IN THE MATTER OF AN ARBITRATION UNDER ANNEX 14-C OF THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA (USMCA), CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA), AND THE 1976 UNCITRAL ARBITRATION RULES

Between

ALBERTA PETROLEUM MARKETING COMMISSION
(CLAIMANT)

and

UNITED STATES OF AMERICA
(RESPONDENT)

(ICSID Case No. UNCT/23/4)

SUBMISSION OF MEXICO PURSUANT TO NAFTA ARTICLE 1128

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1. Pursuant to NAFTA Article 1128, the Government of Mexico is providing its views on certain matters of interpretation of the NAFTA and the USMCA.

2. Mexico takes no position on the facts of this dispute. No inference should be drawn from the fact that Mexico has chosen to address only some of the issues raised by the disputing parties. Mexico has previously addressed the interpretation of the NAFTA Chapter 11 and USMCA Chapter 14 provisions in its submissions in other disputes. Mexico reaffirms those submissions.

I. ANNEX 14-C OF THE USMCA

3. The consent of a State is an essential requisite to the jurisdiction of a Tribunal, and is limited by the provisions of the applicable Treaty.[1] The NAFTA was terminated on July 1, 2020, when the USMCA entered into force. As of that date, it was no longer possible for NAFTA Parties to be bound by or to violate the substantive obligations of NAFTA Chapter 11, since those obligations were replaced by the substantive obligations of Chapter 14 of the USMCA.[2]

4. Given that the NAFTA has been terminated and superseded by the USMCA, the State Parties' consent to arbitration must be established pursuant to the provisions of the USMCA. In this case, Annex 14-C establishes the terms of the Parties' consent to the arbitration of legacy investment claims and pending claims in accordance with the "mechanism for the settlement of investment disputes" established in Section B of NAFTA Chapter 11.[3] Paragraph 1 of Annex 14- C provides as follows:

> 1. Each Party consents, with respect to a legacy investment, to the submission of <u>a claim to arbitration in accordance with Section B of Chapter 11</u> (Investment) of NAFTA 1994 and this Annex alleging <u>breach of an obligation under:</u>
>
> (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.
>
> [Emphasis added]

5. This consent is limited to the submission of a "claim" alleging a "breach of an obligation" in certain NAFTA Provisions, including "under … Section A of Chapter 11 (Investment) of NAFTA 1994". A breach of a Treaty can only occur if that Treaty is in force.[4]

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[1] *Carlos Sastre and others v. the United Mexican States*, ICSID Case No. UNCT/20/2, Award, 21 November 2022, ¶ 208.

[2] Vienna Convention on the Law of Treaties, Article 70(1)(a) ("Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty … releases the parties from any obligation further to perform the treaty").

[3] NAFTA, Article 1115 ("this Section [referring to Section B] establishes a mechanism for the settlement of investment disputes").

[4] Responsibility of States for Internationally Wrongful Acts, Article 13 ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs").

Since NAFTA ceased to be in force as of July 1, 2020, violations of this treaty were no longer possible as of that date

6. As explained below, the NAFTA Parties did not include a "survival clause" to extend the substantive obligations of Chapter 11 (Investment) after its termination, and the USMCA does not include any provision that supports such an interpretation.

A. Annex 14-C of the USMCA does not extend NAFTA substantive obligations in accordance with the ordinary meaning of the terms of the Treaty and the common intention of the Parties

7. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), Annex 14-C must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. There is nothing in the ordinary meaning of the text of Annex 14-C that extends the substantive protections of NAFTA in relation to acts or facts taking place for an additional three-year period after the termination of the NAFTA.

8. In fact, Article 1 of the Protocol Replacing the NAFTA with the USMCA reiterates that the USMCA "shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA". As explained by the Final Report of the panel in USMCA Case No. USA-CDA-2021-31-01:

> In the view of the Panel, the NAFTA and the USMCA are separate treaties. Indeed, 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." It 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. But they did not do so. The Parties created self-standing USMCA obligations even though such obligations were stated in "identical or nearly identical form" to obligations under NAFTA. Where the Parties wanted to carry over specific the NAFTA obligations, such as NAFTA Chapter Nineteen, they did so explicitly in Article 34.
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> Equally, the Panel does not consider that the reference in Article 34.1 to "the importance of a smooth transition from NAFTA to CUSMA" implies continuity in obligations. Regardless of the abstract meaning or dictionary definitions that might be attached to the words "smooth transition," the Panel has difficulty in seeing how they can imply the incorporation of the substantive NAFTA obligations into the USMCA. A "smooth transition" is facilitated by clarity in the obligations under the Agreement and clarity in how the Parties are to carry them out. But this is not achieved by treating the words "smooth transition" as an

> implicit carryover of the NAFTA obligations into the USMCA when there are no other words in the USMCA doing that.[5]
>
> [Emphasis added]

9. The text of Annex 14-C is focused exclusively on the consent to arbitration, in accordance with the NAFTA ISDS mechanism, of legacy investment claims and pending claims alleging NAFTA breaches. As previously discussed, such NAFTA breaches could only have occurred before NAFTA was terminated. As such, the ordinary meaning of Annex 14-C preserves the ability of investors to submit claims to arbitration alleging NAFTA breaches in relation to acts or facts that took place before the termination of the NAFTA.[6] Similarly, Annex 14-C also permits pending claims that were submitted to arbitration before NAFTA was terminated to proceed to their conclusions.[7] There are no terms in Annex 14-C that continue in force the substantive protections under Section A of NAFTA Chapter 11 in relation to acts or facts taking place after the termination of the NAFTA.

10. Thus, Annex 14-C provides that an investor had three years to file a claim to arbitration for a "breach of an obligation under" the NAFTA. As already stated, those obligations expired as of July 1, 2020. The Parties did not agree that the substantive obligations of Chapter 11 would continue to bind them during this three-year period or indeed for any period after the NAFTA's termination.

11. Pursuant to Article 59(1) of the (VCLT), a "treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and (a) it appears from the later treaty or is otherwise established that the parties intended that the matter be governed by that treaty". It is clear from paragraph 1 of the Protocol replacing the NAFTA with the USMCA and the third preambular recital of the USMCA that this was precisely what the Parties intended: i.e., "to REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement". Further, Article 70(1)(a)

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[5] *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021-31-01, Final Report, February 1, 2022, ¶¶ 41-42.

[6] This is consistent with Article 70(1)(b) of the Vienna Convention on the Law of Treaties, which provides that: "Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty … does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." [Emphasis added].

[7] Paragraph 5 of Annex 14-C.

provides that, "unless the Treaty otherwise provides or the Parties otherwise agree, the termination of a Treaty … releases the Parties from any obligation further to perform the Treaty".[8] The NAFTA Parties were conscious of these well-established principles of international law.

12. Any intended temporal extension of the substantive obligations in Section A of NAFTA Chapter 11 would have required the addition of terms to explicitly, clearly, and unambiguously establish that the obligations themselves shall continue to be in force beyond the termination of the NAFTA. Taking into account the Parties' practice of including explicit sunset or survival clauses in treaties,[9] the absence of such text in either the NAFTA or the USMCA concerning the obligations in Section A of NAFTA Chapter 11 confirms that: (a) no continuation of these obligations was intended or agreed upon; and (b) these obligations did not continue to apply after the termination of the NAFTA.

B. The context of Annex 14-C supports the USMCA Parties interpretation of Annex 14-C

13. As noted earlier, the ordinary meaning to be given to the terms of Annex 14-C must be determined in their context. The following sections explain how the context of the terms of Annex 14-C supports the conclusion that Annex 14-C applies only to measures taken while the NAFTA was in force.

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[8] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, ¶ 95, Award, 13 September 2006 ("[I]n the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties."). The consent of a State in a given treaty cannot be replaced by the consent of that same State under a different investment treaty. *See Carlos Sastre and others v. the United Mexican States*, ICSID Case No. UNCT/20/2, Award, 21 November 2022, ¶ 204.

[9] See, *for example*, Mexico Model BIT, Article 30. ("This Agreement shall continue to be effective for a period of ten years from the date of termination only with respect to investments made prior to such date.") [Emphasis added]. US Model BIT, Article 22. ("For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments".) [Emphasis added]. Canada's Model BIT, Article 57(4). ("This Agreement shall remain in force unless a Party delivers to the other Party a written notice of its intention to terminate the Agreement. The termination of this Agreement will be effective one year after the written notice of termination has been received by the other Party. In respect of investments or commitments to invest made prior to the date of termination of this Agreement, Articles 1 through 56, as well as paragraphs 1 and 2 of this Article, shall remain in force for 15 years.") [Emphasis added].

1. Paragraph 3 of Annex 14-C

14. The structure and language of paragraph 3 of Annex 14-C further reinforce the USMCA Parties' common interpretation. This paragraph explicitly addresses the temporal limitation of the Parties' consent to arbitration of claims under Section B of NAFTA Chapter 11, and defines a three-year period during which eligible claims could be submitted.

15. The plain text of paragraph 3 establishes that the USMCA Parties intended to place a temporal limit on the *consent* they had agreed to provide under Annex 14-C. Like paragraph 1, paragraph 3 is silent on the "temporality" of the substantive obligations under Section A. It contains no terms affecting the period of time in which those obligations were binding on the USMCA Parties. Its subject is the "consent under paragraph 1", not the substantive obligations under Section A.

2. Footnote 20 of Annex 14-C

16. Footnote 20 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.
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> [Emphasis added]

17. The inclusion of the phrase "for greater certainty" is common practice in treaty drafting to clarify existing obligations, not to introduce new ones .[10] Accordingly, the terms of footnote 20 do not expand the scope of Annex 14-C, but rather narrow it down.

18. The clarification in footnote 20 is provided specifically with respect to paragraph 1 of Annex 14-C. In this regard, the phrase "with respect to such a claim" at the end of the footnote refers to back to the claim described in paragraph 1 — *i.e.,* a claim with respect to a legacy investment alleging a breach of an obligation under Section A of NAFTA Chapter 11.

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[10] *See, TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, ¶¶ 159 and 162.

19. The claims contemplated in paragraph 1 of Annex 14-C are necessarily submitted to arbitration *after* the termination of the NAFTA and the entry into force of the USMCA. Such claims are therefore concerned with NAFTA provisions that are no longer in force at the time they are submitted to arbitration and evaluated by arbitral tribunals. Footnote 20 merely confirms, "for greater certainty", that the "relevant provisions" of the NAFTA "apply with respect to such a claim". This reflects the principle of customary international law codified in Article 70.1(b) of the VCLT, which is that "the termination of a treaty … does not affect any right, obligation or legal situation of the parties created through the execution of the treaty *prior to its termination*" (unless the treaty otherwise provides or the parties otherwise agree).

20. Therefore, Footnote 20 simply confirms the customary principle of intertemporal law, which dictates that disputes must be assessed based on the legal framework in effect at the time the relevant measures were adopted, not on the law in force when the dispute arises. There is nothing in footnote 20 that suggests the existence of an agreement between the State Parties for the Section A obligations to remain binding in relation to acts and facts taking place after the termination of the NAFTA.

3. Footnote 21 of Annex 14-C

21. 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).

22. Footnote 21 of Annex 14-C precludes investors covered by Annex 14-E from bringing claims on legacy investments under Annex 14-C. This is in line with the principle that such disputes should be governed exclusively by the provisions of the USMCA, thereby eliminating the possibility of overlap with claims for violations of the NAFTA under the regime established in Annex 14-C. This approach is consistent with the broader objective of ensuring clarity and predictability in dispute resolution in the framework of the USMCA.

23. The ordinary meaning of the text in footnote 21 is that an investor that is "eligible to submit claims to arbitration under paragraph 2 of Annex 14-E" is precluded from submitting a claim to arbitration under paragraph 1 of Annex 14-C (*i.e.,* with respect to a legacy

investment). The terms of footnote 21 do not exclude the possibility that such an investor may have: (i) an investment that meets the conditions of a "legacy investment" under paragraph 6 of Annex 14-C, and (ii) a claim alleging a breach of an obligation provided for in Section A of NAFTA Chapter 11 within the meaning of paragraph 1 of Annex 14-C. However, this footnote makes it clear that an investor in this situation cannot submit its claims to arbitration under Annex 14-C against Mexico or the United States.

24. Annex 14-C provides a means to facilitate and control the principle of customary international law codified in in Article 70.1(b) of the VCLT. Footnote 21 is an example of the State Parties "otherwise agreeing" to what extent their obligations under the NAFTA bind them in relation to acts or events occurring prior to the termination of the agreement.

25. The terms of footnote 21 impose an exclusion of a specific category of "investor" rather than on a specific category of investment or a specific category of claim. The text of footnote 21 does not require that the claims that the investor may submit to arbitration under paragraph 2 of Annex 14-E arise out of the same acts or facts that would give rise to a legacy investment claim under paragraph 1 of Annex 14-C. Similarly, the text of footnote 21 does not require that the claims that the investor may submit to arbitration under paragraph 2 of Annex 14-E must relate to the same investment that would qualify as a "legacy investment" for the purposes of paragraph 1 of Annex 14-C. In simple terms, footnote 21 does not contemplate or require any overlap between investments, governmental acts (*i.e.,* measures) or other factual circumstances. All that is required to trigger the exclusion in footnote 21 is the investor's eligibility to "submit claims to arbitration under paragraph 2 of Annex 14-E".

26. Provided that an investor's investment meets the criteria for being considered a "legacy investment" under paragraph 6 of Schedule 14-C, it would be provisionally qualified to submit its claims to arbitration under Schedule 14-C alleging breach of Section A obligations. However, if the investor also meets the criteria set out in paragraph 2 of Annex 14-E, so that it is also "eligible" to submit its Chapter 14 claims to arbitration under that

paragraph, it would be disqualified from submitting its claims for violation of Section A under Schedule 14-C to arbitration. The USMCA Parties share this interpretation.[11]

27. An apparent scenario in which footnote 21 may have been triggered is a continuing act or fact (e.g., a government measure) traversing the termination of the NAFTA and the entry into force of the USMCA that gives rise to: (i) claims alleging breach of Section A obligations before the termination of the NAFTA; and (ii) claims alleging breach of Chapter 14 obligations after the entry into force of the USMCA.

4. The definition of "legacy investment" under Annex 14-C

28. The definition of the term "legacy investment" simply limits the scope of eligible claims to investments that were "established or acquired" during the term of the NAFTA — i.e., between 1 January 1994 and the Date of Termination — and were also "in existence" as of the entry into force of the USMCA. These requirements are in no way related to the temporal aspect of the consent offered in paragraph 1 of Annex 14-C, and there is nothing in the text that suggests otherwise.

C. The "subsequent practice" establishes the USMCA Parties' agreement regarding the interpretation of Annex 14-C

29. Article 31(3)(b) of the VCLT states that, for purposes of treaty interpretation, "there shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

30. The World Trade Organization (WTO) Appellate Body has considered that, "in order for 'practice' within the meaning of Article 31(3)(b) to be established: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or

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[11] *See, TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Mexico NDP Submission, 11 September 2023, ¶ 14. *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Reply on Jurisdiction, December 27, 2023, ¶ 31. *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5, Canada's Counter-Memorial, 15 July 2024, ¶ 216.

pronouncements must imply agreement on the interpretation of the relevant provision".[12] The Appellate Body has also explained that such "agreement may be deduced from the affirmative reaction of a treaty party", and "in specific situations, the 'lack of reaction' or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties".[13]

31. Apart from this case, Canada, Mexico, and the United States have consistently confirmed the same position in recent cases brought under Annex 14-C *–i.e., TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63 (*TC Energy); Cyrus Capital Partners, L.P. and Contrarian Capital Management v. United Mexican States,* ICSID Case No. ARB/23/33 (*Cyrus*)*; Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15 (*Access*)*; Coeur Mining, Inc. v. United Mexican States,* ICSID Case No. UNCT/22/1 (*Coeur Mining*); *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1 (*Legacy Vulcan*); and *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5 (*Ruby River*). The positions publicly stated by each of the Parties in these disputes establish their common understanding that only claims arising out of acts, facts or measures adopted while NAFTA was in force are eligible for submission to arbitration under Annex 14-C. The common position of the USMCA Parties constitutes a "subsequent practice" that must be taken into account for purposes of the interpretation of Annex 14-C.

32. In this sense, the ILC has clarified that statements by treaty parties, even when made in the context of legal disputes, are valid as subsequent practice, contributing to a consistent treaty interpretation.

> Subsequent practice under article 31, paragraph 3 (b), must be conduct "in the application of the treaty". This includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference,

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[12] Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, April 7, 2005 (Adopted April 20, 2005), DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475), ¶ 192.

[13] Appellate Body Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, September 12, 2005 (Adopted September 27, 2005), and Corr.1, DSR 2005:XIX, 9157, ¶ 272.

> **statements in the course of a legal dispute,** or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.[14]
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> [Emphasis added]

33. In addition to the ILC's guidance, the findings by the tribunal in *The Canadian Cattlemen for Fair Trade v. United States of America* reinforce the validity of consistent statements by treaty parties as evidence of subsequent practice. That tribunal found that "statements on the [arbitration] before [the] Tribunal and elsewhere" constitute "evidence of a sequence of facts and acts that amount to a practice that is concordant, common and consistent. The Tribunal is of the view that this is a 'subsequent practice' within the meaning of Article 31[3][c]".[15]

II. LEGAL REQUIREMENTS TO BE CONSIDERED TO HAVE AN INVESTMENT UNDER CHAPTER 11 OF THE NAFTA AND ANNEX 14-C OF THE USMCA

34. Mexico concurs with the United States that for an investor to validly pursue a claim under USMCA Annex 14-C, the investor must demonstrate that it had a "legacy investment" within the meaning of paragraph 6 (a) of USMCA Annex 14-C and Chapter 11 of NAFTA when the conduct at issue occurred.[16]

35. Paragraph 6 (a) of USMCA Annex 14-C provides the following:

> 6. For the purposes of this Annex:
>
> (a) "legacy investment" means 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;

36. According to this definition, in order to demonstrate that there is a "legacy investment", an investor must prove, *inter alia*, that it was an "investor of another Party"

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[14] Report of the International Law Commission, 70th Session, UN Doc. A/73/10, Chapter VI, ¶ 18.

[15] *The Canadian Cattlemen for Fair Trade v. United States of America*, Memorial on Jurisdiction, January 28, 2008, ¶ 189.

[16] United States' Memorial on its Preliminary Objections, ¶ 99.

with an "investment" "in the territory" of the Party (in this case, the territory of the United States).

37. Under paragraph 6 (b) of Annex 14, the terms "investment" and "investor" have the meaning accorded in Article 1139 of NAFTA. Under NAFTA Article 1139, an investor must "establish an investment that falls within one or more of the categories established by [Article 1139]"[17] and it must prove that it had such an investment at the relevant times. As stated by the tribunal in *Sastre et al. v. Mexico*, "the relevant dates for assessing issues of jurisdiction are: (i) the date when the alleged breach took place, and (ii) the date when the request for arbitration was lodged".[18]

38. Thus, pursuant to USMCA Annex 14-C, NAFTA Chapter 11 arbitration is only available to investors that held investments in three moments: at the time the alleged breaching measures occurred; when the claim was submitted to arbitration; and as of the date of entry into force of the USMCA. In that regard, Mexico agrees with the United States that the "possibility that [a] Claimant might choose to make an investment in the future is not itself an investment".[19] The investor therefore must hold an "interest" at these moments to establish jurisdiction.

A. "In the territory of [another] Party"

39. NAFTA Article 1101 and paragraph 6 (a) of the USMCA Annex 14-C limit the application of NAFTA Chapter 11 to investments made "in the territory of [another] Party". The NAFTA Parties have expressed that this requirement is meaningful to the Parties' consent to arbitrate.[20]

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[17] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, January 12, 2011, Award, ¶ 122.

[18] *Carlos Sastre and others v. Mexico*, ICSID Case No. UNCT/20/2, Award, 21 November 2022, ¶ 157. *Ver también*, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Second Submission of the United Mexican States, 25 June 2021, ¶¶ 6-7. *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Second Submission of the United States of America, June 25, 2021, ¶¶ 8-15.

[19] United States' Memorial on Jurisdiction, ¶ 135.

[20] *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Mexico's Memorial on Jurisdiction, 19 April 2006, ¶ 86. *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Submission of the United States of America, November 27, 2006, ¶¶ 1-14.

40. NAFTA Chapter 11 protects foreign investors and their investments of a Party that are subject to the laws of another Party. Simply said, to fall under NAFTA protection, an investment must be "primarily regulated by the law of a State other than the State of the investor's nationality, and [such] law [must be] created and applied by that State which is not the State of the investor's nationality."[21] Thus, "it is quite plain that NAFTA Chapter 11 was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investments may be affected by measures taken by another NAFTA State Party."[22]

41. Article 1101 is the "gateway to the remaining Articles of Chapter 11" and "[a]ccess to Chapter 11 […] is thus restricted only to those entities which can satisfy the provisions of subparagraphs 1101(1)(a) – (c), namely that the measures in question relate to: […] investments of investors of another Party in the territory of the Party".[23] Hence, the territorial requirement clearly applies to all subparagraphs of Article 1139 defining an investment. If a claimant alleges to have an "interest" under subparagraphs (e), (f) or (h), then the claimant must prove that such "interest" is an investment "in the territory of the [respondent] Party", pursuant to Article 1101.[24]

B. The term "investment" requires proof of economic interest

42. Mexico concurs with the United States that "by its ordinary meaning, an 'investment' also has several hallmark characteristics […] which reflect not only legal interest, but also

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[21] *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, ¶¶ 96-98.

[22] *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, ¶ 103.

[23] *Westmoreland Mining Holdings, LLC v. Canada (II)*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 197.

[24] In *B-Mex*, Claimants alleged to have made an investment under Article 1139 (h). *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Reply on the Merits, 6 December 2021, ¶¶ 539, 550 and 552. The Tribunal declined jurisdiction over Claimant Taylor's debt interest "because it [was] not an investment within the territory of Mexico." *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Final Award, 21 June 2024, ¶ 66(a).

economic interest, may include the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and/or duration".[25]

43. The NAFTA and USMCA tribunal in *Finley* confirmed this position and stated that "the *Salini* test […] may reasonably be applied" to the NAFTA definition of "investment".[26] The *Salini* test requires that an investor demonstrates four elements with respect to the alleged investment: *(i)* a contribution, *(ii)* duration, *(iii)* risk and (*iv*) a contribution to the economic development of the host.[27]

Respectfully submitted,
General Counsel for International Trade

[signed]

Alan Bonfiglio Ríos
Pamela Hernández Mendoza
Aldo González Aranda
January 15, 2025

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[25] United States' Memorial on its Preliminary Objections, ¶ 103, citing *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award, April 30, 2014, ¶ 80.

[26] *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Decision on Jurisdiction and Liability, November 4, 2024, ¶ 245.

[27] *Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 16, 2001, ¶ 52.