 5 to 6 is a nonstarter."[160]

[Mr. Mandell, email from November 27, 2018, 5:49 pm]: "Okay, we could also consider a 4-year safeguard, but I will keep thinking, and can also discuss after I finish my meeting now with MX."[161]

[Mr. Bahar, email from November 27, 2018, 12:02 pm]: "I think I understand the CJ proposal, and think it's probably fine if that's what he wants."[162]

[Mr. Mandell, email to Mr. Mahoney, November 27, 2018, 3:12 pm]: "On the transitional protocol, Maria (copied) is comfortable that the agreed protocol text makes clear that NAFTA 1.0 is 'terminated' when USMCA enters into force, even though the word used in the protocol is 'supersede' rather than 'terminate.' So, I think we're good to go on the approach of reverting to 'date of termination' in the grandfather provision. Please let us know if you'd like to discuss."[163]

[Mr. Mahoney, email to Mr. Mandell, November 27, 2018, 3:16 pm]: "That's fine."[164]

[Mr. Mandell, email to Mr. Bahar, November 27, 2018, 3:20 pm]: "After a complicated series of events (including trilateral agreement on a transitional protocol to the USMCA that alludes to the termination of NAFTA 1994), we're going to revert to 'date of

[159] Exhibit C-116, Email Exchange between C.J. Mahoney, Lauren Mandell, and Daniel Bahar, "RE: grandfather trigger," Nov. 27, 2018, at email from Lauren Mandell at 11:33 AM (p. 2 of PDF).

[160] Exhibit C-116, Email Exchange between C.J. Mahoney, Lauren Mandell, and Daniel Bahar, "RE: grandfather trigger," Nov. 27, 2018, at email from C.J. Mahoney at 11:44 AM (p. 2 of PDF).

[161] Exhibit C-116, Email Exchange between C.J. Mahoney, Lauren Mandell, and Daniel Bahar, "RE: grandfather trigger," Nov. 27, 2018, at email from Lauren Mandell at 5:49 PM (pp. 1-2 of PDF).

[162] Exhibit C-116, Email Exchange between C.J. Mahoney, Lauren Mandell, and Daniel Bahar, "RE: grandfather trigger," Nov. 27, 2018, at email from Daniel Bahar at 12:02 PM (p. 1 of PDF).

[163] Exhibit C-117, Email Exchange between C.J. Mahoney, Lauren Mandell, Maria Pagan, Patrick Krissek, and Sloane Strickler, "RE: follow-up," Nov. 27, 2018, at email from Lauren Mandell at 3:12 PM (p. 2 of PDF).

[164] Exhibit C-117, Email Exchange between C.J. Mahoney, Lauren Mandell, Maria Pagan, Patrick Krissek, and Sloane Strickler, "RE: follow-up," Nov. 27, 2018, at email from C.J. Mahoney at 3:16 PM (p. 2 of PDF).

> termination' in the grandfather clause. CJ is okay with it and Maria is okay with it. Now we just have to confirm with MX and CA."[165]

105. There is no mention in this exchange of the three-year limitations period in NAFTA. Various periods are discussed—5-6 years from signature, a "4-year safeguard," three years from ratification of USMCA, or three years from entry into force of USMCA (as opposed to three years from termination of NAFTA)—none of which corresponds to a limitations period covering the three years after NAFTA termination. None of the proposals considered would necessarily, in Respondent's words, give investors "a period consistent with the period allotted to them under the NAFTA to bring those claims, even if they accrued immediately before the NAFTA's termination."[166]

106. *Third*, in their Bifurcation Submissions, Claimants presented numerous examples of three-year transition periods in replacement treaties even though the limitations periods in the terminated BITs were for different periods or had no limitations periods at all.[167] These examples show clearly that a three-year transition period is simply a rule of thumb. It has nothing to do with an underlying limitations period in a terminated treaty.[168]

107. Respondent says "these other agreements are irrelevant" because "[t]he fact that State Parties in other situations involving other agreements adopted a three-year 'transition period' provides no insight on why the USMCA Parties limited their consent to arbitration to three years in Annex 14-C."[169] However, Respondent's own expert, Richard Gardiner, has written that "courts and tribunals do make use of interpretative arguments involving comparison of

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[165] Exhibit C-116, Email Exchange between C.J. Mahoney, Lauren Mandell, and Daniel Bahar, "RE: grandfather trigger," Nov. 27, 2018, at email from Lauren Mandell at 3:20 PM (p. 1 of PDF).

[166] Respondent's Memorial on Preliminary Objection at para. 70.

[167] *See* Claimants' Rejoinder on Bifurcation at para. 30 (discussing the Australia-Mexico Side Letter, the Australia-Chile Free Trade Agreement, the EU-Mexico Free Trade Agreement, CETA, the Trade Agreement between Argentina and Chile, the Free Trade Agreement between Mauritius and China, the Investment Protection Agreement between the European Union and Singapore, and the Investment Protection Agreement between the European Union and Viet Nam).

[168] Respondent makes the argument that that "the majority [of these agreements] do not even involve a USMCA Party." Respondent's Memorial on Preliminary Objection at n.73. Respondent's point is meaningless. Three of the agreements include USMCA Parties. Claimants could have provided a list of only these three agreements and argued that 100 percent of the listed agreements involved USMCA Parties. The point is that there are many agreements all around the world that follow a similar pattern.

[169] Respondent's Memorial on Preliminary Objection at n.73.

characteristics of different treaties and associated material which may loosely be regarded as part of the circumstances of conclusion of the treaty in issue or which may simply be valuable illustrations when seeking the meaning of a particular provision."[170] Thus, the agreements that Claimants have cited are useful in illustrating that adopting a three-year transition period (regardless of the length of any limitations period) has become a common practice.

B. Statements by the USMCA Parties, U.S. Government Advisors, and Former USMCA Negotiators Show that Annex 14-C Allows Claims for Damages Arising from Measures Taken during the Transition Period

108. Statements by the USMCA Parties and USMCA negotiators confirm that Annex 14-C applies to claims for damages arising from measures taken during the transition period. Below, Claimants highlight salient examples of such statements. A list of statements by USMCA Parties, U.S. Government advisors, and former USMCA negotiators confirming the same position appears in the attached Annex.

109. *First*, given the emphasis that Respondent has placed on the distinction between substance and procedure,[171] it is noteworthy that the U.S. Government's own documents regarding the meaning of Annex 14-C refer to the "continued applicability of NAFTA <u>rules</u> and <u>procedures</u>" during the transition period. For example, talking points written by a USTR official and reviewed by the U.S. State Department ("State Department") in preparation for OECD investment committee meetings explain that "investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA <u>rules</u> and <u>procedures</u> with respect to those 'legacy investments' for three years after the termination of the NAFTA."[172] The background document prepared for the OECD investment committee meetings repeats the same statement regarding the continued applicability of "NAFTA <u>rules</u> and <u>procedures</u> with respect to . . . 'legacy investments.'"[173]

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[170] Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 401.

[171] *See* Respondent's Memorial on Preliminary Objection at paras. 44-46.

[172] Exhibit C-118, Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," Oct. 19, 2018, at p. 1 of attachment "Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings" (p. 2 PDF) (emphasis added).

[173] Exhibit C-118, Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," Oct. 19, 2018, at attachment "USMCA Investor-State Dispute Settlement Provisions: Background and Talking Points" (p. 4 PDF). A November 6, 2019 report from the OECD titled "Freedom of Investment Roundtable 29: Summary of

110. The FOIA Materials also include briefing materials dated November 17, 2018 (approximately two weeks before USMCA was signed) that USTR and the State Department used to prepare for a meeting of the UNCITRAL Working Group III. These materials also explain that "investors that have established investments during the lifetime of the NAFTA can continue to bring ISDS claims under NAFTA rules and procedures with respect to those 'legacy investments' for three years after the termination of the NAFTA."[174]

111. Respondent offers nothing in response to the U.S. statements Claimants included in their Bifurcation Submissions other than a few quotes in which former U.S. Trade Representative Robert Lighthizer expresses skepticism about investor-state dispute settlement more broadly.[175] None of Ambassador Lighthizer's statements discusses Annex 14-C or claims made in connection with legacy investments and, therefore, his statements are irrelevant to Respondent's objection.[176] Furthermore, despite Ambassador Lighthizer's skepticism, it is indisputable that he did not abolish ISDS in USMCA. Annexes 14-C, 14-D, and 14-E all contain ISDS mechanisms.

112. *Second*, statements from the Government of Canada that are contemporaneous with the conclusion of USMCA clearly state that NAFTA protections for legacy investments will continue to be available through dispute settlement for the duration of the transition period. The Canadian Government stated, for example, that "NAFTA's existing ISDS mechanism will continue to apply for three years after termination of the Agreement for investments made prior

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Discussion" reflects these points, stating that "[t]he US noted that for three years following the termination of NAFTA, covered investors with existing investments could continue to bring ISDS claims under NAFTA (known as 'legacy claims')." *See* Exhibit CL-165, OECD, Directorate for Financial and Enterprise Affairs Investment Committee, "Freedom of Investment Roundtable 29: Summary of Discussion," Doc. No. DAF/INV/WD(2019)16/FINAL, Nov. 6, 2019, at para. 22. There is no indication in these materials that paragraph 1 of Annex 14-C excludes claims in connection with measures taken during the transition period. The natural reading of these materials is that such claims are included.

[174] Exhibit C-119, Email from Karin Kizer to Lauren Mandell, "Background for Brussels Conference (11.16.18)," Nov. 17, 2018, at p. 2 of attachment (p. 3 PDF) (emphasis added).

[175] Respondent's Memorial on Preliminary Objection at paras. 90-91.

[176] *See* Respondent's Memorial on Preliminary Objection at paras. 90-91.

to the entry into force of CUSMA."[177] The "ISDS mechanism" includes the choice of applicable substantive law. Elsewhere, the Canadian Government stated that:

> The parties [to CUSMA] have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA. . . . [T]he original NAFTA ISDS mechanism will remain available to investors with respect to their existing investments for a period of three years after entry-into-force of CUSMA."[178]

Nothing in these statements indicates that Annex 14-C allows claims only in connection with measures that predated the entry into force of USMCA.

113. If there is any doubt about Canada's position at the time USMCA concluded regarding the scope of Annex 14-C, one need look no farther than Canada's legislation implementing USMCA. Section 8 of the Canada-United States-Mexico Agreement Implementation Act, S.C. 2020, c. 1 provides in relevant part:

> Causes of action under Agreement
>
> (2) No person has any cause of action and no proceedings of any kind are to be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement.
>
> Exception
>
> (3) Subsection (2) does not apply with respect to causes of action arising out of, and proceedings taken under, Annex 14-C of the Agreement.[179]

Thus, Canada clearly understood that Annex 14-C provides the substantive basis for a "cause of action" in order "to enforce or determine any right or obligation that is claimed or arises solely

[177] *See* Exhibit C-120, Government of Canada, "Minister of International Trade - Briefing book," Nov. 2019, *available at* https://www.international.gc.ca/gac-amc/publications/transparency-transparence/briefing-documents-information/transition-trade-commerce/2019-11.aspx?lang=eng (page last modified Aug. 22, 2022).

[178] Exhibit C-121, Government of Canada, "Investment chapter summary," *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/investment-investissement.aspx?lang=eng (page last modified July 10, 2019).

[179] Exhibit C-122, Canada–United States–Mexico Agreement Implementation Act, S.C. 2020, c. 1 (Can.), at Section 8.

under or by virtue of the Agreement."[180] The Canadian legislation makes it clear that Annex 14-C prescribes the substantive law applicable to disputes arising after USMCA entered into force. The legislation distinguishes between "causes of action" and "proceedings," indicating the Annex 14-C is not merely procedural. The only way that Annex 14-C can provide a basis for a substantive cause of action is if Annex 14-C constitutes an arbitration agreement that requires NAFTA as the applicable substantive law. There is no indication that such causes of action are limited to claims regarding measures that predated the entry into force of USMCA.

114. Respondent has no response to the various Canadian statements that Claimants provided in their Bifurcation Submissions other than quoting various statements by Deputy Prime Minister of Canada, Chrystia Freeland, indicating that USMCA removes ISDS with respect to Canada.[181] Deputy Prime Minister Freeland was clearly referring to the elimination of ISDS after the end of the transition period. She was not speaking to Annex 14-C. As the statements from the Canadian Government quoted above and in the annex to this submission confirm, the Canadian Government was well aware that Annex 14-C provides a three-year transition period for asserting NAFTA claims against any USMCA Party, including Canada.

115. *Third*, in their Bifurcation Submissions, Claimants showed that the Government of Mexico's statements contemporaneous with the conclusion of USMCA also reflect an understanding that Annex 14-C allows claims arising out of measures taken during the transition period.[182]

116. In its Memorial, Respondent points to a Mexican government fact sheet stating that "[i]t was agreed that the Investor-State Dispute Settlement mechanism [under the USMCA] will not apply to Canada."[183] Respondent implies that this statement pertains to Annex 14-C. It does not.

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[180] The Government of Canada has further explained that "Subsection 8(2) of the CUSMA Implementation Act sets out the general prohibition against an individual or entity bringing a claim against Canada for a breach of CUSMA. Subsection 8(3) provides an exception for investment dispute settlement under Annex 14-C in the limited circumstances set out therein." *See* Exhibit C-96, Government of Canada, "Canada-United States-Mexico Agreement – Canadian Statement on Implementation," *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/implementation-mise_en_oeuvre.aspx?lang=eng#61 (page last modified Sept. 3, 2020).

[181] Respondent's Memorial on Preliminary Objection at para. 87.

[182] *See* Claimants' Observations on Bifurcation at Annex.

[183] Respondent's Memorial on Preliminary Objection at para. 89 (emphasis omitted).

If it did, it would not be true, as even under Respondent's interpretation, Annex 14-C was available for investors to assert claims against Canada. The statement is clearly referring to the termination of ISDS after the end of the transition period.

117. Respondent also refers to the Government of Mexico's statements in a separate arbitration proceeding (*Legacy Vulcan v. Mexico*) in which Mexico is facing a substantial damages claim.[184] As Respondent itself has shown through its own objection, statements that are made in the heat of litigation do not necessarily reflect the positions of the USMCA Parties when they negotiated Annex 14-C and do not necessarily correspond with the ordinary meaning or context of paragraph 1 of Annex 14-C or the object and purpose of USMCA. Furthermore, it does not appear that Mexico raised an objection based on the scope of Annex 14-C until it submitted its Counter-Memorial on the claimants' ancillary claim in December 2022, at approximately the same time that the United States raised its objection in the present proceeding. For example, there is no discussion of Annex 14-C in the *Legacy Vulcan* tribunal's procedural order from July 2022, which outlines the parties' positions with respect to the claimant's ancillary claims.[185] One can reasonably surmise that Mexico did not even consider an objection on the basis of Annex 14-C until the United States raised the issue with them to coordinate a new position. This is another area where Claimants will be seeking documentation during the discovery phase of this proceeding.

118. *Fourth*, in their Bifurcation Submissions, Claimants provided various statements from the former lead U.S. negotiator (Mr. Mandell) of the investment chapter of USMCA, which showed his understanding that Annex 14-C was intended to allow claims for damages arising from actions taken during the transition period.[186] Included in these statements was an article that Mr. Mandell co-authored with his colleagues at the WilmerHale law firm, which advised investors of

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[184] Respondent's Memorial on Preliminary Objection at para. 89.

[185] *See* Exhibit CL-167, *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No. 7, July 11, 2022.

[186] *See* Claimants' Observations on Bifurcation at Annex; Claimants' Rejoinder on Bifurcation at para. 23.

their right to initiate arbitration under Annex 14-C to challenge measures taken by the Mexican Government during the transition period.[187]

119. Respondent asserts that "WilmerHale posted the client alert while the individual at issue was a lawyer in private practice, not a government official, and the intent of the document was to solicit interest from potential clients with business interests in Mexico . . . ."[188] The fact that Mr. Mandell was in private practice when he made these statements in no way detracts from his ability to recount his understanding of the meaning of Annex 14-C, based on his experience in negotiating that text. Furthermore, Respondent implies that this lawyer was intentionally misleading clients and potential clients regarding the scope of Annex 14-C in order to solicit business. This is a wholly unfounded allegation, and simply shows Respondent's desperation to avoid its responsibility under Annex 14-C.

120. Mr. Mandell further confirmed that Annex 14-C applies to measures taken during the transition period in a presentation that he delivered at the ANADE "Seminario Trinacional – México-Estados Unidos-Canadá [Trinational Seminar – Mexico-United States-Canada]" conference in April 2023. He participated in a panel titled "Protección de inversions en el T-MEC [Protection of Investments in the USMCA]," where he was listed as the chief U.S. negotiator for the investment chapter of T-MEC (USMCA) and special counsel at WilmerHale.[189] We have provided Mr. Mandell's full presentation with this submission.[190]

121. During his presentation, Mr. Mandell explained as follows:

> July 1st of 2023 is a very important date here. Until July 1st of 2023 there were these things called legacy claims. . . . Until July 1 of 2023, the NAFTA rules can still apply effectively, and so for example, U.S. investors can continue to bring ISDS claims using NAFTA rules until July 1st of 2023, provided the investors issued a

[187] *See* Claimants' Observations on Bifurcation at Annex; Claimants' Rejoinder on Bifurcation at para. 23.

[188] Claimants' Rejoinder on Bifurcation at para. 86.

[189] Exhibit C-123, ANADE, "1º Seminario Trinacional – México-Estados Unidos-Canadá," *available at* https://anade.org.mx/quienes-somos/1er-seminario-trinacional-mexico-estados-unidos-canada/.

[190] Exhibit C-124, ANADE, "Protección de inversiones en el T-MEC," Panel Presentation by Lauren Mandell at "1º Seminario Trinacional – México-Estados Unidos-Canadá), Apr. 21, 2023.

> Notice of Intent to bring a claim 90 days in advance, essentially before March 31st of 2023.
>
> . . .
>
> Things change after July 1st of 2023. NAFTA claims are no longer available for . . . U.S. investors in Mexico or Mexican investors elsewhere. . . . Most . . . U.S. investors in Mexico essentially lose meaningful access to ISDS. . . . In order for a US investor after July 1 of 2023 to go to ISDS against Mexico, they have to first litigate in Mexican domestic court for up to two and a half years. . . . [Y]ou are then limited in the types of claims that you can bring. You can effectively bring two types of claims [national/most-favored nation treatment, or direct expropriation]. . . . If you have an issue and you think your investment has been indirectly expropriated after July 1st of 2023, most U.S. investors cannot go to ISDS there. And also for the minimum standard of treatment, which is also a very important standard, it is off limits after July 1st of 2023 for investors. So, those are two major impediments for most investors, which leads me to conclude a lack of sort of meaningful access to ISDS.[191]

122. Mr. Mandell's statements are crystal clear. The full suite of investment protections under NAFTA Chapter 11 is available under Annex 14-C for legacy investments for the duration of the transition period. After the end of the transition period, for most investors, ISDS is available only for the limited set of protections identified in Annex 14-D of USMCA.

VIII. Equity Requires the Tribunal to Reject Respondent's Jurisdictional Objection

123. As explained in the sections above and in Claimants' Bifurcation Submissions,[192] Respondent's interpretation of Annex 14-C is a *post hoc* rationalization that Respondent has not advanced in good faith. Accordingly, the Tribunal should reject Respondent's objection and proceed to the merits phase of the arbitration.

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[191] Exhibit C-124, ANADE, "Protección de inversiones en el T-MEC," Panel Presentation by Lauren Mandell at "1º Seminario Trinacional – México-Estados Unidos-Canadá), Apr. 21, 2023, at timestamps 00:11:57 – 00:15:17 (emphasis added).

[192] *See* Claimants' Observations on Bifurcation at para. 19; Claimants' Rejoinder on Bifurcation at paras. 17-24.

124. The obligation of good faith is a bedrock principle of international law.[193] It applies to the interpretation of treaties,[194] states' performance of their treaty obligations,[195] and parties' conduct during dispute resolution proceedings.[196] In deciding jurisdictional issues, investment treaty tribunals have regularly applied doctrines that emanate from the principle of good faith.[197]

125. In subsection A below, Claimants show that Respondent has advanced a position that is not consistent with its own prior representations and conduct. In subsection B, Claimants show that Respondent has advanced its objection with unclean hands, in that it is seeking to take advantage of its own wrong.

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[193] Exhibit CL-168, *Nuclear Tests Case (Australia v. France)*, Judgment, 1974 I.C.J. 253 (Dec. 20), at para. 46; Exhibit CL-169, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009, at paras. 106-09; Exhibit CL-50, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2d ed., 2006) (excerpts) ("Cheng, *General Principles of Law as Applied by International Courts and Tribunals*"), at p. 105; Exhibit CL-170, Andreas R. Ziegler & Jorun Baumgartner, "Good Faith as a General Principle of (International) Law," in Andrew D. Mitchell, *et al.*, eds, *Good Faith and International Economic Law* (2015), at p. 9.

[194] Exhibit RL-16, VCLT at pmbl. ("Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized . . . ."); *id.* at Art. 31 ("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.").

[195] Exhibit RL-16, VCLT at Art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[196] *See* Exhibit CL-171, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II, Aug. 30, 2018 ("*Chevron v. Ecuador II*, Second Partial Award on Track II"), at para. 7.87 ("The general principle of good faith has a long history in regard to the conduct of dispute resolution, including arbitrations under international law, albeit under different nomenclatures.").

[197] *See*, *e.g.*, Exhibit CL-172, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018, at paras. 316-23 (explaining that "in application of the general principle of good faith, parties are not allowed to abuse their rights" and deciding that Spain's jurisdictional objection did not amount to an abuse of rights); Exhibit CL-173, *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, Nov. 21, 2022, at paras. 253-74 (explaining that "[t]wo principles derive from the fundamental principle of good faith: estoppel and *pacta sunt servanda*" and applying estoppel to decide one of the respondent's jurisdictional objections); Exhibit CL-174, *Stabil LLC and others v. Russian Federation*, PCA Case No. 2015-35, Award on Jurisdiction, June 26, 2017 ("*Stabil v. Russia*, Award on Jurisdiction"), at paras. 164-76 (explaining that "[g]ood faith also encompasses the principle of consistency and the Latin maxim of *allegans contraria non audiendus est* (colloquially translated as 'one cannot blow hot and cold')" and applying that principle to decide the respondent's jurisdictional objection) (footnote omitted); Exhibit CL-175, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, Dec. 15, 2014, at paras. 645-47 (applying the doctrine of unclean hands to decide the respondent's jurisdictional objection).

A. The Principle of Consistency Forecloses Respondent's Preliminary Objection

126. International law has long prohibited states from taking litigation positions that contradict their earlier conduct with respect to a particular legal or factual situation. In the present case, Respondent has advanced an interpretation of Annex 14-C that fundamentally contradicts its earlier representations about the requirements for submitting claims under Annex 14-C.

127. As ICJ Vice-President Alfaro explained in his separate concurring opinion in *Temple of Preah Vihear*:

> inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible. . . . [T]he legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right . . . .[198]

Similarly, in his seminal treatise *General Principles of International Law as Applied by International Courts and Tribunals*, Bin Cheng explained that "[i]t is a principle of good faith that a man shall not be able to blow hot and cold—to affirm at one time and deny at another. . . . Such a principle has its basis in common sense and common justice . . . ."[199]

128. Arbitral tribunals have often cited the principle of consistency as a basis for rejecting respondent states' jurisdictional objections,[200] emphasizing that good faith precludes respondent

[198] Exhibit CL-138, *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 1962 I.C.J. 6 (June 15), at Separate Opinion of Vice-President Alfaro, p. 40 (emphasis added). Similarly, in the *Arbitral Award Made by the King of Spain (Honduras v. Nicaragua)*, the ICJ held that Nicaragua could not contest the validity of an arbitral award, given that its own prior conduct showed that it had recognized the award as valid and binding. Exhibit CL-176, *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, 1960 I.C.J. 192 (Nov. 18), at p. 213. And in the *Legal Status of Eastern Greenland*, the Permanent Court of International Justice ("PCIJ") concluded that Norway could not contest Denmark's sovereignty over Greenland, given that Norway had entered into agreements with Denmark that described Greenland "as a Danish colony or as forming part of Denmark." Exhibit CL-177, *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (ser. A./B.) No. 53 (Apr. 5), at pp. 68-69; *see also* Exhibit CL-50, Cheng, *General Principles of Law as Applied by International Courts and Tribunals* at pp. 145-46 (discussing the PCIJ's holding in *Legal Status of Eastern Greenland* under the heading *allegans contraria non est audiendus*).

[199] Exhibit CL-50, Cheng, *General Principles of Law as Applied by International Courts and Tribunals* at p. 141 (internal quotation and footnote omitted). *See also* Exhibit CL-178, Arnold D. McNair, "The Legality of the Occupation of the Ruhr," 5 *British Yearbook of International Law* 17 (1924), at p. 35.

[200] For example, in *Chevron v. Ecuador II*, Ecuador objected to the tribunal's jurisdiction on the theory that the claimant lacked a direct investment in Ecuador. *See* Exhibit CL-171, *Chevron v. Ecuador II*, Second Partial Award

states from taking arbitration positions on jurisdictional issues that contradict their earlier statements or conduct.[201]

129. In the present case, Respondent's preliminary objection contradicts its prior representations about the scope and purpose of Annex 14-C. On its face, Annex 14-C establishes that the Section A obligations apply to measures taken during the transition period. Respondent confirmed that fact on multiple occasions.[202] Indeed, from the time that USMCA was negotiated until Respondent raised its preliminary objection in this arbitration, the U.S. Government represented that investors could submit claims under Annex 14-C so long as the investors: (a) held legacy investments; (b) alleged a breach of the Section A obligations; (c) submitted their claims in accordance with Section B of NAFTA Chapter 11; and (d) submitted their claims during the transition period.[203]

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on Track II at para. 7.59. Ecuador's judiciary, however, had taken the opposite position in domestic court proceedings involving the claimant. *See id.* at paras. 7.108-11. Applying the principle of consistency—as an expression of good faith—the tribunal held that Ecuador's contradictory position in the arbitration foreclosed its jurisdictional objection. *See id.* at paras. 7.112-23. In *Stabil v. Russia*, the claimants alleged that measures taken with respect to investments in Crimea amounted to Russia breaching the Russia-Ukraine BIT. Exhibit CL-174, *Stabil v. Russia*, Award on Jurisdiction at paras. 1-4. Russia contested the tribunal's jurisdiction on the ground that the claimants' claims did not arise from an investment in the territory of Russia within the meaning of the BIT. *See id.* at para. 5. The tribunal rejected that argument, concluding that "Russia cannot at the same time claim that Crimea forms part of its territory and deny the application of a Treaty that it has concluded to protect investments made on its territory, without incurring an inconsistency contrary to good faith and the principle of consistency." *Id.* at para. 170. In *Mobil v. Argentina*, a claimant was assigned concession and permit rights that it claimed constituted protected investments under the U.S.-Argentina BIT. *See* Exhibit CL-179, *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, Apr. 10, 2013, at paras. 183-85. Argentina objected to the tribunal's jurisdiction on the ground that it had not approved the assignment until after the claimants had submitted claims to arbitration. *See id.* at 186-88. The tribunal rejected Argentina's objection, because it contradicted Argentina's own prior conduct, which indicated that Argentina had treated the claimant as the owner of the rights well before the claimants submitted claims to arbitration. *Id.* at paras. 217-30. The tribunal therefore concluded that "the principle of good faith and the doctrine of *venire contra factum proprium* prevent Argentina from denying the validity of the Claimants' acquisition or ownership of the above interests and others constituting its investment." *Id.* at para. 228.

[201] For example, in *Chevron v. Ecuador II*, the tribunal rejected one of Ecuador's jurisdictional objections on grounds that "the duty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice, that adversely affect the legitimacy of the arbitral process." Exhibit CL-171, *Chevron v. Ecuador II*, Second Partial Award on Track II at para. 7.106 (emphasis added). Likewise, in rejecting Russia's jurisdictional objection in *Stabil v. Russia*, the tribunal explained that good faith "encompasses the principle of consistency" and the maxim that one cannot blow hot and cold, "which has often been applied by international courts and tribunals." Exhibit CL-174, *Stabil v. Russia*, Award on Jurisdiction at paras. 164-66 (internal footnotes omitted).

[202] *See* Section VII.B above and the annex to this submission.

[203] *See* Section VII.B above and the annex to this submission.

130. At no point prior to the eve of the first procedural conference did Respondent assert the existence of a fifth condition: that a claim must relate to a measure that was taken while NAFTA was in force. On November 30, 2022, Respondent asserted the existence of this fifth condition, contradicting Respondent's earlier position, in an attempt to avoid its duty to arbitrate.[204] As Claimants observed in their Bifurcation Submissions, if Respondent genuinely believed that Annex 14-C does not allow claims arising from measures taken during the transition period, then surely it would have taken the earliest opportunity after Claimants submitted their RFA, on November 22, 2021, to clarify its position to its own investors.[205] Instead, Respondent did not assert its position until <u>over one year later</u>. And it did not publicly disclose its position until January 2023[206]—over two and half years into the three-year transition period. Respondent's *volte face* is precisely the type of litigation tactic that the principle of consistency prohibits.

131. In its Memorial, Respondent asserts that none of the statements that Claimants cited during the bifurcation request stage "say clearly that a holder of a legacy investment is entitled to assert a claim under Annex 14-C based on an alleged breach of the NAFTA occurring after its termination."[207] However, Annex 14-C is clear on its face,[208] and Respondent clearly and repeatedly stated that investors would "bring ISDS claims under the NAFTA <u>rules</u> and <u>procedures</u>."[209] The United States through "its representation, its declaration . . . [and] its

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[204] In their Bifurcation Submissions, Claimants showed that Respondent developed its current interpretation of Annex 14-C for the purpose of this arbitration. *See* Claimants' Observations on Bifurcation at paras. 4-7, 39-40, Annex; Claimants' Rejoinder on Bifurcation at paras. 7, 19-24. Respondent has never directly contested that point, much less cited to evidence that could enable it to do so. As discussed in Section VII.B above, Respondent cites to statements from Ambassador Lighthizer that "do not fit [Claimants'] narrative." Respondent's Memorial on Preliminary Objection at paras. 87-91. Respondent is careful not to characterize these statements as showing that Annex 14-C applies only to pretermination measures (*i.e.*, the basis for Respondent's jurisdictional objection). Rightly so, as Ambassador Lighthizer's statements do not even mention Annex 14-C. *See* Respondent's Memorial on Preliminary Objection at paras. 90-91.

[205] *See* Claimants' Observations on Bifurcation at para. 6.

[206] *See* Claimants' Observations on Bifurcation at para. 6.

[207] Respondent's Memorial on Preliminary Objection at para. 85.

[208] As explained in Section IV.B, the text of Annex 14-C explicitly chooses the Section A obligations as the substantive law that applies to Annex 14-C claims.

[209] Exhibit C-118, Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," Oct. 19, 2018, at p. 1 of attachment "Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings" (p. 2 PDF) (emphasis added).

silence, has maintained an attitude manifestly contrary"[210] to the interpretation it is now claiming in this arbitration and is therefore precluded from claiming this new interpretation.

132. Respondent's preliminary objection arises from a fabricated interpretation of Annex 14-C that fundamentally contradicts its prior public position. Applying the principle of consistency—as an expression of good faith—the Tribunal should reject Respondent's preliminary objection.

B. The Doctrine of Unclean Hands Forecloses Respondent's Preliminary Objection

133. Respondent has also raised its preliminary objection with unclean hands. Respondent induced Claimants to withdraw their earlier NAFTA claims in exchange for the promise of granting a Presidential permit for the KXL Pipeline. Respondent then revoked that permit and now argues that Claimants are precluded from asserting claims under NAFTA.

134. A brief synopsis of the events leading to this arbitration is in order. To recall,[211] in 2008, Claimants' subsidiary TransCanada Keystone Pipeline, L.P. ("Keystone") first applied for a Presidential permit to build and operate the KXL Pipeline. At that time, the State Department had a track record of reviewing and coming to a decision on such applications within approximately two years.[212] In 2010 and 2011, the State Department issued three Environmental Impact Statements ("EISs"), all concluding that the KXL Pipeline would not have a significant impact on GHG emissions.[213] Nevertheless, following environmental activist opposition to the

[210] Exhibit CL-138, *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 1962 I.C.J. 6 (June 15), at Separate Opinion of Judge Alfaro, p. 39.

[211] *See* Claimants' Request for Arbitration at Sections III.B.1-2.

[212] *See* Claimants' Request for Arbitration at para. 29.

[213] Exhibit C-17, U.S. Department of State, Draft Environmental Impact Statement for the Keystone XL Oil Pipeline, LP, Applicant for Presidential Permit: TransCanada Keystone Pipeline Project, Apr. 16, 2010 (excerpts) ("DEIS"), at pp. ES-22, ES-23; Exhibit C-18, U.S. Department of State, Supplemental Draft Environmental Impact Statement for the Keystone XL Project, Applicant for Presidential Permit: TransCanada Keystone Pipeline Project, Apr. 22, 2011 (excerpts) ("2011 SDEIS"), at p. 3-197; Exhibit C-19, U.S. Department of State, Final Environmental Impact Statement for the Keystone XL Project, Applicant for Presidential Permit: TransCanada Keystone Pipeline Project, Aug. 26, 2011 (excerpts) ("2011 FEIS"), at p. 3.14-53; *see also* Claimants' Request for Arbitration at para. 30, n.21.

KXL Pipeline, the State Department delayed its processing of Keystone's application and ultimately, in January 2012, denied the application without prejudice.[214]

135. In May 2012, Keystone reapplied for a Presidential permit. The State Department then published two additional EISs on the KXL Pipeline, again concluding for the fourth and fifth time, respectively, that building and operating the KXL Pipeline would not significantly affect climate change.[215] Nonetheless, by that point, the KXL Pipeline had become a litmus test for politicians to prove their environmental *bona fides*. So, in November 2015, the State Department denied Keystone's second application. Despite recognizing that the KXL Pipeline would have a negligible impact on climate change, the State Department concluded that "it is critical for the United States to prioritize actions that are not perceived as enabling further GHG emissions globally."[216]

136. Respondent's actions were discriminatory, expropriatory, and unfair and inequitable. Therefore, on June 24, 2016, Claimants initiated arbitration under NAFTA Chapter 11, alleging that the United States had breached the Section A obligations and caused Claimants more than $15 billion in damages (the "2016 NAFTA Claims").[217] As Claimants explained in their 2016 request for arbitration, "the [Obama Administration's] decision to deny the permit was driven by perceptions and symbolism that conflicted with reality. The State Department abandoned its traditional review criteria to appease environmental activists and their false beliefs—the hallmark of a decision driven by politics."[218]

137. President Donald Trump was sworn into office in January 2017, while Claimants' 2016 NAFTA Claims were still pending. He reversed Respondent's position on the KXL Pipeline,

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[214] *See* Claimants' Request for Arbitration at para. 35.

[215] *See* Exhibit C-20, U.S. Department of State, Draft Supplemental Environmental Impact Statement for the Keystone XL Project, Mar. 1, 2013 (excerpts) ("2013 DSEIS"), at pp. ES-15, 4.15-102, 4.15-107; Exhibit C-21, U.S. Department of State, Final Supplemental Environmental Impact Statement, Jan. 2014 (excerpts) ("2014 FSEIS"), at p. 4.14-5. *See also* Claimants' Request for Arbitration at para. 30, n.21.

[216] Exhibit C-46, U.S. Department of State, Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Nov. 3, 2015 ("2015 ROD"), at p. 29 (emphasis added).

[217] Exhibit C-48, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America*, ICSID Case No. ARB/16/21, Request for Arbitration, June 24, 2016, at paras. 89, 91.

[218] Exhibit C-48, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America*, ICSID Case No. ARB/16/21, Request for Arbitration, June 24, 2016, at para. 62.

and, through a Presidential Memorandum, explicitly invited Keystone to reapply for a Presidential permit.[219] Claimants promptly reapplied.

138. Recognizing Respondent's vulnerability in the pending 2016 NAFTA arbitration, President Trump subsequently demanded that Claimants drop their claims as a condition for receiving the permit, "contend[ing] that essentially forcing TransCanada to drop the suit in the long run is 'easier . . . than settling for like $4 billion in [*sic*] seven years from now.'"[220]

139. Claimants agreed to drop their 2016 NAFTA Claims in exchange for receiving a Presidential permit, as memorialized in the Termination Agreement and Release of NAFTA Claims between Claimants and Respondent.[221]

140. On March 23, 2017, the State Department issued a Presidential permit and a corresponding Record of Decision (the "2017 ROD"), thereby triggering the termination of the 2016 NAFTA Claims. The 2017 ROD confirmed that the KXL Pipeline's construction and operation would not undermine U.S. global leadership on climate change, thereby correcting the finding that had led to the second permit denial and the 2016 NAFTA Claims.[222] It also confirmed the finding of earlier EISs that the KXL Pipeline was unlikely to significantly affect

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[219] *See* Exhibit C-8, White House, Office of the Press Secretary, "Presidential Memorandum Regarding Construction of the Keystone XL Pipeline," Jan. 24, 2017, *available at* https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-regarding-construction-keystone-xl-pipeline/, at Section 2 ("I hereby invite TransCanada Keystone Pipeline, L.P. (TransCanada), to promptly re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline, a major pipeline for the importation of petroleum from Canada to the United States.").

[220] Exhibit C-51, John T. Bennett, "Trump Boasts of Forcing Canadian Firm to Drop Keystone Lawsuit," *Roll Call*, Mar. 22, 2017, *available at* https://www.rollcall.com/2017/03/22/trump-boasts-of-forcing-canadian-firm-to-drop-keystone-lawsuit/; *see also* Exhibit C-52, Damian Paletta and Steven Mufson, "Trump Says He Told Aide to Threaten Keystone XL Pipeline Company over Arbitration Case," *Washington Post*, Mar. 22, 2017, *available at* https://www.washingtonpost.com/news/wonk/wp/2017/03/22/trump-says-he-told-aide-to-threaten-keystone-xl-pipeline-company-over-arbitration-case/.

[221] Exhibit C-53, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America*, ICSID Case No. ARB/16/21, Termination Agreement and Release of NAFTA Claims, Mar. 23, 2017.

[222] Exhibit C-54, U.S. Department of State, Record of Decision and National Interest Determination: TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Keystone XL Pipeline, Mar. 23, 2017 ("2017 ROD") at p. 29.

the rate of extraction in the Western Canadian oil sands and, therefore, would not result in a significant net increase in greenhouse gas emissions.[223]

141. With the issuance of the Presidential permit, Claimants legitimately understood that their 2016 NAFTA Claims had been fully resolved. Claimants had no reason to expect that four years later—after having constructed the KXL border crossing approved by the permit—the United States would turn around and revoke the permit on the very same grounds that had given rise to the 2016 NAFTA Claims. Yet, that is precisely what Respondent did. On January 20, 2021, within hours of being sworn into office, President Biden revoked the Presidential permit through Executive Order 13990 ("EO 13990").[224] He did so relying on the same indefensible reasoning that the Obama Administration had used to reject Keystone's second application in 2015.[225] Through EO 13990, President Biden claimed that leaving the permit in place would inhibit Respondent's ability to assert "vigorous climate leadership."[226] He provided no evidence that the KXL Pipeline would actually have an impact on climate change and no evidence that would undermine the conclusions of the State Department's EISs.

142. In short, as President Trump himself conceded,[227] Claimants' original 2016 NAFTA Claims were strong. Respondent induced Claimants to release those claims with the promise of a permit. Claimants upheld their part of the bargain by terminating the 2016 NAFTA Claims. Respondent then reneged on its promise, breached its obligations under NAFTA—based on the same reasoning that gave rise to the 2016 NAFTA Claims—and now asserts that Claimants have no recourse to arbitration.

143. The doctrine of unclean hands requires that Claimants be heard on the merits. As the PCIJ explained in *Chorzów Factory (Jurisdiction)*, "if the former Party has, by some illegal act, prevented the latter from . . . having recourse to the tribunal which would have been open to him," then that "Party cannot avail himself of the fact that the other has not fulfilled some

[223] Exhibit C-54, 2017 ROD at p. 11.

[224] Exhibit C-11, Executive Order 13990 of January 20, 2021, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis," 86 Fed. Reg. 7037 (Jan. 25, 2021) ("EO 13990"), at p. 7041.

[225] Exhibit C-11, EO 13990 at p. 7041.

[226] Exhibit C-11, EO 13990 at p. 7041.

[227] *See supra* at para. 138.

obligation or has not had recourse to some means of redress."[228] Similarly, as Bin Cheng explained, "[n]o one should be allowed to reap advantages from his own wrong."[229] Respondent comes before this Tribunal with unclean hands, and this Tribunal should therefore reject Respondent's preliminary objection. "To do otherwise would be to reward [the United States'] internationally wrongful conduct . . . ."[230]

IX. Conclusion

144. Claimants have met each of the jurisdictional requirements of the ICSID Convention and Annex 14-C and, under the parties' arbitration agreement, the Tribunal must apply the substantive standards of NAFTA to resolve Claimants' claims. Applying accepted rules of treaty interpretation, paragraphs 1 and 3 of Annex 14-C clearly allow claimants to assert claims arising from measures taken during the transition period. Respondent has not asserted its preliminary objection in good faith and comes before this Tribunal with unclean hands. Accordingly, the

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[228] Exhibit CL-180, *The Factory at Chorzów (Jurisdiction) (Germany v. Poland)*, Judgment, 1927 P.C.I.J. (ser. A) No. 8 (July 26), at p. 31; *see also* Exhibit CL-181, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 1997 I.C.J. 7 (Sept. 25), at para. 110 (explaining that, in evaluating Hungary's argument that it was entitled to terminate a treaty with Czechoslovakia, the Court could not "overlook that Czechoslovakia committed [an] internationally wrongful act . . . as a result of Hungary's own prior wrongful conduct" and citing *Chorzów Factory (Jurisdiction)* for that proposition); Exhibit CL-182, Catherine Titi, *The Function of Equity in International Law* (2021) (excerpts), at p. 176 (observing that "[t]he clean hands doctrine was also applied in all but name in *Chorzów Factory*").

[229] Exhibit CL-50, Cheng, *General Principles of Law as Applied by International Courts and Tribunals* at p. 150. The doctrine also encompasses the maxims that "[a] State may not invoke its own illegal act to diminish its own liability," *id*., and that "an unlawful act cannot serve as the basis of an action in law." Exhibit CL-177, *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (ser. A./B.) No. 53 (Apr. 5), at Dissenting Opinion of Judge Anzilotti, p. 95.

[230] Exhibit CL-183, *Certain Iranian Assets (Iran v. United States)*, Preliminary Objections Submitted by the United States of America, May 1, 2017, at para. 6.30. Investment treaty tribunals have frequently applied the doctrine of unclean hands and the maxims that it encompasses to dispose of jurisdictional objections. As the *Littop v. Hungary* tribunal recently explained: "[T]ribunals have made clear that a party cannot come to investment arbitration with unclean hands. . . . The doctrine has been recognised as a principle of general international law by arbitral tribunals and a number of academic authorities." Exhibit CL-184, *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V2015/092, Final Award, Feb. 4, 2021 (redacted), at para. 439 (citing Exhibit CL-121, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, Aug. 22, 2016, at para. 492; Exhibit CL-185, Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award," 17 *Journal of World Investment & Trade* 229 (2016), at p. 250, Exhibit CL-186, Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," in Marie Öhrström, *et al.*, eds., *Between East and West: Essays in Honour of Ulf Franke* (2010), at pp. 317-18; Exhibit CL-187, Carolyn B. Lamm, *et al.*, "Fraud and Corruption in International Arbitration," 10 *Transnational Dispute Management* 3 (2013); Exhibit CL-188, Rahim Moloo & Alex Khachaturian, "The Compliance with the Law Requirement in International Investment Law," 34 *Fordham International Law Journal* 1473 (2011), at pp. 1485-86. Through its preliminary objection, Respondent seeks to leverage its own misconduct to avoid liability by preventing Claimants from asserting their claims. Such behavior should not be condoned.

Tribunal should reject Respondent's preliminary objection and proceed to the merits phase of the arbitration.

145. Claimants reserve their right to claim all costs and attorney fees associated with the bifurcated stage of this arbitration.

Respectfully submitted,

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Annex: Statements by USMCA Parties, U.S. Government Advisors, and Former USMCA Negotiators

ANNEX

Statements by USMCA Parties, U.S. Government Advisors, and Former USMCA Negotiators

Statements by the U.S. Government:

- In an October 2018 press briefing in connection with the conclusion of USMCA, "[t]wo senior [U.S.] administration officials" engaged in the following exchange:

  > Q: Can you go through any changes to Chapter 11 and the investor-state dispute settlement, both with Mexico and with Canada?
  >
  > And secondly, can you talk a little bit about President Trump and what his level of involvement was during the final stage of negotiations?
  >
  > SENIOR OFFICIAL: With respect to your second question, we're just going to refer you to the White House for the involvement of President Trump.
  >
  > But with respect to Chapter 11, the ISDS, basically we're going to be phasing out Chapter 11 with respect to Canada.
  >
  > SENIOR OFFICIAL: The investment protections in Chapter 11 are going to continue to be available. But the substantive investment protections are available to everyone.
  >
  > There is a question of investor-state dispute settlement; that is going to be phased out with regard to Canada.[231]

- In October 2018, USTR prepared a paper to "outlin[e] potential changes to the USMCA Investment Chapter to respond to stakeholder concerns . . . ."[232] In this paper, the lead U.S. negotiator for USMCA's investment chapter explains that:

  > Under the ISDS grandfather clause, investors can bring ISDS claims under NAFTA 1994 for three additional years with respect to investments established or acquired between January 1, 1994 and

[231] Exhibit C-91, "Quoted: Senior Administration Officials on the USMCA," *World Trade Online*, Oct. 1, 2018, *available at* https://insidetrade.com/trade/quoted-senior-administration-officials-usmca (emphasis added).

[232] Exhibit C-125, Email from Lauren Mandell to C.J. Mahoney and Daniel Bahar, "paper re Investment Text revisions," Attaching "Potential Revisions to USMCA Investment Chapter Text," Oct. 9, 2018, at email (p. 1 PDF).

> the date of the termination of NAFTA 1994 (*i.e.*, the lifetime of NAFTA 1994).[233]

- October 2018 talking points written by a USTR official and reviewed by the State Department in preparation for OECD investment committee meetings explain that:

> investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA <u>rules</u> and <u>procedures</u> with respect to those 'legacy investments' for three years after the termination of the NAFTA.[234]

- Similarly, briefing materials dated November 17, 2018 (approximately two weeks before USMCA was signed) that USTR and the State Department used to prepare for a meeting of the UNCITRAL Working Group III state that:

> investors that have established investments during the lifetime of the NAFTA can continue to bring ISDS claims under NAFTA <u>rules</u> and <u>procedures</u> with respect to those 'legacy investments' for three years after the termination of the NAFTA.[235]

- In April 2019, the U.S. International Trade Commission explained that:

> ISDS expires for current investments three years after USMCA enters into force (pending claims can proceed in this window). . . . Annex 14-C of USMCA states <u>that current and pending investments under the original NAFTA are still subject to the ISDS mechanism under the original NAFTA, following original Section B procedures indicated in NAFTA</u>.[236]

- In January 2020, the U.S. Congressional Research Service explained that:

> for certain claims brought by investors against a NAFTA Party involving investments established or acquired while NAFTA was in force and that still exist when USMCA enters into force, Article 14-

[233] Exhibit C-125, Email from Lauren Mandell to C.J. Mahoney and Daniel Bahar, "paper re Investment Text revisions," Attaching "Potential Revisions to USMCA Investment Chapter Text," Oct. 9, 2018, at email and p. 1 of attachment (pp. 1-2 of PDF).

[234] Exhibit C-118, Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," Oct. 19, 2018, at p. 1 of attachment "Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings" (p. 2 PDF) (emphasis added).

[235] Exhibit C-119, Email from Karin Kizer to Lauren Mandell, "Background for Brussels Conference (11.16.18)," Nov. 17, 2018, at p. 2 of attachment (p. 3 PDF) (emphasis added).

[236] Exhibit C-92, U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, Inv. No. TPA 105-003, USITC Pub. No. 4889 (Apr. 2019), at p. 195 (emphasis added).

> C.1 permits the relevant NAFTA provisions to apply for three years after NAFTA is terminated.[237]

- In 2021, the State Department explained that:

> Canada is not a party to the USMCA's chapter on investor-state dispute settlement (ISDS). Ongoing NAFTA arbitrations are not affected by the USMCA, and investors can file new NAFTA claims by July 1, 2023, provided the investment(s) were "established or acquired" when NAFTA was still in force and remained "in existence" on the date the USMCA entered into force. An ISDS mechanism between the United States and Canada will cease following a three-year window for NAFTA-protected legacy investments.[238]

Statements by the Canadian Government:

- In November 2019, the Government of Canada stated that "NAFTA's existing ISDS mechanism will continue to apply for three years after termination of the Agreement for investments made prior to the entry into force of CUSMA."[239]

- In October 2021, Canada's Minister of International Trade published a briefing book stating that "CUSMA does allow for ISDS 'legacy claims' to be brought under NAFTA Chapter 11 until June 30, 2023."[240]

- The Government of Canada stated that:

> The parties [to CUSMA] have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA. . . . [T]he original NAFTA ISDS mechanism will

[237] Exhibit C-87, Congressional Research Service, "USMCA: Implementation and Considerations for Congress," Legal Sidebar No. LSB10399, Jan. 30, 2020, at p. 3 (emphasis added).

[238] Exhibit C-93, U.S. Department of State, "2021 Investment Climate Statements: Canada," *available at* https://www.state.gov/reports/2021-investment-climate-statements/canada/ (last accessed Feb. 6, 2023) (emphasis added). The U.S. State Department similarly concluded in 2022 that "investors can file new NAFTA claims by July 1, 2023, provided the investment(s) were 'established or acquired' when NAFTA was still in force and remained 'in existence' on the date the USMCA entered into force. An ISDS mechanism between the United States and Canada will cease following a three-year window for NAFTA-protected legacy investments." Exhibit C-94, U.S. Department of State, "2022 Investment Climate Statements: Canada," *available at* https://www.state.gov/reports/2022-investment-climate-statements/canada/ (last accessed Aug. 10, 2023).

[239] *See* Exhibit C-120, Government of Canada, "Minister of International Trade - Briefing book," Nov. 2019, *available at* https://www.international.gc.ca/gac-amc/publications/transparency-transparence/briefing-documents-information/transition-trade-commerce/2019-11.aspx?lang=eng (page last modified Aug. 22, 2022).

[240] Exhibit C-126, Government of Canada, "Minister of International Trade - Briefing book," Oct. 2021, *available at* https://www.international.gc.ca/transparency-transparence/briefing-documents-information/briefing-books-cahiers-breffage/2021-10-trade-commerce.aspx?lang=eng (page last modified Aug. 22, 2022).

> remain available to investors with respect to their existing investments for a period of three years after entry-into-force of CUSMA."[241]

- The Government of Canada stated that "[t]he [USMCA] Parties have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA."[242]

- The Government of Canada stated that "[t]he 3 [USMCA] Parties have also agreed to a transitional period of 3 years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA."[243]

Statements by the Mexican Government:

- In its September 9, 2019, Reporte T-MEC No. 14, Capítulo de Inversión del T-MEC, the Secretaría de Economía stated that:

> In the case of claims that may arise between the investors from Canada and the United States with the respective governments, the dispute settlement mechanism under NAFTA will continue to be applied provisionally. Three years after the entry into force of the T-MEC [USMCA] said mechanism shall cease to apply for Canada and the US, and in the event a dispute arises between investors and governments, the parties shall resort to domestic courts or some other mechanism of dispute resolution.[244]

This statement confirms that "the dispute settlement mechanism under NAFTA will continue to be applied" for three years after the termination of NAFTA.

[241] Exhibit C-121, Government of Canada, "Investment chapter summary," *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/investment-investissement.aspx?lang=eng (page last modified July 10, 2019).

[242] Exhibit C-105, Government of Canada, "Explore key changes from NAFTA to CUSMA for importers and exporters," *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/nafta-cusma_aceum-alena.aspx?lang=eng (page last modified Sept. 25, 2020).

[243] Exhibit C-127, Government of Canada, "GBA+ of the Canada-United States-Mexico Agreement," *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/gba-plus_acs-plus.aspx?lang=eng (page last modified Jan. 17, 2023).

[244] Exhibit C-98, Government of Mexico, Secretary of the Economy, "Reporte T-MEC: Capítulo de Inversión del T-MEC [USMCA Report: USMCA Investment Chapter]," Sept. 9, 2019, at p. 2 (unofficial translation).

Statement by a U.S. Government Advisory Committee:

- On September 27, 2018, the Industry Trade Advisory Committee for Services ("Services ITAC") submitted its report to USTR on the draft USMCA.[245] The Services ITAC understood that USMCA would allow claims for breaches of NAFTA during the transition period. It viewed Annex 14-C as effectively replicating a traditional BIT sunset clause, albeit for a shorter period. According to the Services ITAC's report:

> [T]he transition period for bringing ISDS claims under the original NAFTA is limited to 3 years from the date of NAFTA termination. The 3 year window is short compared to the 10 year period typically provided under terminated BITs.[246]

Statements by Former USMCA Negotiators:

Statements by Lauren Mandell (Former U.S. Government USMCA Negotiator)

- As noted above, Mr. Mandell was the chief negotiator of USMCA's investment chapter. In an article written shortly after he left his position with the Office of the U.S. Trade Representative, Mr. Mandell, stated:

> The key features of this approach [in USMCA] were: . . . a three-year transition period during which investors from all three jurisdictions could continue to use NAFTA ISDS <u>rules</u> and <u>procedures</u> to bring claims in relation to "legacy investments" established or acquired in the territory of another Party during the lifetime of the NAFTA. . . . Going forward, after a three-year transition period, US investment policy posits that these types of disputes will need to be resolved through alternative means.[247]

- A piece that Mr. Mandell co-authored in 2021 stated, in connection with changes to Mexico's Electricity Industry Law in 2021 (<u>after</u> the replacement of NAFTA and the entry into force of USMCA):

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[245] ITAC members have "direct access to policymakers at Commerce Department and the Office of USTR. In such capacity advisors assist in developing industry positions on U.S. trade policy and negotiating objectives" and "must have a Department of Commerce Security Clearance up to the SECRET level because they will have access to classified trade-related information." *See* Exhibit C-128, U.S. Department of Commerce, International Trade Administration, "Industry Trade Advisory Center: Become an Advisor," *available at* https://legacy.trade.gov/itac/become-an-advisor.asp. In short, the Services ITAC was set up specifically to discuss U.S. positions and strategy with U.S. negotiators throughout the negotiation of trade agreements like USMCA.

[246] Exhibit C-129, Report of the Industry Trade Advisory Committee on Services, "A Trade Agreement with Mexico and potentially Canada," Sept. 27, 2018.

[247] Exhibit C-100, Lauren Mandell, "The Trump Administration's Impact on US Investment Policy," 35 *ICSID Review* 345 (2020), at pp. 357-58 (emphasis added).

> Foreign investors in the Mexican energy sector—especially investors pursuing remedies in Mexican court—need to exercise care to ensure that they do not inadvertently forfeit their rights to seek relief under international trade and investment agreements such as the USMCA. This note offers three tips for US and Canadian investors to preserve and advance their USMCA rights . . . .
>
> Subject to an important exception, the USMCA eliminates ISDS with respect to Canada, and it narrows access to ISDS as between the United States and Mexico (excluding with respect to investors with certain defined government contracts). The exception is that US, Canadian and Mexican investors with "legacy investments" in the territory of another Party—investments established during the lifetime of the NAFTA (January 1, 1994–July 1, 2020)—have full access to ISDS under NAFTA rules for claims brought within three years after the date of the USMCA's entry into force, meaning until July 1, 2023 . . . .
>
> The ISDS landscape will change on July 1, 2023, three years after the date of the USMCA's entry into force. Canadian investors will be unable to file new claims against Mexico, though they will still have access to ISDS under the CPTPP. US investors will be able to file new claims, but with notable limitations. Except for those with certain defined government contracts, US investors will lose the ability to lodge some types of claims that might otherwise be viable with respect to the new electricity law, including indirect expropriation and fair and equitable treatment claims. Most US investors will also face requirements to initiate and maintain proceedings in Mexican court for as long as 30 months before they may pursue ISDS. Therefore, US and Canadian investors in Mexico's energy sector should be mindful of their potential change in circumstances on July 1, 2023. To file a claim before that deadline, an investor would need to submit a notice of intent to Mexico by April 1, 2023.[248]

- In an October 2022 presentation at American University, Mr. Mandell stated:

> One key feature is that the parties agreed to permit NAFTA ISDS claims for three additional years. So, July 1, 2020, NAFTA goes away but there was this view that the NAFTA—that the parties could continue to bring claims under NAFTA rules for three years. This is Annex 14-C. But then I think the key point is that

[248] Exhibit C-102, John F. Walsh, David J. Ross, Danielle Morris, and Lauren Mandell, "Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims," Mar. 18, 2021, *available at* https://www.wilmerhale.com/en/insights/client-alerts/20210318-three-tips-for-investors-in-mexicos-energy-sector-regarding-potential-usmca-claims (emphasis added).

> after July 1 of 2023, after the three year period, this transition period, the rules change significantly.[249]

- In April 2023, Mr. Mandell delivered a presentation at the ANADE "Seminario Trinacional – México-Estados Unidos-Canadá" conference. He participated in a panel titled "Protección de inversions en el T-MEC," where he was listed as the chief U.S. negotiator for the investment chapter of T-MEC (USMCA) and special counsel at WilmerHale.[250] We have provided Mr. Mandell's full presentation with this submission.[251] During his presentation, Mr. Mandell explained as follows:

> July 1st of 2023 is a very important date here. Until July 1st of 2023 there were these things called legacy claims. . . . Until July 1 of 2023, the NAFTA rules can still apply effectively, and so for example, U.S. investors can continue to bring ISDS claims using NAFTA rules until July 1st of 2023, provided the investors issued a Notice of Intent to bring a claim 90 days in advance, essentially before March 31st of 2023.
>
> . . .
>
> Things change after July 1st of 2023. NAFTA claims are no longer available for . . . U.S. investors in Mexico or Mexican investors elsewhere. . . . Most . . . U.S. investors in Mexico essentially lose meaningful access to ISDS. . . . In order for a US investor after July 1 of 2023 to go to ISDS against Mexico, they have to first litigate in Mexican domestic court for up to two and a half years. . . . [Y]ou are then limited in the types of claims that you can bring. You can effectively bring two types of claims [national/most-favored nation treatment, or direct expropriation]. . . . If you have an issue and you think your investment has been indirectly expropriated after July 1st of 2023, most U.S. investors cannot go to ISDS there. And also for the minimum standard of treatment, which is also a very important standard, it is off limits after July 1st of 2023 for investors. So, those

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[249] Exhibit C-101, American University Washington College of Law, *USMCA Chapter 14: Experiences (US Perspective)* (Panel Presentation by Lauren Mandell and others at Expert Panel Series on International Arbitration — Investment Agreements of the 21st Century: USMCA and Beyond, Oct. 25, 2022), *full video available at* https://media.wcl.american.edu/Mediasite/Play/c9b76a5aa39f4b06809d33a6be13414c1d (emphasis added).

[250] Exhibit C-123, ANADE, "1º Seminario Trinacional – México-Estados Unidos-Canadá," *available at* https://anade.org.mx/quienes-somos/1er-seminario-trinacional-mexico-estados-unidos-canada/.

[251] Exhibit C-124, ANADE, "Protección de inversiones en el T-MEC," Panel Presentation by Lauren Mandell at "1º Seminario Trinacional – México-Estados Unidos-Canadá), Apr. 21, 2023.

> are two major impediments for most investors, which leads me to conclude a lack of sort of meaningful access to ISDS.[252]

Statement by Hugo Romero Martinez (Former Mexican Government USMCA Negotiator)

- Mr. Romero Martinez was the Deputy-General Counsel for International Trade at the Mexican Ministry of Economy while USMCA was being negotiated, Lead of Mexico in the Trade Remedies Group in connection with USMCA, and a member of Mexico's team in the Legal and Institutional Group in connection with USMCA.[253] A publication issued by Van Bael & Bellis and RRH Consultadores S.C. in which he is listed as one of "the lawyers to contact" states:

> The United States-Mexico-Canada Agreement (USMCA), which replaced the North American Free Trade Agreement (NAFTA) on July 1, 2020, kept alive NAFTA's Investment Chapter (Chapter 11) for a 3-year period allowing investors to submit legacy investment claims to arbitration under NAFTA within that survival period . . . .
>
> Canadian, Mexican or US investors, affected by measures taken by Mexico, US or Canada respectively, which won't have access to ISDS (or the same level of access to ISDS) after the expiry of the legacy clause should consider carefully whether to submit a legacy claim under NAFTA before July 1, 2023. Since this will also require submission of a notice of intent at least 90 days before submission of the claim, such assessments must be undertaken very urgently and any notice of intent filed before the end of [March 2023] at the latest.[254]

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[252] Exhibit C-124, ANADE, "Protección de inversiones en el T-MEC," Panel Presentation by Lauren Mandell at "1º Seminario Trinacional – México-Estados Unidos-Canadá), Apr. 21, 2023, at timestamps 00:11:57 – 00:15:17 (emphasis added).

[253] *See* Exhibit C-130, RRH Consultores, S.C., "Hugo Romero Martínez," *available at* https://rrhconsultores.com.mx/en/our-team.

[254] Exhibit C-131, Van Bael & Bellis, "Investors' Right to Bring Investment Claims Under the NAFTA Investment Chapter Expires Soon," Mar. 13, 2023, *available at* https://www.vbb.com/media/Insights_Articles/13-03-2023_NAFTA_legacy_-_FINAL.pdf (emphasis added).