IN THE ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT,
CHAPTER FOURTEEN OF THE UNITED STATES-MEXICO-CANADA AGREEMENT,
AND THE UNCITRAL ARBITRATION RULES

COEUR MINING, INC.

Claimant

-and-

UNITED MEXICAN STATES

Respondent.

ICSID CASE NO. UNCT/22/1

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Annex 14-C of the United States-Mexico-Canada Agreement (USMCA), Article 1128 of the North American Free Trade Agreement (NAFTA), and the Tribunal's December 7, 2023 procedural calendar for Respondent's jurisdictional objections, the United States of America makes this submission on questions of interpretation of the USMCA and the NAFTA. The United States does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.[*]

USMCA Annex 14-C

2. Paragraph 1 of USMCA Annex 14-C provides the USMCA Parties' consent, with respect to "legacy investments," to the submission of claims for breaches of certain NAFTA obligations

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

that allegedly occurred after the NAFTA entered into force and before it was terminated. That paragraph states:

> Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
>
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
>
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
>
> (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.[1]

Paragraph 3 of Annex 14-C provides an additional three years past the NAFTA's termination for the submission of such claims.[2]

3. The USMCA Parties did *not* consent in Annex 14-C to the submission of claims for alleged breaches of NAFTA obligations that occurred *after* the NAFTA terminated. Indeed, there could be no breach of the NAFTA's obligations after it terminated because NAFTA no longer imposed obligations on the Parties. As explained in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[3]

4. The NAFTA terminated and the USMCA entered into force on July 1, 2020.[4] The default position in customary international law, reflected in Article 70(1)(a) of the Vienna

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

[2] *See* USMCA Annex 14-C, ¶ 3.

[3] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13 (U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2)).

[4] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada provides: "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

Convention on the Law of Treaties, is that "[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention . . . releases the parties from any obligation further to perform the treaty."[5]

5. The NAFTA did not contain a survival provision binding the Parties to continue performing its obligations for a period post-termination. Nor did the USMCA Parties make such a commitment, explicitly or implicitly, with respect to the NAFTA's obligations in the USMCA. Thus, once the NAFTA terminated and the USMCA entered into force, the USMCA Parties ceased to be bound by the NAFTA's obligations, including the substantive investment obligations in Section A of NAFTA Chapter 11. Accordingly, because these obligations did not continue after the NAFTA's termination, there could be no post-termination breach and no claim alleging such a post-termination breach could be submitted to arbitration under Paragraph 1 of Annex 14-C.

6. The United States explained in more detail its interpretation of Annex 14-C to the USMCA in its submissions in support of the preliminary objection in *TC Energy Corp. & TransCanada PipeLines Limited v. United States*, ICSID Case No. ARB/21/63. The United States directs the Tribunal to these submissions, along with the accompanying expert reports of Professor Richard Gardiner and Professor Hervé Ascensio, who also address the interpretation of Annex 14-C. For ease of reference, the United States has appended these materials hereto.

Definition of "Investment" (Article 1139)

7. To the extent that NAFTA Article 1139 is applicable in this case, it provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.[6] Among the enumerated list of what constitutes an investment, Article 1139(g)

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the USMCA that refer to provisions of the NAFTA." *See* USMCA Annex 14-C, ¶¶ 3, 5-6 (discussing the "termination of NAFTA 1994").

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

[6] *See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 82 (Jan. 12, 2011) ("NAFTA's Article 1139 is neither broad nor open-textured. It prescribes an exclusive list of

includes "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." Article 1139(j) explicitly excludes from the definition of investment "any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) [of the definition of 'investment' in Article 1139]."[7]

Respectfully submitted,

[Signed]

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February 12, 2024

elements or activities that constitute an investment for purposes of NAFTA."). All three NAFTA Parties agree on this. *See e.g., Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 32 (Nov. 13, 2000) ("Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an 'investment' for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of 'investment' in Article 1139, however, encompass a mere hope that profits may result from prospective sales . . . ."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶ 59 (Apr. 30, 2001) ("The definition of 'investment' in NAFTA Article 1139 . . . is exhaustive, not illustrative."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 19 (May 15, 2001) ("[A]n investment as defined in Article 1139 . . . while inclusive of several categories, is also exhaustive.").

[7] *See Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award on Jurisdiction and Admissibility ¶¶ 230-32 (June 14, 2013) (quoting Article 1139(j) and finding that it "clarif[ies] that '[the definition of investment in Article 1139] does *not* mean': 'claims to money'").

APPENDIX:

1) The United States of America's Memorial on Its Preliminary Objection, *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America,* ICSID Case No. ARB/21/63 (June 12, 2023)

2) Expert Report of Professor Richard Gardiner, *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America,* ICSID Case No. ARB/21/63 (June 9, 2023)

3) Expert Report of Professor Hervé Ascensio, *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America,* ICSID Case No. ARB/21/63 (June 8, 2023)

4) The United States of America's Reply on Its Preliminary Objection, *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America,* ICSID Case No. ARB/21/63 (Dec. 27, 2023)

5) Supplementary Report of Professor Richard Gardiner, *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America,* ICSID Case No. ARB/21/63 (Dec. 22, 2023)

6) Second Expert Report of Professor Hervé Ascensio, *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America,* ICSID Case No. ARB/21/63 (Dec. 22, 2023)

IN THE ARBITRATION UNDER THE UNITED STATES-MEXICO-CANADA AGREEMENT AND THE ICSID ARBITRATION RULES BETWEEN

TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED

Claimants

-and-

UNITED STATES OF AMERICA

Respondent.

ICSID CASE NO. ARB/21/63

THE UNITED STATES OF AMERICA'S MEMORIAL ON ITS PRELIMINARY OBJECTION

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June 12, 2023

TABLE OF CONTENTS

1. In accordance with the Tribunal's Procedural Order No. 2 of April 13, 2023, the United States hereby submits its Memorial on its Preliminary Objection to the Tribunal's jurisdiction under Annex 14-C to the United States-Mexico-Canada Agreement ("USMCA"), as well as the expert reports of Professor Richard Gardiner and Professor Hervé Ascensio.[1]

I. Introduction

2. The United States objects to the Tribunal's jurisdiction because the USMCA Parties' consent to arbitration in Annex 14-C is limited to claims for the breach of certain obligations under the North American Free Trade Agreement ("NAFTA") and Claimants cannot assert a breach of the NAFTA. The reason is simple: the NAFTA terminated on July 1, 2020, and Claimants' claims are based exclusively on an event – President Biden's revocation of the permit for the Keystone XL pipeline – that occurred more than six months later, on January 20, 2021. The permit revocation could not have breached the NAFTA because it occurred at a time when the United States was, as a result of the NAFTA's termination, no longer bound to perform the relevant NAFTA obligations.

3. In an effort to remedy this dispositive flaw in their jurisdictional case, Claimants argue that Annex 14-C does more than extend the USMCA Parties' consent to the arbitration of claims based on alleged breaches of the NAFTA. Claimants contend that Annex 14-C, in combination with the Protocol Replacing the NAFTA with the USMCA (the "USMCA Protocol"), contains an implicit agreement by the USMCA Parties that, despite the NAFTA's termination and the absence of any survival provision in the NAFTA itself, the NAFTA's substantive investment

[1] In this memorial, the United States cites Professor Gardiner's Report as "Gardiner Report ¶ X" and Professor Ascensio's Report as "Ascensio Report ¶ X".

obligations would continue to bind them for three additional years beyond the NAFTA's termination.

4. Claimants cannot, however, point to any language in Annex 14-C reflecting such an agreement. No provision of Annex 14-C states that the substantive investment obligations in Section A of NAFTA Chapter 11 "shall continue to apply" or "shall remain in force" with respect to investors or their investments for any period of time after the NAFTA's termination. Rather, Annex 14-C provides only the USMCA Parties' "consent[], with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B" of NAFTA Chapter 11 and Annex 14-C, for alleged breaches of Section A of NAFTA Chapter 11, and specifies that such consent "shall expire three years after the termination of NAFTA 1994." The consent to arbitrate claims for an additional three years after the NAFTA's termination did not extend the substantive obligations themselves for an additional three years.

5. Nor does the USMCA Protocol help Claimants. The fact that the USMCA Parties' termination of the NAFTA was "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA" cannot transform Annex 14-C into an agreement to extend the application of the NAFTA simply because it refers to the NAFTA. Rather, this "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.

6. If the USMCA Parties had agreed to bind themselves to perform the NAFTA's substantive investment obligations for three additional years after the NAFTA had been terminated, that commitment would have been clear and unequivocal. Its absence from Annex 14-C is just as clear. Indeed, Professor Gardiner, whose well-regarded treatise on treaty

interpretation has been cited by both parties in this case, and Professor Ascensio, an expert in, among other topics, Article 70 of the Vienna Convention on the Law of Treaties, both opine that the USMCA Parties consented in Annex 14-C only to arbitration of claims based on alleged breaches occurring before the NAFTA's termination.[2]

7. Claimants' claims are outside the scope of Annex 14-C and the Tribunal has no jurisdiction to hear them. They must be dismissed.

II. Claimants Have Failed to Establish the Tribunal's Jurisdiction Over Their Claims

8. A State's consent to arbitration is paramount for the jurisdiction of an arbitral tribunal hearing a dispute against that State.[3] Consent is the "cornerstone" of jurisdiction in investor-State arbitration,[4] and it is therefore axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent.[5] Claimants have the burden to establish the United States' consent to

[2] Gardiner Report ¶ F.2; Ascensio Report ¶¶ 8, 33.

[3] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74, ¶ 125 (2009) **(RL-010)** ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); *AsiaPhos Ltd. & Norwest Chemicals Pte Ltd. v. China*, ICSID Case No. ADM/21/1, Award ¶ 59 (Feb. 16, 2023) **(RL-047)** ("[T]he jurisdiction of any arbitral tribunal should be based on the clear and unambiguous consent of both parties to have their dispute resolved by arbitration. This applies, in particular, in investment disputes where one of the parties is a sovereign State, which generally enjoys jurisdictional immunity from being sued in any kind of proceedings outside of its own State courts. Only where a State has waived its jurisdictional immunity by expressing its consent to have a dispute resolved by international arbitration in a clear and unambiguous manner does an arbitral tribunal have jurisdiction to decide on that dispute.") (internal citations omitted).

[4] As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965) **(RL-012)**.

[5] *Renco Group Inc. v. Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) **(RL-013)** ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru."). *See also* CHRISTOPH SCHREUER, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 (Peter Muchlinski et al., eds., 2008) **(RL-014)** (explaining that "[l]ike any form of arbitration, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); BORZU SABAHI ET AL., INVESTOR-STATE ARBITRATION 309, ¶ 9.01 (2d ed. 2019) **(RL-015)** (explaining that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

arbitrate this dispute.[6] Because Claimants have failed to carry their burden, the Tribunal cannot exercise jurisdiction over this dispute.

9. The alleged basis for the USMCA Parties' consent to arbitration and the Tribunal's jurisdiction is Annex 14-C (Legacy Investment Claims and Pending Claims).[7] The Tribunal's task in this phase of the case is therefore to interpret Annex 14-C, guided by the customary international law principles reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention").

10. Paragraph 1 of Annex 14-C defines the scope of the USMCA Parties' consent to arbitration:

> 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.[8]

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[6] *ICS Inspection & Control Services Ltd. v. Argentina*, PCA Case No. 2010-09, Award on Jurisdiction ¶ 280 (Feb. 10, 2012) **(RL-048)** ("The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined."). *See also Pugachev v. Russia*, Award on Jurisdiction ¶ 248 (June 18, 2020) **(RL-049)** (noting that "[i]t is an accepted principle of international law that the claimant in an arbitration bears the legal burden of showing that the tribunal has jurisdiction to consider its claim").

[7] The USMCA's other dispute resolution annexes, Annexes 14-D and 14-E, do not cover claims by Canadian investors.

[8] Annex 14-C, ¶ 1 (footnotes omitted) **(C-0002)**. The version of the USMCA that Claimants have submitted as Exhibit C-0002 does not appear to include the changes agreed in the December 10, 2019 Protocol of Amendment to the USMCA. Nevertheless, for ease of reference during this phase of the proceedings, the United States will continue to refer to Exhibit C-0002.

11. Paragraph 1 specifies that the Parties' consent to arbitration is limited to claims that allege breaches of the three sets of NAFTA obligations enumerated in subparagraphs (a) to (c).[9] As explained in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[10] Accordingly, in order to establish that their claims based on the January 2021 revocation of the Keystone XL pipeline can be submitted to arbitration under Paragraph 1 of Annex 14-C, Claimants must show that the NAFTA's obligations remained binding on the United States – and could, therefore, be breached by the United States – *when* that act occurred.[11] If not, Claimants' claims are outside the scope of Annex 14-C.

12. The NAFTA terminated as of the USMCA's entry into force on July 1, 2020.[12] Pursuant to customary international law principles reflected in Article 70 of the Vienna Convention, the

[9] Paragraph 1 places other conditions on the Parties' consent, which will be discussed in more detail below. *See infra* ¶¶ 25-32.

[10] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001) **(RL-023)**. *See also* Ascensio Report ¶ 28 ("A breach must relate to a legal rule in force; if not, there would be no obligation and, consequently, no breach.").

[11] As Professor Schreuer observed with respect to consent to arbitration limited to claims alleging violations of a specific treaty: "[T]he entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law. For instance, under the NAFTA, the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA itself." CHRISTOPH SCHREUER, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 859-60 (Peter Muchlinski et al., eds., 2008) **(RL-014)**. Though Professor Schreuer's comments focused on a treaty's entry into force, his reasoning is equally sound as applied to a treaty's termination. *See also* Humphrey Waldock, Third Report on the Law of Treaties 11 (¶ 4), U.N. Doc. A/CN.4/167 (1964) **(RL-050)** ("[W]hen a jurisdictional clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit *ratione temporis* the application of the jurisdictional clause. The reason is that the 'disputes' with which the clause is concerned are *ex hypothesi* limited to 'disputes' regarding the interpretation and application of the substantive provisions of the treaty which, as has been seen, do not normally extend to matters occurring before the treaty came into force.").

[12] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada ¶ 1 **(R-0001)** ("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.") (emphasis added). *See also* Annex 14-C, ¶ 3 **(C-0002)** ("A Party's consent under paragraph 1 shall expire three years after *the termination of NAFTA 1994*.")

NAFTA's termination "release[d] the parties from any obligation further to perform the treaty," subject to an agreement by the Parties, in the NAFTA or elsewhere, to extend the application of those obligations.[13] The NAFTA itself contains no survival provision and, accordingly, the Tribunal's jurisdiction hinges on whether the USMCA memorializes an agreement to be bound by the NAFTA's substantive investment obligations for a period after the NAFTA's termination. This is the critical question before the Tribunal.

13. Claimants have argued that Paragraph 1 of Annex 14-C, in addition to defining the scope of the USMCA Parties' consent to arbitration, also extends the substantive obligations in Section A of NAFTA Chapter 11. As the United States will demonstrate in the sections that follow, it does not. Annex 14-C extends the Parties' *consent to arbitrate* alleged breaches of the obligations in NAFTA Chapter 11, Section A for a period of three years after the NAFTA terminates. It does not extend *the obligations themselves* past the NAFTA's termination. As Professor Gardiner confirms: "[T]he consent in Annex 14-C is consent only to submission to arbitration of claims alleging breach of obligations relating to acts and events taking place before the NAFTA, as the source of those obligations, was superseded on 1 July 2020."[14] Professor Ascensio is in accord: "Annex 14-C does not apply to claims alleging breaches of NAFTA occurring after its termination[.]"[15]

(emphasis added); *id.*, ¶ 5 ("For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by *the termination of NAFTA 1994*, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.") (emphasis added); *id.*, ¶ 6(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") (emphasis added).

[13] Vienna Convention on the Law of Treaties, art. 70(1)(a) **(RL-016)**.

[14] Gardiner Report ¶ F.2.

[15] Ascensio Report ¶ 8. *See also id.* ¶ 33 ("Annex 14-C of USMCA, which contains the State's consent to arbitration, relates to violations of NAFTA that occurred when this treaty was in force. It does not cover an alleged

14. The January 2021 permit revocation therefore cannot constitute a breach of the NAFTA.[16] Claimants' claims based on the permit revocation are, accordingly, outside the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C and must be dismissed.

A. Annex 14-C, Interpreted in Accordance with Article 31 of the Vienna Convention, Does Not Extend the Application of the NAFTA's Substantive Investment Obligations

15. Article 31(1) of the Vienna Convention 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."[17] As the International Law Commission explained in its commentary on the draft text of the Vienna Convention, Article 31 "is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[18]

16. As reflected in the three sections that follow, a good faith interpretation of Annex 14-C's terms **(1)** in accordance with their ordinary meaning, **(2)** in context, and **(3)** in light of the

breach of the NAFTA due to events that took place after it terminated, *i.e.*, after 1st July 2020, as in the present case.").

[16] Accordingly, Claimants' repeated refrain that their claims satisfy all elements set out in Paragraphs 1 and 3 of Annex 14-C is wrong. *See, e.g.*, Claimants' Rejoinder Regarding Respondent's Request for Bifurcation ¶ 25 (Mar. 22, 2023) ("Claimants' Rejoinder on Bifurcation").

[17] Vienna Convention on the Law of Treaties, art. 31(1) **(RL-016)**.

[18] International Law Commission, Draft Articles on the Law of Treaties with commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 220 (¶ 11), U.N. Doc. A/CN.4/SER.A/1966/Add.l **(CL-032)**; *id.* 223 (¶ 18). *See also* Gardiner Report ¶ A.7 ("The rules of the Vienna Convention on the Law of Treaties 1969 apply. These rules have been accepted internationally as stating the customary international law rules for interpretation of treaties. Under these rules the starting point is the text.") (citations omitted). Claimants' attempted use of statements by former government officials to suggest that the U.S. interpretation of Annex 14-C is not in "good faith" (Claimants' Rejoinder on Bifurcation ¶¶ 19-23) is wholly inconsistent with Article 31's focus on the treaty text. The statements that Claimants have identified may be taken into account, if at all, only as supplementary means of interpretation under Article 32 of the Vienna Convention. As explained below, however, these statements do not assist the Tribunal in answering the interpretive question before it. *See infra* ¶¶ 65, 84-92.

USMCA's object and purpose confirms unequivocally that the USMCA Parties did not bind themselves to apply the NAFTA's substantive investment obligations after its termination.

1) Annex 14-C's Text Contains No Agreement to Extend the NAFTA's Substantive Investment Obligations

a. The Overall Structure of Annex 14-C Demonstrates That It Provides Consent to Arbitrate, but Does Not Extend Substantive Obligations

17. Annex 14-C contains no text that constitutes an agreement by the USMCA Parties to bind themselves to the continued application of the NAFTA's substantive investment obligations for three years after its termination.[19] There is little need to take the interpretive exercise further because Claimants' reading falls at this first hurdle.

18. Annex 14-C is not a complex provision. Each of its paragraphs has a single clear function. Paragraphs 1, 2, and 3 establish the substantive and temporal scope of the USMCA Parties' consent to arbitration. Specifically,

- Paragraph 1 establishes the scope of the USMCA Parties' consent to arbitration.
- Paragraph 2 provides that such consent, together with the submission of a claim to arbitration, shall satisfy the requirements of certain other international agreements.
- Paragraph 3 imposes a temporal limit on the USMCA Parties' consent, providing that it "shall expire three years after the termination of NAFTA 1994."

[19] As Professor Ascensio concludes, "the analysis of USMCA shows that there is no transition period provided for in it, but that some specific provisions make reference to certain NAFTA provisions in order to extend their effect over time. Under Chapter 14 of USMCA, only Annex 14-C contains provisions of this type. They allow the NAFTA investor-to-State arbitration procedure to continue to be used to resolve the category of disputes named 'legacy investment claims'. But there is no provision for the substantive obligations of NAFTA to be extended." Ascensio Report ¶ 32.

19. Paragraphs 4 and 5 deal with proceedings initiated pursuant to the Parties' consent to arbitration. Paragraph 4 provides that arbitrations initiated under Paragraph 1 within the three-year time limit provided in Paragraph 3 may proceed to conclusion, and that "the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3." Paragraph 5 provides that an arbitration initiated while the NAFTA was in force may proceed to conclusion, unaffected by the NAFTA's termination. Finally, Paragraph 6 provides definitions applicable to Annex 14-C.[20]

20. Critically, not one of these six paragraphs says anything about the continued application of the NAFTA's substantive investment obligations to investors or their investments.

21. Claimants' jurisdictional argument hinges on the text of Paragraph 1 of Annex 14-C. In Claimants' view, Paragraph 1 of Annex 14-C performs double duty, embodying both the USMCA Parties' consent to arbitration *and* a purported agreement to remain bound by the NAFTA's substantive investment obligations for a further three years. But only the former commitment appears in the text; there is no mention of the latter. Paragraph 1 states that the USMCA Parties "consent" to the arbitration of certain alleged NAFTA breaches, not that they agree to the extension of any of the NAFTA's substantive obligations.

22. The remaining paragraphs of Annex 14-C reinforce the conclusion that Paragraph 1 deals solely with the USMCA Parties' consent to arbitration. Paragraph 2 addresses the effect of "[t]he *consent* under paragraph 1" in combination with the submission of a claim to arbitration.[21] Paragraph 3 provides that "[a] Party's *consent* under paragraph 1 shall expire three years after the

[20] Annex 14-C also includes two footnotes, which are discussed in further detail below (¶¶ 47-58), but for present purposes it is enough to say that neither includes an agreement to the extended application of the NAFTA's substantive obligations.
[21] Annex 14-C, ¶ 2 **(C-0002)** (emphasis added).

termination of NAFTA 1994."[22] The specific language of Paragraph 3 is telling. Had Paragraph 1 been intended to memorialize an agreement between the USMCA Parties to extend the application of the NAFTA's substantive investment obligations, not only would such an intent be evident from the text of that provision – and, to be clear, it is not – but one would also expect Paragraph 3 expressly to relieve the Parties from any obligation further to perform the NAFTA's obligations after three years. It does not do so. Instead, Paragraph 3 ends only the USMCA Parties' consent to arbitrate legacy investment claims, further confirming that such consent is Paragraph 1's sole object.

23. Paragraph 4 is also consistent with this conclusion. Paragraph 4 provides that, "[f]or greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion," and that "the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of *consent* referenced in paragraph 3."[23] Again, the focus is on the USMCA Parties' consent: such consent is given in Paragraph 1 and expires pursuant to Paragraph 3.

24. Finally, the text of Footnote 21, which creates a carveout from Paragraph 1, has a similar effect. In describing the carveout, Footnote 21 provides that "Mexico and the United States do not *consent* under paragraph 1" with respect to a specific category of investors.[24] Again, the focus is on the "consent" provided by the USMCA Parties under Paragraph 1. There is no reference to an agreement by the Parties to extend the application of the NAFTA's substantive investment obligations, nor any attempt to carve investors out from that purported commitment.

[22] *Id.*, ¶ 3 (emphasis added).
[23] *Id.*, ¶ 4 (emphasis added).
[24] *Id.*, ¶ 1 n.21 (emphasis added). *See also infra* ¶¶ 50-55.

b. Paragraph 1 of Annex 14-C Is Not an Agreement to Extend the NAFTA's Substantive Investment Obligations

25. Paragraph 1, the critical paragraph for Claimants' arguments, sets out the three key parameters of the USMCA Parties' consent to arbitration. None of these parameters includes an agreement of the Parties to extend the NAFTA's substantive obligations.

i. Claims Must Relate to a "Legacy Investment"

26. Paragraph 1 limits the Parties' consent to arbitrate to "legacy investments." "Legacy investment" is defined in Paragraph 6 of Annex 14-C 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."[25] This definition limits the USMCA Parties' consent to arbitration in two ways: (1) the investment must have been established or acquired during the period when the NAFTA was in force and, (2) the investment must still have been in existence on the date the USMCA entered into force. It therefore excludes from the USMCA Parties' consent investments that both pre-date the NAFTA, and investments that, despite having been established or acquired while the NAFTA was in force, were no longer in existence on the date the USMCA replaced the NAFTA.

27. In their bifurcation briefing, Claimants argued that the final clause in Annex 14-C's definition of "legacy investment" – requiring that an investment be "in existence" as of the USMCA's entry into force – supports their interpretation of the Annex. According to Claimants, this clause shows that the USMCA Parties were "focused on providing continuing protection of legacy investments."[26] This is not an "ordinary meaning" textual analysis. Such an analysis, had Claimants conducted one, would have confirmed that there is no discussion of "continu[ed]

[25] *Id.*, ¶ 6(a).
[26] Claimants' Rejoinder on Bifurcation ¶ 61 (emphasis omitted).

protection" of investments through the extension of substantive obligations of the NAFTA; rather, the definition of "legacy investments" merely serves to define and limit the scope of the USMCA Parties' consent to arbitrate.

28. In any event, Claimants' argument makes little sense. The final clause of the "legacy investment" definition – which, again, excludes investments that were not in existence when the USMCA entered into force – is redundant with respect to measures taken *after* the date the USMCA entered into force, as such measures could not have had any effect on an investment that had ceased to exist *before* that date, regardless of the definition of "legacy investment."

29. Rather, the limitation on consent provided by the "legacy investment" definition only makes sense with respect to measures taken *before* the USMCA entered into force. The "legacy investment" definition serves to foreclose the USCMA Parties' consent to arbitrate NAFTA claims with respect to investments that were established or acquired while the NAFTA was in force but were no longer "in existence" as of the entry into force of the USMCA. This category of investments could only have been affected by measures taken while they were in existence, *i.e.*, measures taken before the USMCA's entry into force. Accordingly, the "legacy investment" definition does not support Claimants' assertion that the USMCA Parties were focused on providing protection of legacy investments under the NAFTA that would continue after the USMCA's entry into force.

ii. Claims Must Be Submitted to Arbitration in Accordance with Section B of NAFTA Chapter 11

30. Paragraph 1 indicates that claims must be submitted to arbitration in accordance with Section B of NAFTA Chapter 11. NAFTA Chapter 11 was divided into two sections: Section A established the substantive obligations each Party undertook with respect to covered investors and

investments, while Section B provided the investor-State dispute resolution mechanism for allegations of breach of the substantive obligations of Section A. The USMCA's investor-State dispute resolution mechanism is sharply curtailed compared to Section B of NAFTA Chapter 11.[27] Annex 14-C indicated the USMCA Parties' consent 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.

iii. Claims Must Allege a Breach of One of the Specified NAFTA Obligations

31. The final clause of Paragraph 1 limits the scope of the USMCA Parties' consent to arbitration to claims for breach of the obligations included in NAFTA Chapter 11, Section A, and two articles of NAFTA Chapter 15. As Professor Gardiner opines, "[a]n obligation under Section A of Chapter 11 is one binding on the states parties to that treaty when the acts or events that are the subject of claims in the arbitration occurred."[28] Thus, this limitation necessarily excludes (1) any claims not arising under the specified NAFTA clauses, and (2) claims based on acts occurring when the USMCA Parties were not bound by the specified NAFTA obligations. Nothing in the final clause of Paragraph 1 could be read to extend the application of the specified NAFTA obligations past the NAFTA's termination.[29] And any argument that Paragraph 1 has such an effect cannot be based on an "ordinary meaning" analysis.

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[27] For example, under Annex 14-D investors must first resort to local remedies before commencing investor-State arbitration, and can only bring investor-State claims for direct expropriation, national treatment, and most-favored-nation treatment. USMCA, Arts. 14.D.3(1)(a)(i), 14.D.5(1) **(C-0002)**. Except with respect to investors eligible to submit claims under Annex 14-E, claims for indirect expropriation and minimum standard of treatment must be advanced by the investor's home State.

[28] Gardiner Report ¶ E.3.

[29] Ascensio Report ¶ 28 ("Since the substantive provisions of the NAFTA have ceased to be in force on 1st July 2020, there can be no 'breach' of a substantive NAFTA obligation related to foreign investments after that date,

32. In sum, Paragraph 1 does nothing more than memorialize the USMCA Parties' consent to extend by three years the time during which a claimant with a "legacy investment" might assert a breach of the NAFTA and utilize the NAFTA's dispute resolution mechanism. Nowhere in Annex 14-C is there an agreement by the USMCA Parties to continue to be bound by the substantive obligations of NAFTA Chapter 11, Section A, during that same three-year period. Claimants seek to insert additional language in Paragraph 1, to the effect that the substantive obligations under Section A shall continue to apply for three years despite the NAFTA's termination. But that would be treaty revision, not treaty interpretation.

2) The Context of Annex 14-C Confirms That It Does Not Extend the NAFTA's Substantive Investment Obligations

33. The context of Annex 14-C further confirms that it cannot be read as an agreement to extend the application of the NAFTA's substantive investment obligations. Four aspects of the context in which Annex 14-C must be interpreted support the ordinary meaning of Paragraph 1: **(a)** the Preamble to the USMCA ("Preamble") and the USMCA Protocol; **(b)** the placement of Annex 14-C within the USMCA; **(c)** the footnotes to Annex 14-C; and **(d)** Article 34.1 of the USMCA.

a. The Preamble and the USMCA Protocol Emphasize the NAFTA's Termination and Its Replacement by the USMCA

34. The Preamble and the USMCA Protocol provide two points of supportive context for the U.S. interpretation of Annex 14-C. Both the Preamble and the USMCA Protocol make clear, *first*, that the USMCA Parties were bringing the NAFTA to an end and, *second*, that they were replacing it with a new and different trade and investment regime set out in the USMCA.

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unless the USMCA extends such substantive obligations. As this expert sees no language in Annex 14-C or otherwise extending the substantive obligations of NAFTA Chapter 11, Section A, the 'breach of an obligation' necessarily refers to a breach of NAFTA predating its termination.").

35. Beginning with the Preamble, it states in its third paragraph that the USMCA Parties had resolved to:

> REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region;[30]

36. The USMCA Protocol, which is titled in full the "Protocol *Replacing* the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada"[31] has similar language. The USMCA Protocol states in Paragraph 1 the USMCA Parties' agreement that: "Upon entry into force of this Protocol, the USMCA . . . shall *supersede* the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[32]

37. Annex 14-C itself was also drafted with the NAFTA's termination firmly in mind, referring to it in three of the Annex's six paragraphs.[33] For example, Paragraph 3 of Annex 14-C states: "A Party's consent under paragraph 1 shall expire three years after the *termination* of NAFTA 1994."[34]

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[30] Preamble to the USMCA ¶ 3 **(C-0002)**.
[31] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada **(R-0001)** (emphasis added).
[32] *Id*. ¶ 1 **(R-0001)** (emphasis added).
[33] Notably, Annex 14-C is one of the few parts of the USMCA, other than the USMCA Protocol and Preamble, that mentions the NAFTA's termination.
[34] Annex 14-C, ¶ 3 **(C-0002)** (emphasis added); *see also id.* ¶ 5 ("For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by *the termination of NAFTA 1994*, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.") (emphasis added); *id.* ¶ 6 ("'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[]") (emphasis added).

38. The Preamble and the USMCA Protocol, together with the references to the NAFTA's termination in Annex 14-C, show that the USMCA Parties intended to leave the NAFTA behind in favor of the USMCA. The Preamble and the USMCA Protocol are wholly consistent with the U.S. interpretation of Annex 14-C, which ensures that the USMCA Parties' conduct after the agreement's entry into force with respect to investors and their investments would be assessed exclusively under Chapter 14 of the USMCA. Chapter 14, as compared to Chapter 11 of the NAFTA, includes entirely new provisions (*e.g.*, USMCA Articles 14.15 (Subrogation) and 14.17 (Corporate Social Responsibility)) and numerous revisions and clarifications to the text regarding substantive investment obligations. Moreover, claims alleging breach of the Chapter 14 obligations are subject to the USMCA's more restrictive investor-State dispute settlement regime, as embodied in Annexes 14-D and 14-E.

39. Claimants' interpretation of Annex 14-C would, by contrast, result in a period after the USMCA's entry into force during which the USMCA Parties' conduct would, with respect to legacy investments, be subject to two distinct sets of substantive investment obligations and could be the subject of arbitration under investor-State dispute settlement regimes in two different international agreements. Such an overlap is nowhere expressly contemplated by the USMCA Parties,[35] and Claimants' interpretation of Annex 14-C is incompatible with the Preamble and USMCA Protocol.

[35] As discussed below, the United States has, in certain instances, permitted the temporary coexistence of an older bilateral investment treaty and a new free trade agreement with the same counterparty. *See infra* ¶¶ 76-77. However, where it has done so, the United States and its counterparties have been clear about this intention by leaving the bilateral investment treaty in force. Here, by contrast, the United States and its counterparties terminated the NAFTA. The termination of the NAFTA, among other things, makes it clear that the USMCA Parties did not intend for the NAFTA's substantive investment obligations to be in force at the same time as the USMCA's substantive investment obligations.

40. In their bifurcation briefs, Claimants attempted to put the USMCA Protocol to a very different use. Rather than focusing on the stated purpose of the USMCA Protocol – namely, the replacement of the NAFTA with the USMCA – Claimants instead drew attention to the "without prejudice" phrase at the end of Paragraph 1. Claimants argued that this phrase means that "when provisions of USMCA refer to provisions of NAFTA 1994, the NAFTA provisions remain applicable despite the fact that USMCA replaced NAFTA 1994."[36]

41. The problem with Claimants' reading of the USMCA Protocol is that it does not say anything about "NAFTA provisions remain[ing] applicable" following the NAFTA's termination. Rather, Paragraph 1 of the USMCA Protocol seeks only to avoid "prejudice" to those USMCA provisions that refer to the NAFTA. These provisions 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. The application of the UMSCA Protocol's "without prejudice" language therefore depends entirely on the meaning of each of the USMCA provisions at issue.

42. Paragraph 1 of Annex 14-C memorializes the USMCA Parties' consent to arbitration of claims alleging certain breaches of the NAFTA (which could only arise while the NAFTA was still in force), under the dispute resolution framework in NAFTA Chapter 11, Section B. The "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'

[36] Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection ¶ 27 (Feb. 10, 2023) ("Claimants' Observations on Bifurcation"). *See also* Claimants' Rejoinder on Bifurcation ¶ 27 (asserting that "the only way to 'avoid prejudice' to the USMCA provisions that refer to provisions of NAFTA 1994 is to give effect to those NAFTA provisions.").

consent to arbitration of NAFTA claims reflected in NAFTA Article 1122. The "without prejudice" language in the USMCA Protocol cannot, however, be read to supplement Paragraph 1 of Annex 14-C with an additional commitment to extend the application of the NAFTA's substantive investment obligations, which is entirely absent from its text.[37]

43. The Preamble and the USMCA Protocol therefore both support the U.S. interpretation of Annex 14-C. Consistent with the Preamble and the USMCA Protocol, Annex 14-C allows for claims based on alleged breaches of the NAFTA occurring while the NAFTA was in force, while likewise ensuring that alleged breaches occurring after the USMCA entered into force would be subject to the USMCA's substantive investment obligations and (more limited) investor-State dispute settlement regime.[38]

b. Annex 14-C Is a Dispute Resolution Annex and Does Not Impose Substantive Investment Obligations

44. The structure of the USMCA provides further contextual support for the ordinary meaning of Annex 14-C. The USMCA separates the articles relating to the Parties' substantive investment obligations from those relating to investor-State dispute settlement, including provisions reflecting the Parties' consent to arbitration. The USMCA's substantive investment obligations are set out in the main body of Chapter 14, whereas the provisions on investor-State dispute settlement are in

[37] Similarly, in USMCA Article 5.19, the Parties agreed to establish a Sub-Committee on Origin Verification. Among this Sub-Committee's functions is, according to Article 5.19(3)(b), "developing and improving the NAFTA 1994 Audit Manual and recommending verification procedures." USMCA, Art. 5.19(3)(b) **(C-0002)**. Nothing in this Article suggests that the relevant NAFTA obligations on origin verification still applied, but the USMCA Protocol's "without prejudice" clause avoids any confusion about whether the Sub-Committee could undertake this task despite the NAFTA's termination. Similarly, Article 10.12(15) requires the USMCA Parties to maintain or amend certain statutes related to antidumping and countervailing duties in their domestic legislation. USMCA, Art. 10.12(15) **(C-0002)**. Among the statutes to be maintained are those each Party listed in its Annex to NAFTA Article 1904.15. The "without prejudice" clause simply ensures that the termination of the NAFTA does not render that reference a dead letter. Again, nothing in this reference to NAFTA in USMCA Article 10.12(15) suggests that the "without prejudice" clause in the USMCA Protocol meant that NAFTA Article 1904.15 itself "remain[ed] applicable," as Claimants argue.

[38] The USMCA also offers State-to-State dispute settlement under Chapter 31.

Annexes 14-C, 14-D, and 14-E. This separation mirrors the structure of NAFTA Chapter 11, in which Section A contained the agreement's substantive investment obligations and Section B contained provisions – including provisions expressing the Parties' consent to arbitration – related to investor-State dispute settlement.[39]

45. The separation of the USMCA Parties' substantive investment obligations from the provisions governing investor-State dispute resolution reflects, among other things, the distinct nature of the consent to arbitration.[40] Consent to arbitration is an offer that the parties to an investment treaty extend, subject to certain conditions, to individual investors, and "[t]he perfected consent is not a treaty but an agreement between the host State and the investor."[41] The agreement to be bound by specific substantive investment obligations is, by contrast, more typical of commitments that treaty parties make to each other.[42]

46. The terms of Annex 14-C must therefore be read in light of their placement outside of the main body of Chapter 14 – which contains the substantive investment obligations of the USMCA

[39] MEG N. KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 37 (2006) **(RL-051)** ("Section A of Chapter 11 sets forth the primary obligations of the Parties, while Part B sets forth the investor-State dispute resolution mechanism."); *see also id.* 38 ("Section B . . . sets forth the dispute resolution procedures for arbitration that an investor of one NAFTA Party may institute against one of the other NAFTA Parties in which it is making, seeks to make, or has made an investment. Section B contains no substantive rights or obligations, but is devoted to the mechanism by which an investor may seek redress.").

[40] Gardiner Report ¶ A.6 ("Consent underlies obligations relating to the arbitral process. In treaties, these obligations are typically in a set of provisions essentially distinct from the substantive provisions on treatment of investments. . . . Thus, the treaty structure of both the NAFTA and USMCA includes a body of substantive rules for treatment of investments and a body of jurisdictional and procedural rules for arbitration of disputes over the substantive rules.").

[41] CHRISTOPH SCHREUER, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 864 (Peter Muchlinski et al., eds., 2008) **(RL-014)**.

[42] Indeed, underlining the distinction between substantive investment obligations and consent to arbitration, there are numerous treaties that include substantive investment protections, but that do not include a State's consent to arbitrate disputes related to those protections directly with investors (such protections may, depending on the treaty, be subject to interstate dispute resolution provisions). For example, the U.S.-Australia Free Trade Agreement (2004) includes a full chapter on investment but does not include a consent to arbitrate directly with investors. United States-Australia Free Trade Agreement, U.S.-Aus., Chapter 11, May 18, 2004 **(RL-052)**. The United States also maintains numerous Friendship, Commerce, and Navigation Treaties or Treaties of Amity that include protections for foreign investors but do not include consent to arbitrate directly with those investors. Treaty of Friendship, Commerce and Navigation, U.S.-Den., Oct. 1, 1951, 421 U.N.T.S. 105 **(RL-053)**.

Parties – and in one of the investor-State dispute resolution annexes. This context confirms that Annex 14-C does not itself bear on the substantive investment obligations that bind the USMCA Parties. Again, it concerns only the USMCA Parties' consent to arbitration, and no language in Annex 14-C extended the NAFTA's substantive investment obligations beyond its termination.

c. The Footnotes to Annex 14-C Are Consistent with the U.S. Interpretation

47. Claimants rely on Footnote 20 and, more heavily, on Footnote 21 to Annex 14-C to support their interpretation of the Annex. But these footnotes do not assist Claimants.

48. Footnote 20 states that, "[f]or greater certainty, the relevant provisions in" various NAFTA chapters "apply with respect to . . . a claim" submitted to arbitration pursuant to Paragraph 1 of Annex 14-C. As use of the words "for greater certainty" signals,[43] Footnote 20 merely acknowledges that the relevant parts of the NAFTA that may relate to a claim brought under Paragraph 1, including definitions (NAFTA Chapter 2) and exceptions/reservations (NAFTA Chapter 21 and Annexes), apply to "a claim" based on breaches that occurred while the NAFTA was in force, despite the NAFTA's termination.[44] It is a straightforward application of the general principle of intertemporal law that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[45] Pursuant to this principle, an act occurring while the NAFTA was in force

[43] As a general practice, the United States uses the words "for greater certainty" in its international trade and investment agreements to introduce confirmation regarding the meaning of the agreement. In other words, the phrase "for greater certainty" 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.

[44] *See supra* ¶¶ 12-13, 17-32 (showing that the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C is limited to claims based on alleged breaches occurring after the NAFTA entered into force and before it terminated on July 1, 2020).

[45] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 13, [2001] 2 Y.B. Int'l L. Comm. 1, 57 (¶ 1), U.N. Doc. A/56/10 (2001) **(RL-054)** (internal citations omitted).

must be assessed in accordance with the substantive investment obligations of the NAFTA, while an act occurring after the NAFTA's termination and the USMCA's entry into force must be assessed in accordance with the USMCA's substantive investment obligations.[46] Footnote 20 is therefore wholly consistent with the U.S. interpretation of Annex 14-C, as described above, and it provides no support for Claimants' erroneous interpretation.

49. It should be underlined that the reason for the confirmation provided in Footnote 20 is that the NAFTA was terminated, including the relevant provisions referenced in Footnote 20, consistent with the USMCA Protocol discussed above. 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. Nothing in Footnote 20 purports to expand the set of claims that can be submitted pursuant to that consent. Certainly nothing in Footnote 20 expressly indicates the USMCA Parties' agreement to be bound by the obligations in Section A of NAFTA Chapter 11 for an additional three years after termination.

50. Footnote 21 is similarly unhelpful to Claimants. Footnote 21 provides that:

> 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).

51. Footnote 21 addresses potential claims under Annex 14-C by claimants who are also eligible to submit claims under Annex 14-E, such as, for example, a claimant alleging that one of the USMCA Parties adopted a wrongful measure prior to the NAFTA's termination which

[46] Breaches of the USMCA's substantive investment obligations, as reflected in Chapter 14, may be submitted to arbitration under Annexes 14-D and 14-E, but these annexes do not extend to Canadian investors (nor may U.S. and Mexican investors submit claims to arbitration under these annexes against Canada).

continues after the USMCA entered into force (and is also wrongful under the USMCA). Pursuant to Footnote 21, such a claimant cannot submit a claim related to the measure under Annex 14-C if that claimant would also be eligible to submit a claim under Annex 14-E. Footnote 21 funnels claimants who are eligible to use Annex 14-E into the USMCA's new dispute settlement regime, consistent with the USMCA's object and purpose, as discussed below.

52. Claimants' attempt to turn Footnote 21 to their benefit is convoluted and hinges on an attempt to rewrite the footnote so that it becomes *inutile* under the U.S. interpretation of Annex 14-C. Ignoring Footnote 21's text, Claimants contend that the footnote only applies where a claim for the same alleged breach and the same damages could be brought under both Annex 14-C and Annex 14-E. Claimants argue that because that would be impossible under the U.S. interpretation of Annex 14-C, the footnote is *inutile* unless Claimants' interpretation is accepted.[47]

53. But as the scenario described in paragraph 51 demonstrates, Claimants are incorrect. Footnote 21 does have a function under the ordinary meaning of Annex 14-C, because it carves out from the consent to arbitration in Paragraph 1 of Annex 14-C "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)."[48] There is no requirement in the text that the investor be eligible to submit the "same" claim or a claim for the "same damages" under both Annex 14-C and Annex 14-E for Footnote 21 to apply. Rather, the footnote focuses on a discrete class of investors: those that are eligible "to submit claims" under Annex 14-E, which turns in significant part on the characteristics of the investor. As Professor Gardiner explains, "[i]n the footnote's formulation the denial of consent is related to the 'investor'

[47] Claimants' Rejoinder on Bifurcation ¶ 42.
[48] USMCA, Annex 14-C, ¶ 1 n.21 **(C-0002)** (emphasis added).

being 'eligible to submit claims' under Annex 14-E, not to any specific claim being the subject of a possible arbitration under Annex 14-E."[49] Annex 14-E is only open to investors that enter into government contracts in specific sectors, such as oil and gas and power generation.[50] Under 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. Thus, contrary to Claimants' assertion, Footnote 21 is not limited to situations in which an investor has a single identical claim for the "same damages" arising under both the USMCA and the NAFTA.

54. Claimants attempt to salvage their position by arguing that the interpretation of Footnote 21 described above "would lead to absurd results," because hypothetical investors with large claims arising under Annex 14-C but small claims arising under Annex 14-E would be forced to abandon the large claim in favor of the small one.[51] This is neither an absurd result[52] nor one that is particularly unfair, as the default outcome under the NAFTA was that termination would have immediately eliminated all options for the submission of claims for alleged breaches of the NAFTA to investor-State dispute settlement. Instead, the USMCA Parties agreed in Annex 14-C to extend the period for most claimants with legacy investments to file claims under the NAFTA by three years, but likewise agreed to channel potential claimants with both Annex 14-C and Annex 14-E claims into the latter, which is part of the USMCA's new investor-State dispute resolution

[49] Gardiner Report ¶ C.11.
[50] USMCA, Annex 14-E, ¶¶ 2(a)(i)(A), 6(a), (b) **(C-0002)**. An investor must also be able to allege a breach of Chapter 14 of the USMCA, as well as loss or damage "by reason of, or arising out of, that breach," in order to submit a claim to arbitration under Annex 14-E. *Id.* ¶ 2(a)(i), (ii).
[51] Claimants' Rejoinder on Bifurcation 21-22. To the best of the United States' knowledge, there is no such investor in reality.
[52] Gardiner Report ¶ C.11 ("There is nothing manifestly absurd or unreasonable in concluding that consent is not given for any legacy investment to be the subject of an arbitration where an investor is eligible to submit any claims to arbitration that would come within paragraph 2 of Annex 14-E.").

mechanism. This agreement is consistent with the termination of the NAFTA in favor of the more circumscribed investor-State dispute settlement provisions of the USMCA.

55. Claimants' interpretation of Footnote 21 must therefore be rejected. Footnote 21 has clear utility under the U.S. interpretation of Annex 14-C, as explained above, and it therefore provides no support for Claimants' position. The fact that the proper reading of Footnote 21 does not produce the outcome to which Claimants or their hypothetical investor may think they are entitled does not render the provision *inutile*.

56. Even if Claimants were correct about Footnote 21's supposed lack of effectiveness – which they are not – it would have little bearing on the interpretive issue before the Tribunal. As demonstrated above, Annex 14-C does not contain an agreement between the USMCA Parties to bind themselves to apply the NAFTA's substantive investment obligations after the NAFTA's termination. Claimants cannot use Footnote 21's purported lack of utility under the U.S. interpretation of Annex 14-C to add such an agreement into the text. The principle of *effet utile* does not permit the radical revision that Claimants propose.[53]

57. The Tribunal's duty in this case is to interpret Annex 14-C, not to revise it.[54] The International Court of Justice (ICJ) and ICSID tribunals have recognized that *effet utile* cannot be

[53] *See* International Law Commission, Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 219 (¶ 6), U.N. Doc. A/CN.4/SER.A/1966/Add.l **(CL-032)** ("Properly limited and applied, the maxim [*ut res magis valeat quam pereat*] does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty."). The Commission did not include a separate provision on *effet utile* in the Vienna Convention because "to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of 'effective interpretation'." *Id.* In their bifurcation briefing, Claimants cited to the Draft Articles on the Law of Treaties with Commentaries on *effet utile*, but failed to include the text quoted above. *See* Claimants' Observations on Bifurcation ¶ 32, n.55.

[54] *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶ 84 (Dec. 8, 2008) **(RL-055)** (noting that the duty of an ICSID Tribunal, like the duty of an international court, is "to interpret the Treaties, not to revise them") (quoting *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania (Second Phase)*, 1950 I.C.J. 221, 229 (July 18) ("*Interpretation of Peace Treaties*") **(RL-056)**). *Id*. ¶ 82 (finding that "the terms (the

used as a pretext to revise a treaty.[55] In the *Interpretation of Peace Treaties*, for example, the ICJ concluded that "the rule of effectiveness" could not justify the Court attributing to the dispute settlement provisions in the relevant peace treaties a meaning that would be contrary to their letter and spirit, on the pretext of remedying a default for which the treaties at issue had made no provision.[56] Footnote 21's alleged lack of effectiveness cannot, therefore, be used as a basis to change the ordinary meaning of Annex 14-C's terms.

58. In sum, Footnotes 20 and 21 do not support Claimants' interpretation of Annex 14-C.

d. Article 34.1 Confirms that the USMCA Parties Did Not Extend the NAFTA's Substantive Investment Obligations

59. Unlike Annex 14-C, in Article 34.1 (Transitional Provision from NAFTA 1994) the USMCA Parties expressly agreed that certain provisions of the NAFTA, namely Chapter 19, "shall continue to apply" in certain circumstances despite the NAFTA's termination.[57] This language

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text) of a treaty must always be adhered to, for the reason that a treaty expresses the mutual will of the Contracting States"). *See also* International Law Commission, Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 219 (¶ 6), U.N. Doc. A/CN.4/SER.A/1966/Add.l **(CL-032)** (noting that the ICJ has indicated that "to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty"); *id.* 220-21 (¶ 11) ("the [International] Court [of Justice] has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain.").

[55] *See Interpretation of Peace Treaties*, 1950 I.C.J. at 229 **(RL-056)** (noting that "[i]t is the duty of the Court to interpret the Treaties, not to revise them"); *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶ 84 (Dec. 8, 2008) **(RL-055)**; *Banro American Resources, Inc. et al. v. Democratic Republic of Congo*, ICSID Case No. ARB/98/7, Award ¶ 6 (Sept. 1, 2000) **(RL-057)** ("The Tribunal is certainly aware of the general principle of interpretation whereby a text ought to be interpreted in the manner that gives it effect *–ut magis valeat quam pereat.* However, this principle of interpretation should not lead to confer, *a posteriori*, to a provision deprived of its object and purpose a result that goes against its clear and explicit terms.").

[56] *Interpretation of Peace Treaties*, 1950 I.C.J. at 229-30 **(RL-056)** (the Court declining to find that an intended three-member commission could properly be constituted with two members only, despite the illegal refusal of one of the parties to appoint its arbitrator and although the whole purpose of the jurisdictional clause was thereby frustrated). *See also South West Africa (Second Phase)*, 1966 I.C.J. 6, 48 ¶ 91 (July 18) **(RL-058)** (endorsing the Court's holding in *Interpretation of Peace Treaties*).

[57] Gardiner Report ¶ C.6 (observing that Article 34.1 "allow[s] for a small number of features of the NAFTA to continue to have effect after the entry into force of the USMCA introduced the superseding regime" but "do[es] not provide for the investment regime of NAFTA to continue to apply from the point at which it was superseded"); Ascensio Report ¶ 19 (Article 34.1 "makes no reference to the NAFTA provisions offering substantial protection to foreign investment and whose breach could lead to arbitration between foreign investors and States (Section A of Chapter 11, Article 1503(2), and Article 1502(3)); nor does it mention the procedural protection offered by Chapter 11, Section B.").

confirms that the USMCA Parties did not intend to extend any other NAFTA obligations, including the substantive investment obligations in NAFTA Chapter 11, after the NAFTA's termination. Had they so intended, they would have included a reference to Chapter 11 in Article 34.1, or would have expressly specified in Annex 14-C that the NAFTA obligations referenced therein "shall continue to apply" after the NAFTA's termination subject to a temporal limitation.[58] As a Panel constituted pursuant to USMCA Article 31 explained when interpreting Article 34.1:

> 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 NAFTA obligations, such as NAFTA Chapter Nineteen, they did so explicitly in Article 34.[59]

60. Claimants argue that USMCA Article 34.1 supports their interpretation of Annex 14-C, because it limits the applicability of NAFTA Chapter 19 "to final determinations published by a Party before the entry into force of [the USMCA]."[60] This text, Claimants contend, shows that the USMCA Parties knew how "to impose a temporal limitation on measures that could be challenged" in dispute settlement and could have done so in Annex 14-C.[61] But Claimants miss

[58] Another potential approach is reflected in Chapter 4, footnote 82, of the USMCA, which expressly provides that a specified "transition" period "may include providing . . . treatment" under certain NAFTA provisions to eligible passenger vehicles or light trucks. USMCA, Chapter 4, Appendix, Art. 8(2)(a) n.82 **(C-0002)**. There is no reference to "providing treatment" under NAFTA Chapter 11, Section A, in Annex 14-C.
[59] *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report ¶ 41 (Feb. 1, 2022) **(RL-059)** (internal citations omitted). The Panel also noted that the reference to a "smooth transition" in USMCA Article 34.1(1) cannot be treated as an implicit carryover of the NAFTA obligations into the USMCA when there are no other words in the USMCA doing that. *Id*. ¶ 42.
[60] USMCA, Art. 34.1(4) **(C-0002)**.
[61] Claimants' Observations on Bifurcation ¶ 24; Claimants' Rejoinder on Bifurcation ¶ 49.

the broader point about Article 34.1, which is that such a temporal limit with respect to Chapter 19 was only necessary because the article also contains express language stating that "Chapter Nineteen of NAFTA 1994 *shall continue to apply*" after the USMCA's entry into force. Again, there is no reference in Article 34.1 to the continuing applicability of NAFTA Chapter 11, Section A, nor is there any comparable language in Annex 14-C. Accordingly, no temporal limitation was necessary with respect to claims under NAFTA Chapter 11.

3) The Object and Purpose of the USMCA Was to Replace the NAFTA, Not Extend It

61. As noted above, the USMCA Parties expressly resolved in the Preamble to "REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement" to support trade and economic growth in the region. The USMCA Protocol similarly states that the USMCA "shall supersede the NAFTA," and Annex 14-C itself repeatedly references the NAFTA's termination.[62] Not only did the USMCA expressly supersede and replace the NAFTA overall, but the USMCA specifically replaced the old investor-State dispute settlement regime of the NAFTA with a new regime, one that Canada chose not to join. The new USMCA regime is narrower than the one in Chapter 11 of the NAFTA, with express limitations not included in the NAFTA.[63]

62. The U.S. interpretation of Annex 14-C is consistent with the object and purpose of the USMCA because it ensures that investor claims based on allegedly wrongful conduct occurring after the USMCA's entry into force will be governed by the USMCA's new substantive obligations and circumscribed dispute settlement regime. Accordingly, it confines legacy investment claims,

[62] RICHARD K. GARDINER, TREATY INTERPRETATION 213, 218 (2d ed. 2015) **(RL-060)** (noting that while the preamble is a source of guidance on the object and purpose of a treaty, both the Vienna Convention and practice make it clear that an interpreter needs to take into account the whole treaty).
[63] *See supra* ¶ 30 & n.27.

which are governed by the NAFTA's substantive obligations, to conduct occurring prior to the USMCA's entry into force. Claimants' interpretation of Annex 14-C would, on the other hand, effectively delay the implementation of the USMCA's new regime for three years, maintaining significant parts of the NAFTA in force. This is hardly consistent with the USMCA Parties' stated purpose that the USMCA "replace" and "supersede" the NAFTA upon its entry into force.[64]

63. Claimants argue that the Preamble supports their interpretation of Annex 14-C, but they ignore the part of the Preamble that is unfavorable to their theory.[65] In support, Claimants quote a few general principles stated in the Preamble indicating a desire to promote clarity, transparency, and predictability in the "legal and commercial framework."[66] None of these broad, aspirational phrases even remotely suggests an intent by the USMCA Parties to extend the substantive obligations of the NAFTA beyond its termination. To the contrary, the Preamble explicitly states that the USMCA was intended to replace the NAFTA. Indeed, 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.

64. There is nothing unclear, nontransparent, or unpredictable about the United States' interpretation of Annex 14-C. In the absence of a survival clause in the NAFTA, there was no expectation that investors would be able to bring an investor-State arbitration under Chapter 11 of

[64] Ascensio Report ¶ 30 ("If the claimants' interpretation were to be followed, it would mean that, during a period of three years after the entry into force of USMCA, the NAFTA chapter relating to investment would not be replaced by the USMCA, but would continue to apply as it stands, in terms of both substance and dispute settlement. This would also result in a three-year overlap with the substantive provisions of USMCA Chapter 14 for investments existing at the time of the entry into force of the Protocol.").
[65] Claimants' Observations on Bifurcation ¶ 35; Claimants' Rejoinder on Bifurcation ¶ 12.
[66] Claimants' Observations on Bifurcation ¶ 36; Claimants' Rejoinder on Bifurcation ¶ 18.

the NAFTA following its termination.[67] As explained above, the object and purpose of the USMCA was to terminate the NAFTA and replace it with a new agreement that included a new investor-State dispute settlement regime. Accordingly, Annex 14-C provided holders of legacy investments three additional years following the NAFTA's termination to submit claims to arbitration based *only* on breaches that occurred while the NAFTA was in force.

B. Resort to Supplementary Means of Interpretation Is Unnecessary but, in Any Event, Confirms the U.S. Position

65. Article 32 of the Vienna Convention provides that "[r]ecourse *may* be had" to supplementary means of interpretation "to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[68] Because the application of Article 31 to Annex 14-C unambiguously establishes that it does not extend the application of the NAFTA's substantive investment obligations beyond the NAFTA's termination, and because there is nothing manifestly absurd or unreasonable about this choice of the USMCA Parties, there is no need for the Tribunal to consider supplementary means of interpretation.[69]

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[67] *See, e.g.*, Sidley Conference Invitation, USMCA – What Does NAFTA 2.0 Mean for Investor Protection in North America and Beyond? (Oct. 2018), https://www.sidley.com/en/insights/events/2018/10/usmca-what-does-nafta-2-0-mean-for-investor-protection-in-north-america-and-beyond **(R-0005)** ("If USMCA is implemented, investor-state arbitration to enforce key investor protections will be eliminated for U.S.-Canada investors and significantly restricted for U.S.-Mexico investors."); Sidley Cross-Border Energy Update, Keys to Success in Cross-Border Energy Trade (Nov. 2019), https://www.sidley.com/-/media/publications/keys-to-success-in-crossborder-energy-trade.pdf **(R-0006)** ("Currently, under NAFTA, you can bring cases in arbitration – what is generally called investor-state dispute settlement or ISDS – and that has been significantly cut back. There are provisions in the USMCA that will extend it for certain types of energy investments, but perhaps not all, and it's pretty circumscribed, so that's a real loss for our client base.").

[68] Vienna Convention on the Law of Treaties, art. 32 **(RL-016)** (emphasis added).

[69] Gardiner Report ¶ F.3 ("[T]here is nothing in the interpretative process to suggest an outcome that leaves the meaning [of Annex 14-C] ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Hence, no requirement arises to seek to determine the meaning from supplementary means of interpretation."). *See also Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶ 79 (Dec. 8, 2008) **(RL-055)**

66. Nevertheless, should the Tribunal have recourse to supplementary means in order "to confirm the meaning resulting from the application of article 31," the supplementary means before the Tribunal either confirm the interpretation set out in the preceding section or are of little help in the interpretive process. Below, the United States discusses three categories of documents outside the four corners of the USMCA that could be taken into account as supplementary means of interpretation: **(1)** relevant NAFTA provisions and their relationship to the provisions of Annex 14-C; **(2)** the USMCA Parties' past practice with respect to treaties other than the NAFTA; and **(3)** statements of current or former officials of the USMCA Parties.

1) Annex 14-C's Text Mirrors NAFTA Provisions That Relate to the Consent to Arbitration, Not the Imposition of Substantive Investment Obligations

67. Chapter 11 of the NAFTA provides a useful comparator in analyzing the terms of Annex 14-C. Two points, in particular, are worth emphasizing. *First*, Paragraphs 1 and 2 of Annex 14-C closely resemble NAFTA Articles 1116(1)/1117(1) and 1122, which concern the NAFTA Parties' consent to arbitration. This is illustrated in the color-coded table below, which shows the similarities between the two sets of provisions. In the table below, the green text in the USMCA Annex 14-C column derives from NAFTA Article 1122(1), the blue text derives from NAFTA Articles 1116/1117, and the orange text derives from NAFTA Article 1122(2).

("Judgments of international tribunals (the PCIJ and ICJ) contain pronouncements to the effect that where the ordinary meaning of words (the text) is clear and they make sense in the context, there is no occasion at all to have recourse to other means of interpretation."); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, 2002 I.C.J. 624, 652-53, ¶¶ 52-53 (Dec. 17) **(RL-061)** (after expressing the Court's conclusion on the interpretation of the text at issue "when read in context and in the light of the [treaty's] object and purpose," explaining that "the Court does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the [treaty] and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention") (citations omitted); *Conditions of Admission of a State to Membership in the United Nations*, 1948 I.C.J. 57, 63 (May 28) **(RL-062)** ("The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.").

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.[70] **Article 1116**[71] **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), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.	**1.** Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994; (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.
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; (b) Article II of the New York Convention for an agreement in writing; and (c) Article I of the InterAmerican Convention for an agreement.	**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) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; (b) Article II of the New York Convention for an "agreement in writing"; and (c) Article I of the Inter-American Convention for an "agreement".

[70] The "procedures set out in this Agreement" are those contained in Section B of NAFTA Chapter 11. NAFTA, Chapter 11, Section B **(C-0001)**.

[71] Article 1117(1) is, in relevant part, nearly identical to Article 1116(1), except that it addresses the submission of a claim by "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." NAFTA, art. 1117(1) **(C-0001)**.

68. NAFTA Articles 1116(1)/1117(1) and 1122 are part of the investor-State dispute resolution framework established in Section B of NAFTA Chapter 11, and are not part of the substantive obligations detailed in NAFTA Chapter 11, Section A. Article 1122 provides the NAFTA Parties' consent to arbitration and Articles 1116(1) and 1117(1) specify the types of claims that an investor may submit pursuant to this consent. Self-evidently, these articles impose no substantive investment obligations on the NAFTA Parties.

69. Accepting Claimants' interpretation of Annex 14-C would require the Tribunal to conclude that the terms of NAFTA Articles 1116(1)/1117(1) and 1122, when transposed with minor modifications into Annex 14-C, took on a wholly new function beyond the one that they performed in the NAFTA. According to Claimants, these terms not only set the scope of the Parties' consent but also embody an agreement to extend the NAFTA's substantive investment obligations for three years beyond termination. Claimants have not, however, identified any additional text that would account for this supplemental functionality, nor can they. To the contrary, as the above table shows, the changes are minor and none of the new text could be read to embody an agreement to extend the obligations in Section A of NAFTA Chapter 11.

70. The *second* point of similarity between NAFTA Articles 1116(2) and 1117(2) and Annex 14-C relates to the length of the USMCA Parties' consent to arbitration of legacy investment claims, which Paragraph 3 of Annex 14-C specifies shall last three years. This corresponds to the limitations period set out in NAFTA Articles 1116(2) and 1117(2), which provide that an investor may not make a claim "if more than *three years* have elapsed from the date on which the [investor/enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the [investor/enterprise] has incurred loss or damage."[72] Accordingly, under

[72] NAFTA, arts. 1116(2) & 1117(2) **(C-0001)** (emphasis added).

Paragraph 3 of Annex 14-C, investors who have claims based on pre-termination breaches receive 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 (*e.g.*, on June 30, 2020).[73] In essence, Annex 14-C did nothing more than preserve the three-year claims limitation period in NAFTA Chapter 11 for most investors.

71. The relationship between Annex 14-C and relevant provisions in Section B of NAFTA Chapter 11 further confirms that the USMCA Parties did not agree in Annex 14-C to the extension of the NAFTA's substantive investment obligations. Rather, Annex 14-C merely 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.

2) Annex 14-C Does Not Contain the Language That the USMCA Parties Have Previously Used to Prolong the Obligations of a Terminated Treaty

72. Beyond the NAFTA, which was the USMCA's direct antecedent, the USMCA Parties' past treaty practice also confirms the meaning of Annex 14-C reached under Article 31 of the Vienna Convention. This practice discloses how the USMCA Parties draft language to

[73] In their bifurcation briefs, Claimants complained that the three-year period in Annex 14-C does not conform in all respects to the three-year period that investors would have had under NAFTA Articles 1116(2) and 1117(2) because it does not account for the possibility that an investor may not learn about the loss or damage incurred as a result of an alleged breach until sometime after the breach has occurred. *See* Claimants' Observations on Bifurcation ¶¶ 41-43; Claimants' Rejoinder on Bifurcation ¶ 29. The United States has explained the impracticality of addressing this specific scenario, which would require an effectively indefinite extension of the USMCA Parties' consent to arbitration with respect to legacy investment claims. Reply to Claimants' Observations on the Request for Bifurcation of Respondent United States of America ¶ 36 n.34 (Mar. 2, 2023) ("U.S. Reply on Bifurcation"). In any event, the alignment between the three-year period covered by Annex 14-C and NAFTA Articles 1116(2) and 1117(2) need not be perfect to support the U.S. interpretation of the Annex. Claimants have also suggested that the use of three-year "transition periods" in other agreements that replaced legacy bilateral investment treaties lacking limitations periods, or containing limitations periods of different lengths, undermines U.S. reliance on the correspondence between Annex 14-C and NAFTA Articles 1116(2) and 1117(2). *See* Claimants' Rejoinder on Bifurcation ¶ 30. But these other agreements are irrelevant (indeed, the majority do not even involve a USMCA Party). The 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.

memorialize an agreement that a treaty's provisions will apply for some period after the treaty has been terminated. The absence of any language in Annex 14-C similar to what the USMCA Parties have previously drafted for this purpose supports the conclusion that the Parties did not intend for Annex 14-C to have this effect with respect to the NAFTA's substantive investment obligations.

73. Each of the USMCA Parties' model bilateral investment treaties ("BITs") contains language that extends the application of the BIT's obligations for a specified period after its termination. For example, the U.S. Model BIT achieves post-termination survival in a single clear sentence:

> 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.[74]

74. This provision extends the substantive obligations in the terminated treaty for a period of ten years past termination. The Canadian and Mexican models use similar language for the same purpose.[75]

75. These model treaties show that the USMCA Parties had readily available language that could, with minor modifications, have been used to memorialize an agreement to extend the

[74] 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) **(RL-017)** (emphasis added); *see also* 2004 U.S. Model Bilateral Investment Treaty, art. 22(3) **(RL-018)** ("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.").

[75] 2021 Canada Model Agreement for the Promotion and Protection of Investments, art. 57(4) **(RL-019)** ("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."); 2014 Canada Model Agreement for the Promotion and Protection of Investments, art. 42(4) **(RL-020)** ("In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, Articles 1 to 41 inclusive, as well as paragraphs 1 and 2 of this Article, shall remain in force for a period of 15 years."); 2004 Canada Model Agreement for the Promotion and Protection of Investments, art. 52(3) **(RL-021)** ("In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles 1 to 51 inclusive, as well as paragraphs (1) and (2) of this Article, shall remain in force for a period of fifteen years."); 2008 Mexican Model of Investment Promotion and Protection Agreement, art. 30(4) **(RL-022)** ("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.").

application of the NAFTA's substantive investment obligations beyond the termination of the agreement. The USMCA Parties could have included, either in Annex 14-C or Article 34.1, a statement such as: "Section A of Chapter 11 (Investment) of NAFTA 1994 *shall continue to apply* to legacy investments . . . ." Fatally for Claimants' claims, however, the Parties did not include this or similar language in the USMCA.[76]

76. Also relevant are examples (which Claimants themselves raised in their bifurcation briefing)[77] in which the United States and its counterparty chose *not* to terminate a legacy BIT despite the entry into force of a new free trade agreement between them. For instance, the United States did not terminate BITs with Morocco and Panama after entering into free trade agreements with both States. The United States likewise left its BIT with Honduras in force after both States became parties to the CAFTA-DR. Rather than terminate the legacy BITs in each of these examples, the State Parties suspended their dispute resolution provisions, subject to express exceptions allowing investors to continue submitting claims to arbitration under the BIT for ten years based on preexisting investments or disputes.[78] The substantive obligations under the BIT, which was not terminated, therefore remained in force despite the later free trade agreement. This arrangement allowed claimants with qualifying investments to submit claims to arbitration for alleged breaches of the BIT both pre- *and* post-dating the entry into force of the subsequent free trade agreement.

[76] As noted above, the USMCA Parties included similar language in Article 34.1 with respect to NAFTA Chapter 19, but not with respect to NAFTA Chapter 11. *See supra* ¶¶ 59-60.
[77] *See* Claimants' Observations on Bifurcation ¶ 34 n.59.
[78] United States-Morocco Free Trade Agreement, U.S.-Morocco, arts. 1.2(1), 1.2(4), June 15, 2004 **(CL-049)**; United States-Panama Trade Promotion Agreement, U.S.-Pan., arts. 1.3(1), 1.3(3), June 28, 2007 **(RL-063)**; 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 **(CL-048)**; Dominican Republic-Central America-United States Free Trade Agreement, art. 1.3(1), Aug. 5, 2004 **(RL-044)**.

77. The approach that the United States took with respect to the Morocco, Panama, and Honduras BITs therefore demonstrates another avenue that would have been available to the USMCA Parties if they had wanted the NAFTA's substantive investment obligations to remain in force after entering into the USMCA. Rather than adopt this approach, the USMCA Parties terminated the NAFTA. This contrast further confirms that Annex 14-C does not allow claims based on conduct postdating the USMCA's entry into force.

78. In their bifurcation briefs, Claimants highlighted four other past treaties involving either Canada or Mexico, each of which replaced a legacy BIT with a new agreement, as purported support for their interpretation of Annex 14-C. These treaties are not relevant to the interpretive issue before the Tribunal because they address a different legal situation. Claimants rely on these treaties because they include express language limiting claims under the legacy BITs to alleged breaches occurring before the new agreement entered in force. Claimants suggest that, if the USMCA Parties had wanted to limit the NAFTA claims that could be submitted to arbitration under Annex 14-C in the same way, they could have included similar language. But Claimants' argument skips a critical step: the type of express limitation that is found in Claimants' examples is only necessary where the treaty parties have included language, whether in the legacy BIT or in the new agreement, that would otherwise result in the legacy BIT's substantive obligations continuing to bind them post-termination. The NAFTA, however, included no survival clause, and the USMCA Parties included no language in Annex 14-C binding them to continue applying the NAFTA's substantive investment obligations. Accordingly, the absence of an express temporal limitation of the type that appears in Claimants' examples tells the Tribunal nothing.

79. Unlike the NAFTA, each of the legacy BITs at issue in Claimants' examples contained a survival clause providing that the BIT's provisions would remain in force for between 10 and 20

years following termination, with respect to investments (or, in some cases, commitments to invest) made prior to the date of termination.[79] In drafting language to address the transition from the legacy BIT to the new agreement, Canada, Mexico, and their counterparties were therefore operating under a different set of default conditions. Rather than releasing the Parties from any obligation further to perform the legacy BITs, as in the case of the NAFTA, termination would by default have resulted in a lengthy period of overlap, during which both the legacy BIT and the new agreement would continue to apply. The parties to these treaties therefore chose to eliminate the period of overlap through language in the later treaty – which was unnecessary for the NAFTA.

80. In addition to survival clauses in the legacy BITs, three of Claimants' examples also included language in the new agreement that would, standing alone, have confirmed the ongoing applicability of the legacy BITs' substantive obligations.[80] Beginning with the Canada-Peru and

[79] *See* Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru, art. 52(3), Nov. 14, 2006, U.N.T.S. No. 55972 **(RL-034)**; Treaty Between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments, Can.-Pan., art. XVIII(2), Sep. 12, 1996, 3080 U.N.T.S. 379 **(RL-035)**; Agreement Between the Government of the United Mexican States and the Government of Australia on the Promotion and Reciprocal Protection of Investments, Austl.-Mex., art. 24(3), Aug. 23, 2005, 2483 U.N.T.S. 247 **(RL-036)**; Agreement Between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments, art. XV(4), Can.-Croat., Feb. 3, 1997, 3087 U.N.T.S. 261 **(RL-037)**; Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments, Can.-Czech, art. XV(8), May 6, 2009, U.N.T.S. No. 53345 **(RL-038)**; Agreement Between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, Can.-Hung., art. XIV(3), Oct. 3, 1991, 3068 U.N.T.S. 313 **(RL-039)**; Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, Can.-Lat., art. XVIII(7), May 5, 2009, U.N.T.S. No. 53591 **(RL-040)**; Agreement Between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, Can.-Pol., art. XIV, Apr. 6, 1990, U.N.T.S. No. 52655 **(RL-041)**; Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, Can.-Rom., art. XVIII(7), May 8, 2009, U.N.T.S. No. 53574 **(RL-042)**; Agreement Between the Slovak Republic and Canada for the Promotion and Protection of Investments, Can.-Slovk., art. XV(7), July 20, 2010, 2817 U.N.T.S. 57 **(RL-043)**.

[80] Claimants' fourth example is the Canada-European Union Comprehensive Economic and Trade Agreement ("CETA"). *See* Claimants' Rejoinder on Bifurcation ¶¶ 55-56. As noted, the legacy BITs terminated by the CETA all had survival clauses. Claimants assert that CETA Article 30.8(1)'s termination of the legacy BITs abrogated their survival clauses and that, as a result, there should have been no need to limit the claims that could have been brought under these BITs to situations in which "the treatment that is object of the claim was accorded when the agreement was not terminated." CETA art. 30.8(2)(a) **(CL-037)**. Even 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. The point

Canada-Panama Free Trade Agreements, both suspended a preexisting BIT subject to the following caveat: "*the [BIT] shall remain operative for a period of fifteen years* after the entry into force of this Agreement for the purpose of any breach of the obligations of the [BIT] that occurred before the entry into force of this Agreement."[81] As this excerpt shows, the temporal limitation on claims under the legacy BIT followed language stating that the BIT "shall remain operative" for a specified period.[82] In light of this broad language providing for the continued operation of each legacy BIT, an express limitation was required to ensure that investors would only be able to bring claims based on alleged breaches occurring before the BIT's suspension. In the absence of such language, the continued operation of the BIT would permit the submission of claims based on both pre- and post-suspension breaches.

81. The language in the Mexico-Australia side letter regarding the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is similar and is irrelevant for the same reason. The side letter provides that "*[t]he [BIT] shall 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 Agreement . . . with respect to any act or fact that took place or any situation that

remains that the CETA Parties drafted Article 30.8 against the background of legacy agreements that contained survival clauses. As a result, it has little relevance to the interpretation of Annex 14-C, which was negotiated to replace an agreement (the NAFTA) that did not. 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. What Claimants must establish for their interpretation of Annex 14-C to prevail is that the USMCA Parties agreed to bind themselves to apply the NAFTA's substantive investment obligations for a period after the NAFTA's termination. The CETA Parties did not include any such agreement in Article 30.8 with respect to the obligations in the relevant legacy BITs and so a comparison of the text of that Article with Annex 14-C shows only that it is absent from both.

[81] Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, art. 845(2), May 29, 2008 **(CL-035)** (emphasis added); *see also* Free Trade Agreement Between Canada and the Republic of Panama, Can.-Pan., art. 9.38(2), May 14, 2010 **(CL-036)** (same).

[82] Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, art. 845(2), May 29, 2008 **(CL-035)** (emphasis added). *See also* Free Trade Agreement Between Canada and the Republic of Panama, Can.-Pan., art. 9.38(2), May 14, 2010 **(CL-036)** (same).

existed before the date of termination."[83] While the temporal limitation is present here, it is again necessitated by a broad statement that the legacy BIT "shall continue to apply"[84] for a specified period after the new agreement's entry into force.

82. Neither Annex 14-C nor any other part of the USMCA, however, includes language specifying that the NAFTA's substantive investment obligations "shall remain operative" or "shall continue to apply" for any period. There was, accordingly, no need for an express temporal limitation on the claims for breach of the NAFTA that could be asserted under Annex 14-C because such claims are inherently limited to the period when the NAFTA was in force.[85]

83. For the foregoing reasons, relevant past treaty practice of the USMCA Parties confirms that Annex 14-C does not contain an agreement to extend the application of the NAFTA's substantive investment obligations after its termination.

3) Statements by Current or Former Officials of the USMCA Parties Do Not Support Claimants' Position

84. Claimants have identified several statements by current and former officials regarding the USMCA that, in Claimants' view, support their reading of Annex 14-C. These statements, however, provide little insight on the interpretive question before the Tribunal, which again is whether the USMCA Parties bound themselves to apply the NAFTA's substantive investment obligations after its termination. Many of the statements are vague and none expressly address this question, let alone provide a considered analysis that could be persuasive to the Tribunal.

[83] 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) **(CL-038)** (emphasis added).
[84] *Id*.
[85] *See, e.g., supra* ¶¶ 11-13.

85. As the United States explained during the bifurcation phase, the statements that Claimants have identified are notable primarily because they do not 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.[86] Claimants do not dispute this but argue that the statements imply that such claims would be viable.[87] Claimants are, in many cases, wrong about the implications to be drawn from the statements that they have identified. For example, the various references to submitting "NAFTA claims"[88] or "claim[s] for a breach of the investment obligations under the NAFTA"[89] during the period covered by Annex 14-C provide no help to the Tribunal. Both Claimants and the United States agree that Annex 14-C permits the submission of NAFTA claims – the dispute is whether "NAFTA claims" are limited to those that arose from breaches that occurred while the NAFTA was still in force, or whether the USMCA Parties agreed to the extended application of the NAFTA's substantive investment obligations such that they could continue to be breached despite the NAFTA's termination. In any event, this evidence is of no value for the Tribunal's interpretive exercise.

86. Claimants draw particular attention to a WilmerHale client alert listing a former employee of the Office of the U.S. Trade Representative ("USTR") as one of four "contributors."[90] The client alert suggests that Annex 14-C might be used to challenge a Mexican electricity law enacted after the USMCA entered into force. The relevance of a law firm "client alert" issued roughly two

[86] U.S. Reply on Bifurcation ¶ 38.
[87] Claimants' Rejoinder on Bifurcation ¶ 20.
[88] U.S. Department of State, "2021 Investment Climate Statements: Canada" **(C-093)**.
[89] Michelle Hoffman, "Canada-United States-Mexico Agreement," The Canadian Bar Association (Feb. 1, 2019) **(C-103)**. *See also* Global Affairs Canada, "The Canada-United States-Mexico Agreement: Economic Impact Assessment" (Feb. 26, 2020) **(C-097)**.
[90] 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) **(C-102)**.

years after the USTR negotiator left government service could only be minimal at best.[91] 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: "WilmerHale stands ready to assist clients with respect to dispute settlement options under the USMCA and other trade and investment agreements with respect to Mexico's amended Electricity Industry Law."[92] Moreover, the client alert does not explain the legal basis in the text of Annex 14-C for the views that it contains. It merely asserts these views. The WilmerHale client alert cannot, therefore, assist the Tribunal in its interpretation of Annex 14-C.

87. Claimants' argument also ignores other public statements by officials of the USMCA Parties that do not fit their narrative. For example, the Deputy Prime Minister of Canada, Chrystia Freeland, issued a statement on the USMCA's entry into force explaining that the new agreement "*removes* the investor-state dispute resolution system, which has allowed large corporations to sue the Canadian government for regulating in the public interest. Known as ISDS, this has cost Canadian taxpayers more than $275 million in penalties and legal fees."[93] This echoed earlier statements by Ms. Freeland – who was Minister of Foreign Affairs during negotiation of the USMCA – including in an October 19, 2018 op-ed:

> Perhaps one of the achievements I'm most proud of is that the investor-state dispute resolution system, which in the past allowed foreign companies to sue Canada, *will be gone*. This means that Canada can make its own rules, about public health and safety, for

[91] Lauren Mandell, LinkedIn Profile (last visited May 15, 2023) **(R-0007)** (indicating Mr. Mandell departed USTR in May 2019).
[92] 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) **(C-102)**. *See also id.* ("Many observers believe the law may . . . violate Mexico's commitments under international trade and investment agreements, including the United States-Mexico-Canada Agreement (USMCA) . . . .").
[93] Statement by the Deputy Prime Minister on the entry-into-force of the new NAFTA, at 2 (June 30, 2020) **(R-0008)** (emphasis added).

> example, without the risk of being sued by foreign corporations. Known as ISDS, this provision has cost Canadian taxpayers more than $300 million in penalties and legal fees.[94]

88. Unlike the statements in the WilmerHale client alert that Claimants attribute to the former USTR negotiator, Ms. Freeland's statements were made in her official capacity, shortly after the USMCA negotiations concluded. Ms. Freeland made no reference to investors' continued ability to hold Canada to the NAFTA's substantive investment obligations for three years after its termination. To the contrary, she was unequivocal that Canada would be free of "the risk of being sued by foreign corporations" for actions taken after the USMCA entered into force.

89. Ms. Freeland's description of the USMCA's ISDS provisions mirrors statements made by Mexican officials in their official capacities. For example, the Undersecretary for North America in Mexico's foreign ministry put out a factsheet stating: "It was agreed that the **Investor-State Dispute Settlement** mechanism [under the USMCA] will **not apply to Canada**."[95] Again, there was no qualification suggesting that the NAFTA's substantive investment obligations would continue to bind Canada for an additional three years. More recently, Mexico has expressed a consistent view of Annex 14-C in *Legacy Vulcan v. Mexico*, where claimants submitted an ancillary claim based on an alleged breach that occurred almost two years after the NAFTA's termination. Mexico objected to the tribunal's jurisdiction over the ancillary claim noting that Annex 14-C "grants investors a three-year period to claim a breach of the NAFTA that occurred before the NAFTA was terminated . . . [it] does not extend the protections of Section A of Chapter

[94] *Chrystia Freeland says the new trade deal prevented possible widespread economic disruption*, Canada's National Observer (Oct. 19, 2018) **(R-0009)** (emphasis added). *See also* Deputy Prime Minister letter to party leaders regarding the new NAFTA (Jan. 26, 2020) **(R-0010)** ("The investor-state dispute resolution system – which has allowed large corporations to sue the Canadian government for regulating in the public interest – *is now gone.* Known as ISDS, this has cost Canadian taxpayers more than $275 million in penalties and legal fees.") (emphasis added).

[95] Secretaría de Relaciones Exteriores, United States – Mexico – Canada Agreement (USMCA): Investment and Investor-State Dispute Settlement Mechanism (emphases in original) **(R-0011)**.

XI of the NAFTA for an additional three years."[96] Mexico also indicated that the "USMCA Parties did not consent to allow NAFTA claims to be based on measures subsequent to the entry into force of the USMCA."[97]

90. The Canadian and Mexican understanding of how the USMCA curtailed ISDS coincides with the skeptical views of ISDS held by the lead U.S. negotiator of the USMCA, the U.S. Trade Representative Robert Lighthizer. Prior to, during, and after the negotiations, Ambassador Lighthizer made his concerns about ISDS known. During a March 2017 hearing, Ambassador Lighthizer stated that ISDS was "troubling to me on a variety of issues and on a variety of levels."[98] Ambassador Lighthizer expanded on these views during a March 2018 hearing, in the midst of the USMCA negotiations:

> We are skeptical about ISDS for a variety of reasons, which I would like to go into if I have a second to do it. Number one, on the U.S. side there are questions of sovereignty. Why should a foreign national be able to come in and not have the rights of Americans in the American court system but have more rights than Americans have in the American court system? It doesn't strike me -- it strikes me as something . . . at least we ought to at least be skeptical of and analyze. . . . On the outgoing side there are many people who believe that in some circumstances, and I can discuss the varieties of them, in some circumstances it's more of an outsourcing issue.[99]

91. Finally, after the USMCA negotiations were completed, Ambassador Lighthizer addressed several questions on ISDS during a June 2019 hearing, during which he reiterated his view that

[96] *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Mexico's Counter-Memorial on the Ancillary Claim (Dec. 19, 2022), ¶ 409 (English free translation) ("otorga a los inversionistas un periodo de tres años para reclamar un incumplimiento del TLCAN que haya ocurrido antes de que el TLCAN fuera terminado . . . no extiende las protecciones de la Sección A del Capítulo XI del TLCAN por otros tres años adicionales") (Spanish original) **(RL-064)**.
[97] *Id.*, ¶ 414 (English free translation) ("Partes del T-MEC no dieron su consentimiento para permitir que reclamaciones del TLCAN se basen en medidas posteriores a la entrada en vigor del T-MEC.") (Spanish original).
[98] President's Trade Policy Agenda and Fiscal Year 2018 Budget, Hearing Before the Senate Committee on Finance, S. Hrg. 115–247, at 21 (June 21, 2017) **(R-0012)**.
[99] U.S. Trade Policy Agenda, Hearing Before the House Committee on Ways & Means, Serial No. 11-FC08, at 19-20 (Mar. 21, 2018) **(R-0013)**.

ISDS leads to outsourcing.[100] While specifically discussing the "changes in ISDS" under Annex 14-D[101] and Annex 14-E,[102] which Ambassador Lighthizer argued "improved the situation" from the perspective of those who are opposed to ISDS,[103] he never suggested that investors could, under Annex 14-C, continue to rely on the NAFTA's broader ISDS framework for recourse against the USMCA Parties based on actions taken after the USMCA entered into force.

92. As the foregoing demonstrates, statements by current or former officials of the USMCA Parties do not support Claimants' position.

III. Conclusion

93. Annex 14-C does not include an express agreement to extend the NAFTA's substantive investment obligations past its termination. Nor can it be read to have provided such an extension implicitly. The sole interpretive question before the Tribunal must, accordingly, be resolved in favor of the United States.

94. The consequences of that conclusion are clear. The NAFTA's termination released the United States and the other NAFTA Parties from any further obligations under its substantive provisions. The United States was therefore not bound by the NAFTA's substantive investment obligations when President Biden revoked the permit for the Keystone XL pipeline on January 20, 2021. As a result, the permit revocation cannot have breached the NAFTA's substantive investment obligations. Claimants' claims based on the permit revocation accordingly are outside

[100] 2019 Trade Policy Agenda: Negotiations with China, Japan, the EU, and UK; new NAFTA/USMCA; U.S. Participation in the WTO; and other matters, Hearing Before the House Committee on Ways & Means, Serial No. 116-27, at 85 (June 19, 2019) **(R-0014)**.
[101] *Id.* at 61.
[102] Asked about a "loophole whereas U.S. oil and gas, for example, this particular industry, can still contractually sue the Mexican government," Mr. Lighthizer responded: "If you say, 'How would I distinguish the oil and gas industry from other industries,' I would say it's, to me, that allowing ISDS that would incentivize moving a factory to Mexico is something that I think is a mistake and is bad, as in a subsidy, but that doesn't apply to a natural resource where the industry has to go there." *Id.* 85-86.
[103] *Id.* at 86.

the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C, which is limited to claims for breach of specified NAFTA obligations.

95. In light of the above, the United States respectfully requests the Tribunal to conclude that it lacks jurisdiction over Claimants' claims and to dismiss them in their entirety.[104]

Respectfully submitted,

[Signed]

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[104] The United States' bifurcated jurisdictional objection is without prejudice to other jurisdictional objections or defenses that the United States may raise in other phases of this arbitration.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED

v.

UNITED STATES OF AMERICA

(ICSID Case No. ARB/21/63)

EXPERT REPORT OF PROFESSOR RICHARD GARDINER

Report on the Interpretation of Annex 14-C to the Agreement between the United States of America, the United Mexican States, and Canada attached to the Protocol signed at Buenos Aires, 30 November, 2018 ("USMCA")

Preliminary Statement

The U.S. Department of State has requested a Report in connection with the proceedings before the Tribunal for the jurisdictional phase of the arbitration. My Report focuses on the interpretation of certain provisions of the USMCA, in particular Annex 14-C and the consent expressed in such provisions in light of the jurisdictional issues presented in this proceeding. To this end, I have reviewed documents in the public domain, including:

- The North American Free Trade Agreement
- The Agreement Between the United States of America, the United Mexican States, and Canada
- Request for Bifurcation of Respondent United States of America
- Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection
- Reply to Claimants' Observations on the Request for Bifurcation of Respondent United States of America
- Claimants' Rejoinder regarding Respondent's Request for Bifurcation

I have had no previous relationship with or interest in any of the parties to this arbitration, nor do I have a connection to the matters in dispute.

My Report represents my true professional assessment of the matters to which it refers based on my academic research and on experience in the application of international law.

Statement of Qualifications

I have a degree in law from Oxford University and a Masters degree from London University where my studies included specialist international law areas. I was an assistant legal adviser at the Foreign and Commonwealth Office for some twelve years. For the next twenty years I was lecturer, then senior lecturer, at University College London. I am now an Honorary Professor at University College London. I have written and contributed to many books and articles on international law topics and in other areas of law. My book *Treaty Interpretation*, published by Oxford University Press, is now in its second edition.

A copy of my *curriculum vitae* is appended at the end of this Report.

A. Introduction

The Issue

A.1 The difference between the parties in this arbitration is over the interpretation and application of Annex 14-C to the USMCA which is itself attached as an annex to The Protocol ['the Protocol'] Replacing the North American Free Trade Agreement ['NAFTA'] with the Agreement Between the United States of America, the United Mexican States, and Canada, signed at Buenos Aires, the 30th day of November, 2018 ['USMCA'].[1] The Protocol provides that upon its entry into force:

'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.'

A.2 The core issue is whether the consent to arbitration expressed in Annex 14-C to the USMCA is effective to establish the jurisdiction of an Arbitral Tribunal to entertain a dispute over matters occurring after the NAFTA was superseded.

The Treaty and Arbitration Matrix

A.3 A preambular paragraph to the USMCA states as its objective the resolve of the parties to:

> REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region;

That replacement took effect when the USMCA superseded the NAFTA on entry into force on 1 July 2020 but, in accordance with Article 1 of the Protocol, 'without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.'

A.4 The NAFTA and USMCA both include provisions setting up regimes for acceptance and treatment of investments made by investors of one party within the territory of another party. These are in Section A of Chapter 11 (Investment) of NAFTA 1994 and Chapter 14 of USMCA.

A.5 There is no provision in the USMCA expressly indicating that the NAFTA provisions regarding treatment of investments continued to have effect in respect of investments which continued in existence after the USMCA superseded the NAFTA regime. Had there been any such continuation it would have been necessary to include provisions indicating which investment treatment was to prevail in relation to acts or events at any particular time. Host states would otherwise have been in the position of having to apply two differing regimes to the same investment or make an unguided choice. No treaty provision in the Protocol or associated instruments suggests that this was contemplated or regulated.

A.6 The regime for treatment of investments was complemented under the NAFTA by a system for resolution of disputes between investor and host state, as is that under the USMCA. Provisions of both treaties follow generally well-recognised procedures for

[1] An amending Protocol of 10 December 2019 concerns matters not relevant to the present issues.

international arbitration. Such procedures include a strict requirement for consent to arbitration of disputes arising over interpretation or application of a particular treaty's provisions. Consent is typically given by treaty or ad hoc. Consent goes to the foundation of the constitution, jurisdiction and functioning of an arbitral tribunal. Such consent is an essential and prominent feature of arbitration over investment disputes. Consent underlies obligations relating to the arbitral process. In treaties, these obligations are typically in a set of provisions essentially distinct from the substantive provisions on treatment of investments. Thus provisions on consent are part of the law which governs the existence and functioning of an arbitral tribunal. The provisions on treatment of investments constitute the law to be applied by the tribunal (sometime specified to apply in conjunction with international law). Thus, the treaty structure of both the NAFTA and USMCA includes a body of substantive rules for treatment of investments and a body of jurisdictional and procedural rules for arbitration of disputes over the substantive rules.

The Interpretation Regime

A.7 The rules of the Vienna Convention on the Law of Treaties 1969 ('1969 Vienna Convention') apply.[2] These rules have been accepted internationally as stating the customary

[2] The rules are stated in Part III, Section 3 of the Convention 'Interpretation of Treaties', arts 31-33 **(RG-0001)**:

Article 31 General rule of interpretation

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(*c*) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(*a*) leaves the meaning ambiguous or obscure; or
(*b*) leads to a result which is manifestly absurd or unreasonable.

Article 33 Interpretation of treaties authenticated in two or more languages
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

international law rules for interpretation of treaties. Under these rules the starting point is the text. However, the general rule provides that it is the 'treaty' which is to be interpreted. Thus it is not solely the part of the text central to a dispute which is to be interpreted, but all parts of the treaty germane to the interpretation in issue. All the elements of the general rule of interpretation that are present in any instance need to be considered and drawn into the interpretative reasoning.

A.8 In the present case, therefore, analysis needs to identify the relevant parts of the treaties to identify the complete context. The terms of these texts must be examined to establish their ordinary meaning in their context and in the light of the object and purpose of the treaty. The context is to be ascertained as including the elements indicated in Article 31(2) of the 1969 Vienna Convention. Article 31(3) requires that account must also be taken of any agreements of the parties as to meaning subsequent to conclusion of the treaty or of practice amounting to such an agreement (if any), and of 'any relevant rules of international law applicable in the relations between the parties'. This latter part of the general rule envisages 'systemic interpretation'. This requires considering a treaty as part of international law, taking into consideration related international law obligations, including any other relevant treaties.

B. Treaty Texts

Material Provisions

B.1 The starting point for interpretation is identification of the relevant texts. The whole of the treaty (and other elements identified in the 1969 Vienna Convention, Article 31) is admissible as context but only those provisions necessary for establishing the relevant interpretation are identified here. Relevant texts include:

TEXT I

PROTOCOL REPLACING THE NORTH AMERICAN FREE TRADE AGREEMENT WITH THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA

The United States of America, the United Mexican States, and Canada (the "Parties"),

Having regard to the *North American Free Trade Agreement*, which entered into force on January 1, 1994 (the "NAFTA"),

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Having undertaken negotiations to amend the NAFTA pursuant to Article 2202 of the NAFTA that resulted in the Agreement between the United States of America, the United Mexican States, and Canada (the "USMCA");

HAVE AGREED as follows:

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.

2. Each Party shall notify the other Parties, in writing, once it has completed the internal procedures required for the entry into force of this Protocol. This Protocol and its Annex shall enter into force on the first day of the third month following the last notification.

3. Upon entry into force of this Protocol, the *North American Agreement on Labor Cooperation*, done at Mexico, Washington, and Ottawa on September 8, 9, 12, and 14, 1993 shall be terminated.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Protocol.

DONE at Buenos Aires, this 30th day of November, 2018, in triplicate, in the English, Spanish, and French languages, each text being equally authentic.[3]

TEXT II

CHAPTER 14 USMCA

Article 14.2: Scope

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) covered investments; and

(c) with respect to Article 14.10 (Performance Requirements) and Article 14.16 (Investment and Environmental, Health, Safety, and other Regulatory Objectives), all investments in the territory of that Party.

2. A Party's obligations under this Chapter apply to measures adopted or maintained by:

(a) the central, regional, or local governments or authorities of that Party; and

[3] The French and Spanish texts are not reproduced or reviewed here, the English text being used here following the presumption in the 1969 Vienna Convention, Article 33(3) that the terms of the treaty have the same meaning in each authentic text.

(b) a person, including a state enterprise or another body, when it exercises any governmental authority delegated to it by central, regional, or local governments or authorities of that Party.

3. 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.

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

[Footnotes omitted]

Article 14.1: Definitions

Article 14.3: Relation to Other Chapters

Article 14.4: National Treatment

Article 14.5: Most-Favored-Nation Treatment

Article 14.6: Minimum Standard of Treatment

Article 14.7: Treatment in Case of Armed Conflict or Civil Strife

Article 14.8: Expropriation and Compensation

Article 14.9: Transfers

Article 14.10: Performance Requirements

Article 14.11: Senior Management and Boards of Directors

Article 14.12: Non-Conforming Measures

Article 14.13: Special Formalities and Information Requirements

Article 14.14: Denial of Benefits

Article 14.15: Subrogation

Article 14.16: Investment and Environmental, Health, Safety, and other Regulatory Objectives

Article 14.17: Corporate Social Responsibility

[The texts of these provisions and of other elements of Chapter 14 are not reproduced here]

TEXT III

CHAPTER 34 USMCA

FINAL PROVISIONS

Article 34.1: Transitional Provision from NAFTA 1994

1. The Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement.

2. Issues under consideration, including documents or other work under development, by the Commission or a subsidiary body of NAFTA 1994 may be continued under any equivalent body in this Agreement, subject to any decision by the Parties on whether and in what manner that continuation is to occur.

3. Membership of the Committee established under Article 2022 of NAFTA 1994 may be maintained for the Committee under Article 31.22.4 (Alternative Dispute Resolution).

4. Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement.

5. With respect to the matters set out in paragraph 4, the Secretariat established under Article 30.6 of this Agreement shall perform the functions assigned to the NAFTA 1994 Secretariat under Chapter Nineteen of the NAFTA 1994 and under, for Chapter Nineteen, the domestic implementation procedures adopted by the Parties in connection therewith, until the binational panel has rendered a decision and a Notice of Completion of Panel Review has been issued by the Secretariat pursuant to the Rules of Procedure for Article 1904 Binational Panel Reviews.

6. With respect to claims for preferential tariff treatment made under NAFTA 1994, the Parties shall make appropriate arrangements to grant these claims in accordance with NAFTA 1994 after entry into force of this Agreement. The provisions of Chapter Five of NAFTA 1994 will continue to apply through those arrangements, but only to goods for which preferential tariff treatment was claimed in accordance with NAFTA 1994, and will remain applicable for the period provided for in Article 505 (Records) of that Agreement.

TEXT IV

ANNEX 14-C

LEGACY INVESTMENT CLAIMS AND PENDING CLAIMS

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

(a) Section A of Chapter 11 (Investment) of NAFTA 1994;

(b) Article 1503(2) (State Enterprises) of NAFTA 1994; and

(c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.[20, 21]

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) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

(b) Article II of the New York Convention for an "agreement in writing"; and

(c) Article I of the Inter-American Convention for an "agreement".

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

4. For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

[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.

[21] 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).

5. For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

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;

(b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994; and

(c) "ICSID Convention", "ICSID Additional Facility Rules", "New York Convention", and "Inter-American Convention" have the meanings accorded in Article 14.D.1 (Definitions).

ANNEX 14-E

MEXICO-UNITED STATES INVESTMENT DISPUTES RELATED TO COVERED GOVERNMENT CONTRACTS

1. Annex 14-D (Mexico-United States Investment Disputes) applies as modified by this Annex to the settlement of a qualifying investment dispute under this Chapter in the circumstances set out in paragraph 2.[29]

2. In the event that a disputing party considers that a qualifying investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under Annex 14-D (Mexico-United States Investment Disputes) a claim:

(i) that the respondent has breached any obligation under this Chapter,[30] provided that:

(A) the claimant is:

(1) a party to a covered government contract, or

(2) 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 covered government contract, and …

[Footnotes omitted. The Annex is not reproduced here in extenso]

C. Application of the General Rule for Interpretation of Treaties

Text I

C.1 This establishes that the provisions of the USMCA supersede the NAFTA, except to the extent and effect of references in the USMCA to provisions of the NAFTA. 'Supersede' has an ordinary meaning of displacing something by something else which takes its position.[4] The context indicates that the term is used here in regulating treaty relations. Thus the term 'supersede' in a treaty takes effect in accordance with the customary international law rules reflected in the 1969 Vienna Convention. These rules provide for a treaty to be considered terminated by being superseded by a later treaty on the same subject matter and by the expression of the intention of the parties to that effect.[5] The NAFTA was thus terminated by being superseded by the USMCA as indicated by the Protocol and with the limited transitional and continuation arrangements mentioned in the Protocol. The Protocol entered into force on 1 July 2020.

C.2 The phrase 'without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA' is to be read in conjunction with those provisions of the USMCA that do refer to the NAFTA. Such references in the USMCA indicate differing functions which are preserved by the "without prejudice" provision. There are no references to NAFTA in the Articles constituting Chapter 14 (Investment) of the USMCA. In Chapter 14 references to NAFTA are only present in its Annex 14-C.

Text II

C.3 This Chapter has the title 'Investment'. Its substantive provisions constitute a regime for treatment of investments. USMCA Article 14.2 sets out the scope of the Chapter principally in terms of personal scope (art 14.2 (1)(a): 'investors of another Party') and material scope (art 14.2 (1)(b): 'covered investments'). However, Article 14.2 para (3) touches on the temporal scope of the Chapter indicating (for greater certainty) that it does not create obligations 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 [the USMCA]' except to the extent of the provisions in Annex 14-C (Legacy Investment Claims and Pending Claims). Thus Annex 14-C is identified here as being an exception in relation to matters pre-dating the USMCA. This sets a basis for understanding Annex 14-C to relate to acts, facts or situations within the investment treatment regime in force under NAFTA, not that under USMCA.

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[4] Merriam-Webster.com Dictionary online offers the definitions **(RG-0002)**: "Supersede." '1 a: to cause to be set aside; b: to force out of use as inferior; 2: to take the place or position of; 3: to displace in favor of another.' <https://www.merriam-webster.com/dictionary/supersede> accessed 1 Jun. 2023.

[5] 1969 Vienna Convention, art 59 **(RG-0001)**:
'(1) 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 should be governed by that treaty; or
(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. …'

C.4 Articles 14.4 to 14.17 set out the USMCA regime for treatment of investments. This regime differs from that in Section A of Chapter 11 (Investment) of NAFTA both formally and substantively. The USMCA regime differs formally in that it is a regime having a different treaty basis from that of Section A of Chapter 11 of NAFTA. It differs substantively in that some texts of the NAFTA provisions are omitted, some different text is included in the USMCA, and some portions of text of the USMCA which are broadly similar to those of the NAFTA contain changed words or phrases. The effect of the formal and substantive differences between the two regimes is that the application of treaty provisions in respect of an investor and investment requires election between the two investment regimes as only one could properly and effectively apply to a given set of acts and events.

C.5 Further, in the USMCA treatment of investments regime there are several provisions included 'for greater certainty'. Such provisions in a treaty succeeding one in the same subject area 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.[6]

Text III

C.6 Article 34.1, a provision in the final clauses of the USMCA, sets out 'Transitional Provision from NAFTA 1994'. These are six paragraphs dealing with miscellaneous arrangements for the transition. They do not establish any uniform or prescribed period of transition. They allow for a small number of features of the NAFTA to continue to have effect after the entry into force of the USMCA introduced the superseding regime. They do not provide for the investment regime of NAFTA to continue to apply from the point at which it was superseded.

Text IV

C.7 Annex 14-C contains provisions within the category mentioned in the Protocol and in Article 14.2 USMCA (Scope) as referring to provisions of the NAFTA. The Annex contains provisions governing the Annex's material, temporal and personal scope. The central feature of the Annex is consent by the states parties to submission of certain claims to arbitration. The material scope is that such claims relate to a 'legacy investment' and allege breach of an obligation under the 'investment', 'state enterprise', or 'monopolies and state enterprise' regimes of the 1994 NAFTA.

C.8 Paragraph 1 of the Annex sets out the consent of the states parties, with respect to a legacy investment, to the submission of a claim to arbitration. The claim is to be submitted in accordance with Section B of Chapter 11 of NAFTA 1994 and the Annex. Section B of the

[6] An example of a 'for greater certainty' provision is USMCA Article 14.6, para 4:

> 'For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.'

NAFTA Chapter is the Section which deals with arbitration as a possible means of settlement of disputes. It includes in section 1122 the consent of the NAFTA states parties to submission of claims to arbitration.

C.9 The subject matter of any such arbitration is a claim alleging breach of an obligation under Section A (the investment regime) of Chapter 11 of NAFTA (or other provisions of the NAFTA not relevant here). The obligations potentially in issue are those which concerned the treatment of investors and investments while Section A was in force. Thus in the treaty structure of the NAFTA, Section B of Chapter 11 provides for the process of arbitration in which consent is an essential element for establishing the jurisdiction of an arbitral tribunal. Section A sets out the treaty obligations which form part of the law to be applied by any such arbitral tribunal. Thus consent in Section B is in a part of the treaty structure distinct from the regime of obligations on treatment of investors in Section A.

C.10 'Legacy investment' is defined by reference to material, personal and temporal elements. The material and personal elements are identified by reference to definitions of 'investment' and 'investor'. The temporal element is that the relevant investment must have been established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and been in existence on the date of entry into force of the USMCA, that is the date on which the USMCA rules for treatment of investments superseded those of the NAFTA.

C.11 Footnote 21 of Annex 14-C provides that consent is not granted for a legacy investment claim if a putative claimant is an investor that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E. No such exception is made in respect of potential claimants whose eligibility to submit claims to arbitration is regulated by Annex 14-D. Annex 14-E can be loosely described as concerned with arbitration of claims by investors having covered government contracts at a time when a claim could be submitted to arbitration if the investor were not excluded. The context in which the footnote is located might be thought to suggest that the note refers to exclusion of a particular putative legacy dispute. The wording clearly indicates otherwise. In the footnote's formulation the denial of consent is related to the 'investor' being 'eligible to submit claims' under Annex 14-E, not to any specific claim being the subject of a possible arbitration under Annex 14-E. Whether an investor is someone who would be eligible to submit claims under Annex 14-E is a matter for investigation of facts. There is nothing manifestly absurd or unreasonable in concluding that consent is not given for any legacy investment to be the subject of an arbitration where an investor is eligible to submit any claims to arbitration that would come within paragraph 2 of Annex 14-E.[7]

C.12 Paragraph 2 of Annex 14-C declares that the consent given in paragraph 1 is effective for specified arbitral purposes. This refers to other treaties on arbitration which make written consent, agreement in writing, or agreement a pre-requisite for their application in relation to

[7] The context may assist in identifying the ordinary meaning of terms used in a treaty. It cannot change the ordinary meaning when this is quite clear, nor allow an interpreter to adjust the wording of a treaty or to read into it words which are not there. Good faith does not permit this. Vattel states that 'When a deed is worded in clear and precise terms, when its meaning is evident, and leads to no absurdity, there is no ground for refusing to admit the meaning which the deed naturally presents.' E de Vattel, *The Law of Nations*, Book II, Chap XVII, of *The Interpretation on Treaties* (1758 edition, trans by C G Fenwick) (Washington DC: Carnegie Institution, 1916) at § 263 **(RG-0003)**.

an arbitration. These Conventions are identified through the definitions to which reference is made in paragraph 6(c) of Annex 14-C as: the 'ICSID Convention' Washington, 1965, and the associated Additional Facility Rules; the New York Convention on Foreign Arbitral Awards, New York, 1958; and the Inter-American Convention on International Commercial Arbitration, Panama, 1975.

C.13 Paragraph 3 of the Annex provides for the consent under paragraph 1 to expire three years after the termination of NAFTA 1994. Thus this consent continues for three years, the consent being to submission to arbitration of claims alleging breaches of Section A of Chapter 11 of NAFTA. Any such breach presupposes obligations of Section A being binding, which they only were until superseded. There is nothing in paragraph 3 of Annex 14-C to indicate that those obligations had any effect after they were superseded, nor by that very fact of being superseded could they have continuing effect.

C.14 Paragraph 4 confirms that such expiry of consent does not affect the jurisdiction of a tribunal duly constituted following a claim duly submitted before that expiry. This only confirms the effectiveness of consent and makes no provision for continuation of superseded obligations in the regime for treatment of investments. Paragraph 5 gives similar confirmation of jurisdiction in relation to specified claims submitted while NAFTA 1994 was in force.

D. Further Interpretative Elements of the General Rule for Interpretation of Treaties

D.1 Interpretative declarations and unilateral statements

Interpretative declarations and unilateral statements have sometimes been accepted as having an interpretative role. This may be when made by one or more parties in an instrument made in connection with the conclusion of a treaty and accepted by the other parties as an instrument related to the treaty (1969 Vienna Convention, art 31(2)(b)), where made by one party after conclusion of the treaty and enjoying the concurrence of the other parties thus constituting a subsequent agreement (1969 Vienna Convention, art 31(3)(a)), or as confirmation of meaning where constituting part of the preparatory work (1969 Vienna Convention, art 32). In all cases declarations and unilateral statements must be attributable to a state party to a treaty to be relevant.

D.2 Interpretative declarations may take a defined form.[8] They are commonly found in instruments of international legal significance such as Final Acts of Diplomatic Conferences, in instruments of ratification of a treaty etc. For such statements to form part of the context under Article 31(2)(b) of the 1969 Vienna Convention they must be in an instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted

[8] The International Law Commission's *Guide to Practice on Reservations to Treaties* (Addendum to Report of ILC Sixty-third session (2011), UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1), endorsed by General Assembly Resolution A/RES/68/111 (2013), provides a definition as Guideline 1.2 **(RG-0004)**:
'Definition of interpretative declarations
"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.'

by the other parties as an instrument related to the treaty. However, such declarations do not in themselves have a decisive effect on interpretation unless capable of being held to constitute an estoppel.[9] If taken up by one or more other parties to a treaty they may provide the formulation for an agreement as to interpretation of provisions of a treaty in accordance with Article 31(2)(a) or Article 31(3)(a) of the 1969 Vienna Convention. They may alternatively provide a basis for agreement on the meaning of a treaty through practice in its implementation as envisaged in Article 31(3)(b).

D.3 No authoritative interpretative declaration or statement has been adduced in the present case.

D.4 Relevant Rules of International Law

A further interpretative element is constituted by relevant rules of international law applicable in the relations between the parties (1969 Vienna Convention, 31(3)(c)). This requires account to be taken of general principles of international law and of relevant treaties additional to that which is the subject of interpretation, applying in relations between the parties to a dispute. This aspect of interpretation has been conveniently described as 'systemic integration'.[10]

D.5 Systemic integration is pertinent to interpretation of Annex 14-C because any consent given there relates to arbitration at the International Centre for Settlement of Investment Disputes and because the Annex refers to other treaties relevant to arbitration.

D.6 Professor Christoph Schreuer, a well-known commentator on arbitration at the International Centre for Settlement of Investment Disputes, has stated:

> 'Like any form of arbitration, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction.'[11]

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[9] As to a purely unilateral statement, the International Court of Justice has indicated: "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court." (Advisory Opinion of the ICJ on the International Status of South West Africa [1950] ICJ Reports 128, at 135–36) **(RG-0005)**

[10] This description has been widely adopted from the following explanation:

> ". . . [a]rticle 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system. As such, they must be 'applied and interpreted against the background of the general principles of international law', and, as Verzijl put it . . . a treaty must be deemed 'to refer to such principles for all questions which it does not itself resolve expressly and in a different way.'"
>
> C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279 at 280 (original emphasis, footnotes omitted) **(RG-0006)**

[11] C Schreuer, 'Consent to Arbitration', Chapter 21 in *The Oxford Handbook of International Investment Law* (Peter Muchlinski et al., eds., 2008) at p. 831. **(RG-0007)**

D.7 A provision in a treaty giving consent to arbitration of disputes over acts and events which are the subject of rules in that treaty, in another treaty, or in some other body of law, is a provision identifying issues open to arbitration and the law applicable to them, not making that law applicable to the acts and events in issue. Hence, Schreuer has described jurisdiction and applicable law as having 'separate lives'.[12] He makes clear that this distinction applies to temporal aspects of consent:

> 'The question whether acts and events that occurred prior to an expression of consent to arbitration are covered by the latter should be distinguished from the issue of the applicable substantive law. Even if jurisdiction is established under a treaty, this does not mean that the treaty's substantive provisions are necessarily applicable to all aspects of the case. The general rule is that the law applicable to acts and events will normally be the law in force at the time they occurred.'[13]

D.8 Schreuer has also stated:

> 'In some cases the applicable law is to be found primarily or exclusively outside the treaty establishing jurisdiction. This is particularly evident in situations involving inter-temporal questions. A tribunal's jurisdiction may extend to situations which are outside the treaty's application *ratione temporis*. A treaty may provide for jurisdiction over disputes arising from events that occurred before its entry into force. In such a situation the law in force at the time of the relevant events and not the treaty establishing jurisdiction will have to be applied to the merits of the case.'[14]

D.9 It is clear from this analysis that a grant for a specified length of time of consent to submission of defined classes of disputes to arbitration does not determine the time during which the legal regime of rules in a treaty applies to acts and events affecting investments which might be the subject of such an arbitration.

E. Interpretation of the Issues

In the light of the foregoing analysis the following issues can be identified and resolved:

E.1 What is the consent to which paragraph 3 of Annex 14-C relates?

The paragraph refers expressly to consent under its paragraph 1.

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[12] C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1:1 McGill Journal of Dispute Resolution 1, Part IV, The Separate Lives of Jurisdiction and Applicable Law at p 20 ff. **(RG-0008)**

[13] C Schreuer, 'Consent to Arbitration', *The Oxford Handbook of International Investment Law*, above, at p. 859. **(RG-0007)**

[14] C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration', above, at p.20. **(RG-0008)**

E.2 What is the nature and effect of the consent in paragraph 1 of Annex 14-C?

The consent in paragraph 1 is consent by states bound by the Annex for submission of a claim to arbitration. Its effect is established by long-standing arbitral practice and, more particularly, as indicated in paragraph 2 of the Annex. The institution of international arbitration, including investment arbitration, and long-standing arbitral practice have established that consent is an essential element for an arbitral tribunal to be constituted and to have jurisdiction. The present consent also has the specified effect of meeting the requirements of the three treaties relevant to arbitration identified in paragraph 2 of the Annex.

E.3 How is the extent of consent defined in paragraph 1?

The extent of the consent is defined: (a) by specifying the material element to which it relates; (b) by reference to the arbitration process to which it relates; (c) by identifying the subject-matter over which claims may be submitted to arbitration; and (d) by a specific exclusion in footnote 21.

The boundaries are set as follows:

> (a) The material element to which the consent relates is a 'legacy investment' as defined in paragraph 6 of the Annex.
>
> (b) The arbitration process is specified as that within Section B of Chapter 11 (Investment) of NAFTA and Annex 14-C.
>
> (c) The subject-matter is identified as being a claim alleging breach of an obligation under Section A of Chapter 11 (Investment) of NAFTA (and other provisions of NAFTA not relevant here). An obligation under Section A of Chapter 11 is one binding on the states parties to that treaty when the acts or events that are the subject of claims in the arbitration occurred.
>
> (d) The 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.

E.4 What are the relevant time factors consequent upon defining the extent of consent in paragraph 1?

A 'legacy investment', being an investment established or acquired between 1 January 1994 and the date of termination of NAFTA 1994 and in existence on the date of entry into force of the USMCA, is one which was covered by Section A of Chapter 11 of NAFTA while those provisions were in force.

Obligations under Section A of Chapter 11 were binding until Section A was superseded by the provisions of Chapter 14 of the USMCA which entered into force on 1 July 2020.

An arbitration process duly and validly submitted in accordance with Section B of Chapter 11 of NAFTA, in accordance with general principles of law, sustains the jurisdiction of an arbitral tribunal until the conclusion of an arbitral process. This principle is further evidenced and reaffirmed by the provisions of paragraphs 4 and 5 of Annex 14-C. This time factor relates to the institution and continuance of an arbitration and is thus distinct from the time frame within which is found the subject-matter of the arbitration.

E.5 What is the significance of these time factors for interpretation of paragraph 3 of Annex 14-C?

The definition of legacy investment in paragraph 6 is by reference to matters covered by Section A of Chapter 11 of NAFTA as is the reference to the subject matter of a dispute being claims relating to obligations in Section A. Together these facts show that consent is given only for acts or events while those obligations were in force. Those criteria for consent ceased to be met when Section A ceased to be in force. Nowhere is there any exception expressed to Section A being superseded by the regime of Chapter 14 of USMCA.

F. Conclusion

F.1 The terms used in the relevant treaty texts are unambiguous in their ordinary meaning. However, applying the general rule of treaty interpretation requires that the context in which the terms are used and the relevant rules of international law are also given due weight. These rules as they relate to arbitration show clearly that consent to arbitration is an essential element for the constitution and jurisdiction of an arbitral tribunal that is distinct from the law applicable by that tribunal to the subject matter of an arbitration.

F.2 Thus understood, the consent in paragraph 1 of Annex 14-C to USMCA is for arbitration of claims alleging breach of an obligation under Section A of Chapter 11 of NAFTA. Paragraph 3 of Annex 14-C to USMCA provides for expiry of such consent 3 years after the provisions of Section A of Chapter 11 of NAFTA were superseded. This time factor delimiting such consent makes no change to the point in time at which those provisions of Section A were superseded. Thus the consent in Annex 14-C is consent only to submission to arbitration of claims alleging breach of obligations relating to acts and events taking place before the NAFTA, as the source of those obligations, was superseded on 1 July 2020.

F.3 My report on interpretation of Annex 14-C relies only on documents within the public domain and there is nothing in the interpretative process to suggest an outcome that leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Hence, no requirement arises to seek to determine the meaning from supplementary means of interpretation.

[Signed]

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09 June 2023
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QUALIFICATIONS:

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Preparation of Human Rights cases.

1968 to 1969

Lycée Benzerdjeb, Tlemcen, Algeria:

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1970 to 1971

Fletcher School of Law and Diplomacy (administered by Tufts and Harvard Universities):

Assistant Director of Research Programme in Law and Population and Research Associate.

1971 to 1974

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Practising in general common law matters, in criminal cases, landlord and tenant, personal injuries and matrimonial work.

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Other subjects: Shipping, International Trade, Economic Relations, Industrial and Intellectual Property, Human Rights, United Nations and other International Organisations, European Community, Nationality and Treaties.

On secondment January 1983 to May 1986 to Law Officers' Department, Attorney General's Chambers, as: Senior Legal Assistant January 1983

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1986 to 2007 Lecturer, then Senior Lecturer at University College London

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Publications:

1. ***Industrial and Intellectual Property Rights: Their Nature and the Law of the European Communities*** (1972) 88 Law Quarterly Review 507 to 529

2. ***Consumer Interest in Trademark Protection*** (1973) 36 Modern Law Review 300

3. ***Registering a Colourable Invention*** (1974) 124 New Law Journal 191

4. ***United Kingdom Air Services Agreements 1970 to 1980*** (1982) VII Air Law 2-10

5. Review of J.E.S.Fawcett, Outer Space: New Challenges in Law and Policy, [1986] LLoyd's Maritime and Commercial Law Quarterly ("LMCLQ") 404

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9. Review of M.N. Taishoff, State Responsibility and the Direct Broadcast Satellite. [1988] International & Comparative Law Quarterly ("ICLQ") 211

10. ***Our Law or Theirs*** [1988] LMCLQ 445-449

11. Review of C.P. Verwer Liability for Damage to Luggage in International Air Transport LMCLQ (1989), 124-5

12. ***Carriage by Air Outside the International Conventions*** [1989] LMCLQ 267-270

13. Review of T.L.Zwaan (Ed) Space Law: Views of the Future [1989] Leiden Journal of International Law 276.

14. ***Air and Space Law: Laying the Track and Leaving the Rails*** in Perestroika and International Law (Ed. Butler, W.E.) (1990), 165-176.

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21. Review of C Blackshaw, *Aviation Law and Regulation*, [1993] LMCLQ 586-588

22. ***Independent Advice and the Role of Attorney Generals*** Parliamentary Brief, Vol.2 No.7, 80-81 (1994)

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27. ***Treaties and Foreign Affairs*** Chapter 28 in de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th Ed., 1995 and Supp.)

28. **'Interpreting Treaties in the United Kingdom', Chapter** in *Legislation and the Courts* (Michael Freeman, Ed.) (1997), pp 115-132.

29. ***Incorporating the Convention and Internalising its Principles*** Paper to Edinburgh University Conference on Human Rights, http://www.ed.ac.uk/pgstuff/gardiner/htm

30. Intellectual Property: Recent Developments, (video with others) Legal Network Television Programme 422, April 1997

31. ***Treaties and Treaty Materials: Role, Relevance and Accessibility*** (1997) 46 ICLQ 643 – 662

32. ***Revising the Law of Carriage by Air: Mechanisms in Treaties and Contract*** (1998) 47 ICLQ 278 – 305

33. ***The Warsaw Convention at Threescore Years and Ten*** (1999) XXIV Air & Space Law 114 – 120

34. ***Treaty Relations in the Law of Carriage by Air: Article 55(1) of the Montreal Convention*** [2000] The Aviation Quarterly 245 - 261

35. Review of L. B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* and Fountain Court Chambers (Trevor Philipson QC and others), *Carriage by Air* [2002] LMCLQ 155-158

36. Service Issues for ***Shawcross and Beaumont on Air Law***, April and December, (as one of the editors)

37. ***International Law*** (Pearson/Longman, 2003) ISBN 0-582-36976-2 (Paperback) 504 pages + xlii and index

38. **UN Convention on State Immunity: form and function** (2006) 55 ICLQ 407-409

39. **Treaty Interpretation** (OUP, 2008, and paperback edn 2010) 398 pages + tables and index

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41. **Treaty Interpretation** (2nd edn, OUP, 2015, and paperback edn 2017)

42. Review of H Stevens, *The Life and Death of a Treaty: Bermuda 2* (London: Palgrave Macmillan, 2018), (2018) 43 Air & Space L. 645

43. **'Characteristics of the Vienna Convention Rules on Treaty Interpretation'**, Chapter 11 in MJ Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge, CUP, 2018)

44. Review of T Gazinni, *Interpretation of International Investment Treaties* (Oxford and Portland: Hart, 2016), (2018) 19 J. World Investment & Trade 321

45. Review of J Klingler & others (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Leiden: Kluwer, 2019), (2019) 30 Eur. J. Int'l L. 1077

46. **'The Vienna Convention Rules on Treaty Interpretation'**, Chapter 19 in D Hollis, *The Oxford Guide to Treaties* (Oxford: OUP, 2nd Edn, 2020)

47. Evidence to Public Administration and Constitutional Affairs Committee, oral evidence on Scrutiny of Treaties (5 July 2022), transcript and video at: <https://committees.parliament.uk/event/13963/formal-meeting-oral-evidence-session/>

Not yet published but under contract:

1. Chapters on International Air Law and Space Law for new Edition of Oppenheim's International Law (To be published by OUP) – submitted and in editorial process

2. *Treaties*, an 80,000 word book in OUP's Elements of International Law series – publication expected 2023

3. *Treaty Interpretation*, Third edition, see items 39 and 41 above, due 2024–5

EXHIBIT LIST

Exhibit No.	Description
RG-0001	Vienna Convention on the Law of Treaties (1969)
RG-0002	Merriam-Webster.com Dictionary online "Supersede." <https://www.merriam-webster.com/dictionary/supersede> accessed 1 Jun. 2023
RG-0003	E de Vattel, *The Law of Nations*, Book II, Chap XVII, of *The Interpretation on Treaties* (1758 edition, trans by C G Fenwick) (Washington DC: Carnegie Institution, 1916)
RG-0004	The International Law Commission's *Guide to Practice on Reservations to Treaties* (Addendum to Report of ILC Sixty-third session (2011), UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1), endorsed by General Assembly Resolution A/RES/68/111 (2013)
RG-0005	Advisory Opinion of the ICJ on the International Status of South West Africa [1950] ICJ Reports 128
RG-0006	C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279
RG-0007	C Schreuer, 'Consent to Arbitration', Chapter 21 in *The Oxford Handbook of International Investment Law* (Peter Muchlinski et al., eds., 2008)
RG-0008	C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1:1 McGill Journal of Dispute Resolution 1, Part IV, The Separate Lives of Jurisdiction and Applicable Law

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED

v.

UNITED STATES OF AMERICA

(ICSID Case No. ARB/21/63)

EXPERT REPORT OF PROFESSOR HERVE ASCENSIO

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June 8, 2023

1. The undersigned, author of the expert report, is a professor at the University Paris 1 Panthéon-Sorbonne (Sorbonne Law School) (France). He teaches public international law, including international economic law and investment arbitration. He is the director of the *Global Business Law and Governance* master's degree, a partnership with the universities of Columbia (New York), City University of Hong Kong and Melbourne. He is the author of numerous publications on international economic law and general public international law, including a commentary on Article 70 of the Vienna Convention on the Law of Treaties on the consequences of the termination of a treaty in an edited collection on the Vienna Convention,[1] and an article on interpretation according to Article 31 of the Vienna Convention in international investment law published in the *ICSID Review*.[2] He co-edits the *Annuaire français de droit international* (French Yearbook of International Law). He has acted as counsel in several cases before the International Court of Justice, as a party's expert on international investment law in a large number of cases before investment arbitration tribunals and before French courts, and as an arbitrator in one ICSID arbitration. He is a member of the OSCE Court of Conciliation and Arbitration, as an alternate arbitrator, and a national expert in the OSCE human dimension mechanism. In January 2022, he taught a special course at The Hague Academy of International Law on "the responsibility of business enterprises in international law". A copy of the expert's *curriculum vitae* is appended at the end of this expert report.

2. In the matter of the arbitration between *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, the Government of the United States of America has requested the author's expertise on the consequences of the termination of the North American Free Trade Agreement (hereinafter "NAFTA"), and the interpretation of the provisions on intertemporal law of the Agreement between the United States, Mexico and Canada (hereinafter "USMCA"), notably its Annex 14-C on "Legacy Investment Claims and Pending Claims". It is the expert's understanding that these issues call into question the jurisdiction of the arbitral tribunal. The expert has no previous relationship with or interest in any of the parties to this arbitration, nor a connection to the matters at issue.

3. To address the legal questions raised in the context of the present case, the expert took note of the case materials available on the ICSID website, including the parties' submissions related to the Respondent's request for bifurcation.[3] He was provided with the claimants' request for arbitration by the Government of the United States of America. For his analysis, he relied on the text of the relevant treaties and on the decisions of international courts and arbitral tribunals publicly available. This expert report represents the expert's true professional assessment of the matters to which it refers based on his experience in the application of international law.

4. As a preliminary point, it is useful to briefly recall the relevant dates for the purposes of analysing the temporal issues covered in this report. As for the investment treaties involved, NAFTA was signed on 17 December 1992 and entered into force on 1st January 1994; it terminated on 1st July 2020, the date of entry into force of the Protocol of 30 November 2018 replacing NAFTA with USMCA. The subject of the dispute is the revocation of a permit to build a pipeline that had been granted on 29 March 2019; the revocation occurred on 20 January 2021, and the claimants filed their request for arbitration before ICSID on 22 November 2021.

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[1] Hervé Ascensio, "Article 70 – Consequences of the termination of a treaty", *in* O. Corten and P. Klein (ed.), *The Vienna Conventions on the Law of Treaties*, Oxford University Press, Oxford, vol. II, pp. 1585-1611 (2011) **(HA-0001)**. The second edition of this collection is forthcoming.

[2] Hervé Ascensio, "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", *ICSID Review – Foreign Investment Law Journal*, vol. 31, n°2, 2016, pp. 366-387 **(HA-0002)**.

[3] <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/63>

The chronology is thus the following one (in bold: dates relating to the investment treaties involved):

- 1994, 1st January: entry into force of NAFTA

- 2019, 29 March: Presidential permit to construct the KXL Pipeline[4]

- 2020, 1st July: termination of NAFTA, entry into force of USMCA

- 2021, 20 January: revocation of the Presidential permit to construct the KXL Pipeline[5]

- 2021, 22 November: request for arbitration under Annex 14-C of USMCA

5. Such a chronology reveals a problem with the application of treaties over time. This must be approached from two angles, that of the arbitration procedure and that of the substance of the protection offered to the investment.

6. From a procedural standpoint, the claimants' request for arbitration is not based directly on NAFTA Chapter 11, Section B, since it postdates the termination of NAFTA, but indirectly, through a reference to this section in USMCA Annex 14-C. It is worth recalling here that USMCA does not provide a mechanism for the settlement of investor-to-State disputes regarding the treaty relationship between the United States and Canada – whereas it does regarding the treaty relationship between the United States and Mexico. However, its Annex 14-C extends the possibility of invoking the NAFTA arbitration procedure after the termination of NAFTA in respect of two specific categories of dispute known as "legacy investment claims" and "pending claims". Only the first category, that of "legacy investment claims", is at issue in the present case. On reading the parties' written submissions, the expert considers that they are not opposed on this point.[6]

7. From a substantive standpoint, the claimants' request does not allege a breach of USMCA Chapter 14, which protects foreign investment since 1st July 2020, but a breach of NAFTA, because Annex 14-C of USMCA applies to claims alleging such breaches only. The main question of law raised is therefore whether the extension of NAFTA's arbitration mechanism in Annex 14-C relates only to breaches of that treaty that occurred while it was in force, *i.e.*, until 1st July 2020, or whether it also involves an extension of the substantive protection provided by NAFTA for a further three years, *i.e.*, until 1st July 2023. The first part of the alternative corresponds to the position of the respondent and the second to that of the claimants.

8. In the expert's opinion, the answer depends on the application in the present case of a set of rules of public international law, which will be presented in two parts: on the one hand, the legal consequences of the termination of NAFTA, and on the other, the interpretation of Annex 14-C of the USMCA, and more particularly its paragraph 1. The conclusion will be that Annex 14-C does not apply to claims alleging breaches of NAFTA occurring after its termination, and that consequently the jurisdictional objection raised by the respondent should be granted. The reasons are developed below.

* * *

[4] Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13101 (Mar. 29, 2019) **(C-010)**.

[5] 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 Section 6 **(C-11)**.

[6] See Request for Arbitration, para. 17, 73-74, and Request for Bifurcation, para. 17.

I. LEGAL CONSEQUENCES OF THE TERMINATION OF NAFTA

a) Overview

9. In international law, the consequences of the termination of a treaty are governed by the treaty itself or, in the absence of a provision to this effect, by a suppletive rule codified in article 70 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "VCLT" or "Vienna Convention"). Although a signatory, the United States has not become a party to the Vienna Convention, which is therefore not directly applicable in this case; but it is widely accepted that Article 70 of the Convention is a faithful reflection of customary international law.[7] The rule is as follows:

> *Article 70 – Consequences of the termination of a treaty*
>
> 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;
>
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
>
> 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

10. A reading of the NAFTA, particularly its final provisions, shows that the NAFTA parties have provided almost no detail about the effects of the termination of the treaty. The only clarification appears in Article 2205, when it states that in the event of withdrawal of a party, the treaty continues to apply in the relations between the remaining parties, which is perfectly in line with Article 70(2) VCLT.[8] That said, NAFTA Article 2205 is in no way at issue in the present case. The United States, Mexico and Canada did not decide to terminate NAFTA by withdrawing altogether from the treaty, and thus ending all bilateral relationships between them. They rather negotiated a new treaty, the 2018 Protocol, to govern their future relationships. The 2018 Protocol did not limit itself to modifying NAFTA, but replaced it entirely with a new treaty, USMCA. Hence the termination of NAFTA, as mentioned several times in Annex 14-C.[9]

11. In the silence of the treaty, the customary rule as codified in Article 70(1) VCLT must apply. But where, as here, a treaty has been terminated by reason of a new treaty between the same parties, it is conceivable that the new treaty contains provisions which organise the effects of the termination in a different, or more precise, way than does Article 70(1) VCLT. This is apparent from a reading of the 2018 Protocol. It states that "[u]pon [its] entry into force, the USMCA … shall supersede the NAFTA, without prejudice to those provisions set forth in the

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[7] See International Law Commission, Second Report of Sir Gerald Fitzmaurice, A/CN.4/107, *YILC*, 1957, vol. II, at p. 67 **(HA-0003)**; *Case between New Zealand and France, RIAA*, 30 April 1990, vol. XX, p 251, para. 75 **(HA-0004)**. In legal literature, see S. Wittich, "Article 70 – Consequences of the Termination of a Treaty", *in* O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer Verlag, Berlin Heidelberg, 2nd ed., 2018, p. 1299 **(HA-0005)**; H. Ascensio, *op. cit*. note 1, p. 1590-1591 **(HA-0001)**.

[8] The provision follows the logic of the law of treaties of deconstructing a multilateral treaty into bilateral relations in order to resolve this type of question of law.

[9] USMCA, Annex 14-C, para. 3 ("A Party's consent under paragraph 1 shall expire three years after termination of NAFTA 1994"), para. 5 ("… the Tribunal's jurisdiction … is not affected by the termination of NAFTA 1994"), para. 6 ("'legacy investment' means an investment … established or acquired between January 1, 1994, and the date of termination of NAFTA 1994 …").

USMCA that refer to provisions of the NAFTA".[10] Actually, the "without prejudice" clause still amounts to applying the USMCA; but it suggests that the new treaty has included specific provisions that rely in some way on provisions previously contained in the NAFTA. A careful reading of the new treaty is therefore necessary to determine whether the termination of NAFTA has consequences different from those which, in principle, would result from customary law with respect to the case at hand.

12. However, the Protocol makes no reference to a "transition period". The term "provisions", indicates only limited, *ad hoc* borrowings from NAFTA that will be analysed further below (n°19-25). These selective referrals are in no way comparable, for instance, to the "transition period" and the transitional legal regime established in the context of Brexit, in Part IV of the 2019 Agreement on the withdrawal of the United Kingdom from EU, and applicable from its entry into force until 31 December 2020. According to its Article 127, as a matter of principle, "Union law shall be applicable to and in the United Kingdom during the transition period", which makes it perfectly clear that the previous treaty and all secondary legislation remain applicable on a transitional basis.[11] This is the kind of language that would be expected if the drafters of the Protocol had intended to keep a substantial part of NAFTA in force. On reading the Protocol, no such wording is to be found.

13. The legal situation is also very different from that encountered by several investment tribunals faced with the termination of an investment treaty that included a so-called "survival clause" or "sunset clause".[12] In the presence of such a clause, the treaty continues to produce both procedural and substantive effects in favour of the protection of foreign investments for the period indicated. But this is not the case with NAFTA, lacking such provision. As the arbitral tribunal in this case noted in its Procedural Order No. 2, "[t]he Respondent relies … on the undisputed fact that NAFTA does not contain a sunset clause".[13]

14. The circumstances of the present case are closer to those of the famous *Ambatielos* case brought before the International Court of Justice in 1951. In this case, the Court discussed an 1886 treaty which, like NAFTA, was terminated by another treaty concluded between the same parties in 1926. The 1926 treaty was accompanied by a Declaration that provided consent to arbitration for claims arising from the 1886 treaty. Without this declaration, the treaty of 1926 would have "wipe[d] out the Treaty of 1886 and all its provisions, including its remedial provisions, and any claims based thereon".[14] It was then clear that the 1926 declaration, when addressing "claims … based on the provisions of the of Anglo-Greek Commercial Treaty of 1886",[15] referred to claims pre-dating the 1926 treaty. In *Ambatielos*, Greece relied on the provisions of the 1886 treaty, but it did not assert its claim until 1939. The claims were permitted in part because the alleged breach occurred in 1922-1923, before the 1886 treaty was terminated, and the 1926 Declaration permitted the assertion of such claims after the termination of the 1886 treaty.[16] Annex 14-C works in much the same fashion.

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[10] Protocol, para. 1.

[11] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 17 October 2019, *OJEU*, 12/11/2019, C 384 I/1, articles 126 and ff **(HA-0006)**.

[12] See, for instance, Stockholm Chamber of Commerce (SCC) No. 088/2004 Partial Award, *Eastern Sugar BV v Czech Republic*, of 27 March 2007, para. 173-177 **(HA-0007)**.

[13] *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2, 13 April 2023, para. 23.

[14] ICJ, *Ambatielos case (jurisdiction)*, judgment of 1st July 1952, *ICJ Reports 1952*, p. 28 ff, at 43 **(HA-0008)**.

[15] *Ibid.*, at 36.

[16] For the facts, see *The Ambatielos Claim (Greece v. United Kingdom)*, award of 6 March 1956, *RIAA*, vol. XII, p. 83 ff, at 91-94 **(HA-0009)**.

15. In its Procedural Order No. 2, the Arbitral Tribunal stressed the novelty in investment arbitration of the legal issue raised by Annex 14-C of USMCA concerning the consequences of the termination of NAFTA.[17] To answer this question, it is proposed here to begin by reasoning as if NAFTA had ended without any new treaty specifying the effects of its termination, which amounts to applying the customary rule of Article 70 VCLT alone. This will make it possible, at a second stage and by comparison, to seek what different effects may be due to the provisions of the USMCA referring to NAFTA.

b) Consequences of termination under customary law and under USMCA

16. Article 70(1) contains two subparagraphs, the first of which provides that treaty obligations cease to apply when the treaty ends, while the second provides for the maintenance of rights, obligations and legal situations created previously. It must be deduced from this that the customary rule provides for different effects depending on the nature of the rights, obligations, or legal situations. If they were instantaneous and have been performed, such as the payment of a sum of money provided for in the treaty, they remain valid and continue to produce legal effects. If they are continuous, then the date of termination of the treaty marks a caesura: the State obligation continues for the party that had to be performed before the end of the treaty; but this obligation ceases for the party after the end of the treaty. In investment treaties, substantive obligations provide a continuous, ongoing, protection for investments. In the event of termination of the treaty, protection therefore ceases on the date of termination of the treaty.

17. The consequences of the customary rule on litigation must also be specified. Firstly, it is accepted that a dispute which arose when the treaty was in force and on the basis of that treaty creates a legal situation which continues despite the termination of the treaty.[18] Another question is whether and until when a dispute settlement mechanism provided for by the terminated treaty can still be used. In this respect, international law recognises a transitional effect for dispute settlement clauses contained in a terminated treaty. According to a constant jurisprudence of the International Court of Justice, jurisdiction of the Court persists, and proceedings can continue, if the dispute is referred to the court before the date of termination of the treaty. After that date, the dispute cannot be validly referred to the court even if the claims relate to events pre-dating termination. The relevant date, here, is the date of the filing of the application.[19] If we apply this principle of the transitional effect of dispute settlement clauses to the arbitration clauses of a terminated investment treaty, it follows that, according to customary international law, the arbitral tribunal whose jurisdiction is based on that treaty retains jurisdiction, and that the arbitration may continue, provided that the request for arbitration was filed before its termination.

18. If customary law alone were to apply in the present case, it would have to be concluded that a dispute arising after the termination of NAFTA could not create any legal situation capable

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[17] *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2, 13 April 2023, para. 26.

[18] See the Dissenting Opinion of Lord McNair *in* ICJ, *Ambatielos (Preliminary Objection)*, Judgment of 1 July 1952, *ICJ Reports 1952*, p. 63 **(HA-0010)**. The idea was then taken up by the ICJ: *Northern Cameroons* case, Judgment of 2 December 1963, *ICJ Reports 1963*, at 34-35 **(HA-0011)**. See also *Case between New Zealand and France*, award of 30 April 1990, *RIAA*, vol. XX, at 266, para. 106 **(HA-0004)**.

[19] ICJ, *Northern Cameroons* case, Judgment of 2 December 1963, *ICJ Reports 1963*, at 35 **(HA-0011)**; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, *ICJ Reports 2016*, at 115, para. 31 **(HA-0012)**; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 13 February 2019, *ICJ Report 2019*, at 21-22, para. 30 **(HA-0013)**; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 3 February 2021, *ICJ Reports 2021*, at 19, para. 24 **(HA-0014)**.

of having legal effects under NAFTA. Furthermore, as the request for arbitration arose after 1st July 2020, the investment arbitration provisions of NAFTA would not be available. It is now possible to look at the provisions of USMCA to see to what extent its provisions modify the effects normally expected, under customary international law, of the termination of a treaty.

19. Firstly, it is necessary to establish whether USMCA contains transitional provisions in its general parts, including the final clauses. We note that one general clause appears in Article 34.1 entitled "Transitional Provision from NAFTA 1994". The areas concerned are the following ones: works of the NAFTA Commission and NAFTA subsidiary bodies; membership of the Committee under NAFTA Article 2022; NAFTA Chapter 19; NAFTA Chapter 5 inasmuch as it applies to arrangements to grant claims for preferential tariff treatment. The list makes no reference to the NAFTA provisions offering substantial protection to foreign investment and whose breach could lead to arbitration between foreign investors and States (Section A of Chapter 11, Article 1503(2), and Article 1502(3)); nor does it mention the procedural protection offered by Chapter 11, Section B.

20. Secondly, there is a provision in Chapter 14 dealing with the relationship between USMCA and NAFTA specifically in the field of investment and applicable to the whole chapter. This is Article 14.2, paragraph 3, according to which:

> "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."

21. Annex 14-C is therefore an exception to a general rule laid down by the treaty, and this general rule echoes Article 70(1) VCLT, but seen in mirror image from the new treaty. Hence the fact that, under USMCA, as a matter of principle, obligations do not relate to acts or events that took place prior to its entry into force, or to situations that had ceased by that date. By way of exception, Annex 14-C deals with such acts, facts or situations. The language of Article 14.2 supports the conclusion that the temporal scope of Annex 14-C is thus events that occurred *before* the entry into force of USMCA.

22. Annex 14-C of USMCA is the only text modifying the consequences of the termination of NAFTA in relation to investment. Moreover, its status as an exception suggests that the modification is narrow and should be explicit. It should also be noted that this instrument, according to its title, covers two categories of "claims", "legacy investment claims" and "pending claims", meaning that the exception deals with litigation – "claims" – rather than with substantive protection of investments. It also presupposes that the dispute pre-existed the date of termination of NAFTA, consistent with Article 14.2, paragraph 3, which is in line with Article 70(1) VCLT because only pre-existing disputes can continue to exist under NAFTA.

23. Consequently, this expert could not interpret Annex 14-C as implementing a "transition period", as it is presented by the claimants.[20] There is no provision in Annex 14-C and no provision in the whole of Chapter 14 to indicate any "transition" of the NAFTA's substantive obligations. When a period of three years is mentioned in Annex 14-C, paragraph 3, it is not a question of creating a "transition period" covering substance as well as procedure, but of setting a time limit on the extension of consent to arbitration beyond the end date of NAFTA.[21]

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[20] *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/21/63, Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objections, 10 February 2023 ["Claimants' Observations"], para. 20.

[21] USMCA, Annex 14-C, para. 3: "A Party's consent under paragraph 1shall expire three years after the termination of NAFTA 1994".

Moreover, the two categories of claims covered by the Annex do not imply that the substantive provisions of NAFTA would remain applicable after 1st July 2020.

24. The second category of claims, "pending claims", is not at stake in the present case. But it is worth emphasising that the category refers to arbitration cases that were initiated while NAFTA was still in force. The fact that "the Tribunal's jurisdiction with respect to such claims is not affected by the termination of NAFTA 1994" thus coincides entirely with the transitory effect of the dispute settlement clause under customary law.[22] The provision therefore merely clarifies, without changing, the usual consequences of the termination of a treaty on ongoing proceedings, and was drafted "for greater certainty" only.[23] There are examples of subsequent treaties modifying the treatment of pending claims,[24] but this is not the path chosen in USMCA.

25. The first category, that of "legacy investment claims", refers to another dispute configuration, where arbitration may be initiated after the end of the NAFTA, up to the end of a three-year period. This departs from customary law, because the arbitration procedure provided for under NAFTA is normally no longer available. But this does not correspond to the circumstances of the present case either. Based on the analysis of what USMCA specifies or modifies in comparison to Article 70(1) VCLT, based on the very title of Annex 14-C, and just like in the *Ambatielos* case, everything suggests that only consent to arbitration and the arbitral procedure are extended, without this in any way affecting the substance of the obligations or the moment of the breach. Disputes may still be arbitrated if they arose when NAFTA was in force, although the request for arbitration postdates its termination. This is confirmed by an analysis of the annex itself, particularly its paragraph 1.

II. INTERPRETATION OF ANNEX 14-C OF USMCA

26. According to the claimants, Annex 14-C of USMCA would make it possible to initiate arbitration proceedings under Section B of Chapter 11 of the NAFTA for a breach of the NAFTA substantive provisions due to an act occurring *after* the termination of the treaty.

27. It should be remembered here that treaties must be interpreted in accordance with the customary rules codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. While article 32 deals with the "supplementary" means of interpretation and article 33 with possible differences among the different authentic language versions, the "general rule" of article 31 contains the main methodological elements necessary for interpretation. Its first paragraph provides that "a treaty shall be interpreted in good faith and in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose".

28. Under Annex 14-C, disputes relating to the NAFTA may continue to be arbitrated in accordance with Chapter 11, Section B, of the treaty if the request was filed before 1st July 2020 ("pending claims"). Disputes relating to a "breach of an obligation" under NAFTA for which the request could not be filed in time may still be referred to arbitration under Annex 14-C ("legacy investment claims"), for three years after the USMCA's entry into force. The meaning of the term "breach of an obligation" under Annex 14-C, paragraph 1, is therefore important, because it determines the category of claims called "legacy investment claims". A breach must

[22] USMCA, Annex 14-C, para. 5.
[23] *Ibid*.
[24] See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, *OJEU*, 29/05/2020, L 169/1, articles 8 to 10 **(HA-0015)**.

relate to a legal rule in force; if not, there would be no obligation and, consequently, no breach. Since the substantive provisions of the NAFTA have ceased to be in force on 1st July 2020, there can be no "breach" of a substantive NAFTA obligation related to foreign investments after that date, unless the USMCA extends such substantive obligations. As this expert sees no language in Annex 14-C or otherwise extending the substantive obligations of NAFTA Chapter 11, Section A, the "breach of an obligation" necessarily refers to a breach of NAFTA predating its termination.

29. The above analysis of Article 34.1 and Chapter 14 of USMCA shows that the contextual interpretation confirms the interpretation according to the ordinary meaning of the terms. However, in support of their interpretation, the claimants rely on two additional contextual elements, namely footnote 20, which cites the chapters of NAFTA possibly involved in a legacy investment claim, and footnote 21, which refers to another USMCA Annex, Annex 14-E. In the expert's opinion, neither of these notes alters the ordinary meaning of the terms of Annex 14-C, paragraph 1, as explained above. Footnote 20 contains no indication as to the application of paragraph 1 over time. It merely recalls, "for greater certainty", which chapters of NAFTA may be invoked in a legacy investment claim, *i.e*., according to our understanding, which provisions may have been violated when the treaty was still in force. And as for footnote 21, claimants read into it proof that legacy investment claims could relate to events occurring before as well as after 1st July 2020, since the note aims at avoiding parallel proceedings under Annex 14-E which concerns disputes under the USMCA, *i.e.,* occurring after 1st July 2020. Even following this *a contrario* interpretation instead of another for discussion purposes, this could at most be an inconsistency affecting the note itself and not the sentence constituting paragraph 1 of Annex 14-C, the meaning of which is clear.

30. Lastly, the interpretation of Annex 14-C supported in this report is consistent with the object and purpose of the treaty. As stated clearly in the title of the 2018 Protocol, and in the preamble of USMCA which is an annex to it, USMCA is intended to replace NAFTA. If the claimants' interpretation were to be followed, it would mean that, during a period of three years after the entry into force of USMCA, the NAFTA chapter relating to investment would not be replaced by the USMCA, but would continue to apply as it stands, in terms of both substance and dispute settlement. This would also result in a three-year overlap with the substantive provisions of USMCA Chapter 14 for investments existing at the time of the entry into force of the Protocol. This would create confusion, in contradiction to the idea of establishing a "clear, transparent, and predictable legal and commercial framework" for investment and of promoting "transparency, good governance and the rule of law", as it appears in the preamble of USMCA.

III. CONCLUSIONS

31. On the basis of the terms of the NAFTA and the Protocol, the expert concludes that the NAFTA terminated on the date on which the USMCA entered into force, *i.e*., 1st July 2020, and that its provisions relating to the substantive protection of foreign investments ceased to apply on that date, in accordance with Article 70 VCLT.

32. Secondly, the analysis of USMCA shows that there is no transition period provided for in it, but that some specific provisions make reference to certain NAFTA provisions in order to extend their effect over time. Under Chapter 14 of USMCA, only Annex 14-C contains provisions of this type. They allow the NAFTA investor-to-State arbitration procedure to continue to be used to resolve the category of disputes named "legacy investment claims". But there is no provision for the substantive obligations of NAFTA to be extended.

33. It follows from these two sets of conclusions that Annex 14-C of USMCA, which contains the State's consent to arbitration, relates to violations of NAFTA that occurred when this treaty was in force. It does not cover an alleged breach of the NAFTA due to events that took place after it terminated, *i.e.*, after 1st July 2020, as in the present case.

Respectfully submitted,

[Signed]

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Scientific, editorial and assessment activities: co-editor of the *Annuaire français de droit international* (French Yearbook of International Law, since 2022); member of the editorial committees of the *Journal of World Investment and Trade*, the *Manchester Journal of International Economic Law*, the *Asia Pacific Law Review*; elected member of the French National Council of Universities (2019-2023); member of the French Society for International Law (former Secretary General, 2004-2008), the American Society of International Law, the International Law Association, the Société de Législation comparée.

Courses or lectures abroad (in French or English): The Hague Academy of International Law (special course, winter session 2022, on "Responsibility of Business Enterprises in International Law"; director of studies in French 2010); Pontificia Universidad Javeriana (Bogotá, 2022); QueenMary University of London (2019, 2020); University of Vienna (2019); City University of Hong Kong (2019, 2012-2016); University of Buenos Aires (2018); Cornell University (Ithaca, USA, 2015); *etc*.

Selected Publications:

i/ Books:

- *Droit international économique*, PUF, Paris, 2nd ed., 2020, xviii-379 p. [*International Economic Law* (handbook)] ;
- *Les principes communs de la procédure administrative : Essai d'identification*, P. Gonod & H. Ascensio (dir.)[eds.], Mare & Martin, 2019, 242 p. [*Common Principles of Administrative Procedure: Search for an Identification*]
- *Dictionnaire des idées reçues en droit international*, H. Ascensio, P. Bodeau-Livinec, M. Forteau, F. Latty, J.-M. Sorel, M. Ubéda-Saillard (dir.)[eds.], Pedone, Paris, 2017, 606 p. [*Dictionnary of Received Ideas on International Law*, book in honour to Prof. Alain Pellet]
- *Le pouvoir normatif de l'OCDE*, SFDI/OCDE, H. Ascensio, N. Bonucci (dir.)[eds.], Pedone, Paris, 2014, 148 p. [*The Normative Power of the Organization for Economic Co-operation and Development*]
- *Droit international pénal – 2ème édition révisée*, H. Ascensio, E. Decaux, A. Pellet (dir.)[eds.], Pedone, Paris, 2012, 1280 p. [*Treatise on International Criminal Law*]

ii/ Articles:

- "The International Settlement of Disputes under the (Draft) CAI", *The Journal of World Investment and Trade*, Vol. 23, 2022, Issue 4, pp. 651-674;
- "Introduction : une année de droit international marquée par la crise sanitaire", *AFDI 2020*, 2021, pp. 3-18 [introduction to the special part of the French Yearbook of International Law dedicated to the covid19 crisis in international law];
- "Some Questions about International Economic Law Raised during the Pandemic", *Revista de Direito Internacional / Brazilian Journal of International Law*, 2021, vol. 18, n°2, pp. 21-25;
- "Conclusions", *in* SFDI, *Extraterritorialités et droit international*, Pedone, 2020, pp. 349-357 [conclusions of the annual conference 2019 of the French Society for International Law on Extraterritoriality] ;
- Commentaire sous CA Paris, *Venezuela c. Sté Rusoro Mining Limited*, 29 janvier 2019, *JDI*, 2020, n°1, 4 [case comment: annulment proceedings against an investment award before the Appeals Court of Paris];
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- "Les activités normatives des entreprises multinationales", *in* Société française pour le droit international, *L'entreprise multinationale et le droit international*, Pedone, Paris, 2017, pp. 265-278 ["Normative Activities of Multinational Corporations"];
- "La conduite de la procédure dans l'arbitrage d'investissement et les droits de l'homme: intérêt et limites d'une comparaison", *in* Walid Ben Hamida et Frédérique Coulée (dir.), *Convergences et contradictions du droit des investissements et des droits de l'homme : une approche contentieuse*, Pedone, Paris, 2017, pp. 105-118 ["Conduct of the Procedure in Investment Arbitration and Human Rights: Interest and Limits of a Comparison"];
- "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", *ICSID Review – Foreign Investment Law Journal*, vol. 31, n°2, 2016, pp. 366-387;
- "Le droit non-écrit dans la jurisprudence des tribunaux d'investissement", *in* Paolo PALCHETTI (a cura di), *L'incidenza del diritto non scritto sul diritto internazionale ed europeo*, Editoriale

Scientifica, Milano, 2016, pp. 115-130 ["Non-Written Law in the Jurisprudence of Investment Tribunals"];

- "Abuse of Process in International Investment Arbitration", *Chinese Journal of International Law*, vol. 13 (4), 2014, 763-785;
- "Le règlement des différends entre organisations internationales et personnes privées", *in* E. Lagrange et J.-M. Sorel (dir.), *Traité de droit des organisations internationales*, LGDJ, Paris, 2013, 1121-1145 ["The Settlement of Disputes Between International Organizations and Private Parties" in a treatise on the law of international organizations];
- "Relations extérieures", *in* M. Troper et D. Chagnollaud (dir.), *Traité international de droit constitutionnel*, vol. II, *Distribution des pouvoirs*, Dalloz, Paris, 2012, pp. 659-704 [Chapter on "External Relations" in a treatise on constitutional law];
- "Le Pacte mondial et l'apparition d'une responsabilité internationale des entreprises", *in* L. Boisson de Chazournes et E. Mazuyer (dir.), *Le Pacte mondial, dix ans après – The Global Compact, Ten Years After*, Bruylant, Bruxelles, 2011, pp. 167-184 ["The Global Compact and the Emergence of International Liability for Corporations"];
- "Article 70 – Consequences of the termination of a treaty", *in* O. Corten and P. Klein (ed.), *The Vienna Conventions on the Law of Treaties*, Oxford University Press, Oxford, 2011, vol. II, pp. 1585-1611 (2nd ed. forthcoming, 2023);
- "Rapport introductif", *in* H. Gherari et Y. Kerbrat (dir.), *L'entreprise dans la société internationale*, Pedone, Paris, 2010, pp. 13-41 ["Introductory Report" on the Role of Corporations in Global Legal Perspective].

iii/ Reports

- *Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020*, report under the OSCE Moscow mechanism, by prof. H. Ascensio as sole rapporteur, 18 April 2023, 53 p., published at <https://www.osce.org/odihr/543240>
- *Extraterritoriality as an instrument: Contribution to the work of the UN Secretary's Representative on human rights and transnational corporations and other businesses*, by prof. H. Ascensio, December 2010, 17 p. (commissioned by the French Ministry of Foreign Affairs), available at <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/business-and-human-rights/article/the-united-nations-guiding>

LIST OF EXHIBITS

Exhibit No.	Description
HA-0001	Hervé Ascensio, "Article 70 – Consequences of the termination of a treaty", *in* O. Corten and P. Klein (ed.), *The Vienna Conventions on the Law of Treaties*, Oxford University Press, Oxford, 2011, vol. II (2011)
HA-0002	Hervé Ascensio, "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", *ICSID Review – Foreign Investment Law Journal*, vol. 31, n°2, 2016
HA-0003	International Law Commission, Second Report of Sir Gerald Fitzmaurice, A/CN.4/107, *YILC*, 1957, vol. II
HA-0004	*Case between New Zealand and France, RIAA*, 30 April 1990, vol. XX
HA-0005	S. Wittich, "Article 70 – Consequences of the Termination of a Treaty", *in* O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer Verlag, Berlin Heidelberg, 2nd ed., 2018
HA-0006	Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 17 October 2019, OJEU, 12/11/2019, C 384 I/1
HA-0007	Stockholm Chamber of Commerce (SCC) No. 088/2004 Partial Award, *Eastern Sugar BV v Czech Republic*, of 27 March 2007
HA-0008	ICJ, *Ambatielos case (jurisdiction)*, judgment of 1st July 1952, *ICJ Reports 1952*
HA-0009	*The Ambatielos Claim (Greece v. United Kingdom)*, award of 6 March 1956, *RIAA*, vol. XII
HA-0010	Dissenting Opinion of Lord McNair *in* ICJ, *Ambatielos (Preliminary Objection)*, Judgment of 1 July 1952, *ICJ Reports 1952*
HA-0011	ICJ, *Northern Cameroons* case, Judgment of 2 December 1963, *ICJ Reports 1963*
HA-0012	*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, *ICJ Reports 2016*
HA-0013	*Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 13 February 2019, *ICJ Report 2019*
HA-0014	*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 3 February 2021, *ICJ Reports 2021*
HA-0015	Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, *OJEU*, 29/05/2020, L 169/1

PUBLIC VERSION

IN THE ARBITRATION UNDER THE UNITED STATES-MEXICO-CANADA AGREEMENT AND THE ICSID ARBITRATION RULES BETWEEN

TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED

Claimants

-and-

UNITED STATES OF AMERICA

Respondent.

ICSID CASE NO. ARB/21/63

THE UNITED STATES OF AMERICA'S REPLY ON ITS PRELIMINARY OBJECTION

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December 27, 2023

TABLE OF CONTENTS

1. In accordance with the Tribunal's Procedural Order No. 2 of April 13, 2023, the United States hereby submits its Reply on its Preliminary Objection to the Tribunal's jurisdiction under Annex 14-C to the United States-Mexico-Canada Agreement ("USMCA"), as well as the Supplementary Report of Professor Richard Gardiner and the Second Expert Report of Professor Hervé Ascensio.[1] Abbreviations used in this submission have the same meaning as in the U.S. Memorial on its Preliminary Objection.

I. Introduction

2. As the United States made clear in its Memorial, this Tribunal lacks jurisdiction because Claimants have not alleged a breach of a NAFTA obligation that occurred while that treaty was in force. Paragraph 1 of USMCA Annex 14-C only permits claims for "breach of an obligation" under the specified NAFTA provisions.[2] Consistent with the rule of customary international law that an act of a State cannot breach an obligation unless it was bound by that obligation at the time the act occurred, the United States could not have "breached an obligation" of the NAFTA after its termination in 2020.[3] As the Parties agree, the only relevant U.S. act – the revocation of the Presidential Permit – occurred in 2021. Therefore, there could be no "breach of an obligation" under the NAFTA that gives rise to jurisdiction under Annex 14-C.

3. Claimants have floated two different arguments in an attempt to circumvent this rule. At the bifurcation stage, Claimants argued that a combination of the USMCA Protocol and references to the NAFTA in Annex 14-C amounted to an agreement by the USMCA Parties to extend the NAFTA's substantive investment obligations for three years after its termination. The United

[1] In this Reply, the United States cites Professor Gardiner's Supplementary Report as "Gardiner's Supplementary Report ¶ X" and Professor Ascensio's Second Expert Report as "Ascensio's Second Report ¶ X".
[2] Annex 14-C, ¶ 1 **(C-0002)**.
[3] *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc.A/56/49(Vol. I)/Corr.4 (2001) **(RL-023)**.

States rebutted that argument in detail in its Memorial, showing that no provision or combination of provisions in the USMCA could be read to constitute such an agreement. NAFTA Chapter 11 clearly terminated in July 2020, as indicated by (among other things) the several references to the termination in USMCA Annex 14-C. Annex 14-C merely extended the time period to file a claim for alleged breaches of the NAFTA that occurred while it was in force.

4. In their Counter-Memorial, Claimants shift their focus to a theory advanced by their expert Christoph Schreuer. According to Professor Schreuer, it does not matter whether the United States was bound by the NAFTA's obligations when it revoked the Keystone XL pipeline permit – or whether the revocation breached those obligations when it occurred – because Annex 14-C specifies the NAFTA as the law applicable to claims submitted thereunder. Professor Schreuer does not concern himself with how an act can be a "breach of an obligation" if that obligation is no longer in force.

5. As will be explained below, Claimants' applicable law argument is no more compelling than their original theory. The requirement in Paragraph 1 of Annex 14-C that claims submitted to arbitration be claims for "breach of an obligation" under the specified NAFTA provisions is a limit on the Tribunal's jurisdiction *ratione temporis*. Specifically, this language permits only claims based on events occurring while the NAFTA's obligations were binding on – and capable of being breached by – the USMCA Parties. This is clear from the ordinary meaning of the language in Annex 14-C, Paragraph 1, and it is how the nearly identical language in NAFTA Articles 1116 and 1117 was understood by NAFTA tribunals, the USMCA/NAFTA Parties, and scholars – including Professor Schreuer – who have considered the issue. Under this plain reading and these common understandings, in order to reach the "applicable law" provisions on which Professor Schreuer relies, a claimant must first be able to allege a breach of an obligation of the

NAFTA; if such obligation does not exist at the time of the act at issue, there is no claim and the question of applicable law does not arise. Furthermore, in confirming in Footnote 20 that the NAFTA is the law applicable to claims under Annex 14-C, the USMCA Parties were merely acknowledging the general principle of intertemporal law that events occurring while the NAFTA's obligations were in force must be assessed under those obligations.[4] There is nothing in this confirmation of the applicable law that could be read to alter, let alone remove, the *ratione temporis* limit placed on the Tribunal's jurisdiction in Paragraph 1.

6. The Tribunal therefore lacks jurisdiction over Claimants' claims and should dismiss them in their entirety. This Reply addresses the interpretation of Annex 14-C, the core issue before the Tribunal in this phase of the bifurcated proceeding, in **Section II**, before turning to Claimants' meritless equitable arguments in **Section III**.

II. Annex 14-C Does Not Provide the Tribunal with Jurisdiction over Claimants' Claims

7. The customary international law rules of treaty interpretation memorialized in Article 31 of the Vienna Convention on the Law of Treaties provide the framework for resolving the U.S. preliminary objection. As the United States and its expert Professor Gardiner have explained, these rules give primacy to the treaty text.[5] Claimants' expert, Professor Schreuer, is in accord, observing in a 2018 expert report in another case:

> [T]he text of the treaty must be presumed to be the authentic expression of the intentions of the parties. The interpretation of a treaty should proceed from the elucidation of the meaning of its text.

[4] *See* International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 13, [2001] 2 Y.B. INT'L L. COMM. 1, 57 (¶ 1), U.N. Doc. A/56/10 (2001) **(RL-054)** ("[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.") (internal citations omitted).
[5] U.S. Memorial ¶ 15; Gardiner Report ¶ A.7.

> It should not investigate *ab initio* the supposed intentions of the parties.[6]

8. As discussed in **Section II.A**, the U.S. interpretation of Annex 14-C proceeds – consistent with Article 31 of the Vienna Convention – from the ordinary meaning of its terms, read in context and in light of the USMCA's object and purpose. The U.S. preliminary objection is based upon the express requirement in Paragraph 1 of Annex 14-C that a claimant allege a "breach of an obligation" under the specified NAFTA provisions.[7] Claimants' two theories, by contrast, lack support in the text of Annex 14-C, as addressed in **Section II.B**. Context and the USMCA's object and purpose also undermine Claimants' position, and support the U.S. interpretation, as discussed in **Sections II.C** and **II.D**, respectively. Further, while the United States does not believe that the Tribunal needs to have recourse to supplementary means of interpretation, given the clarity of Annex 14-C's terms, **Section II.E** explains why this material either supports the plain meaning as indicated by the United States, or otherwise sheds no new light on the meaning of Annex 14-C. Finally, in response to extended arguments put forward by Claimants and Professor Schreuer, the United States touches briefly on issues related to the burden of proof in **Section II.F**.

A. Annex 14-C Limits the Tribunal's Jurisdiction *Ratione Temporis* to Claims Based on Breaches Allegedly Occurring While the NAFTA Was in Force

9. The text of Annex 14-C limits the scope of the USMCA Parties' consent to arbitration in several ways, but the critical limitation for the U.S. preliminary objection is that Paragraph 1 allows only claims "alleging *breach of an obligation* under" the specified NAFTA provisions, including the substantive investment obligations contained in Section A of NAFTA Chapter 11.[8] This requirement limits the *ratione temporis* jurisdiction of Annex 14-C tribunals because "[a]n act of

[6] *García Armas and others v. Venezuela (II)*, PCA Case No. 2016-08, Second Legal Opinion of Prof. Christoph Schreuer on Questions of Jurisdiction relating to Nationality ¶ 7 (May 31, 2018) **(RL-079)**.
[7] Annex 14-C, ¶ 1 **(C-0002)**.
[8] Annex 14-C, ¶ 1 (emphasis added) **(C-0002)**.

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."[9] Accordingly, claims may only be submitted under Annex 14-C for acts occurring while the Parties were bound by the NAFTA obligations specified in Paragraph 1. The NAFTA entered into force on January 1, 1994, and was terminated on July 1, 2020. Acts occurring outside this timeframe, like the revocation of the Keystone XL pipeline permit, cannot be the subject of a claim for breach of the NAFTA. The Tribunal therefore lacks jurisdiction *ratione temporis* over Claimants' claims in this case.

10. Claimants contend that the United States "is trying to insert a temporal limitation that simply is not there[,]"[10] but Claimants' argument ignores the plain language of Paragraph 1, which contains just such a limitation, as described above.[11] Indeed, the presence of a temporal limitation in Paragraph 1 of Annex 14-C should not be a controversial proposition. The key text – namely, the reference to "breach of an obligation" under the specified NAFTA provisions – is not new. As the United States demonstrated in its Memorial,[12] it derives almost verbatim from NAFTA Articles 1116(1) and 1117(1), which allowed only claims alleging that another Party "has breached an obligation under" the same NAFTA provisions specified in Paragraph 1 of Annex 14-C.[13]

11. The USMCA Parties, NAFTA tribunals, and scholars – including Claimants' expert Professor Schreuer – well understood NAFTA Articles 1116(1) and 1117(1) to limit potential claims to those that arose while the obligations were in force. For example, the tribunal in *Feldman*

[9] *See* International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001) **(RL-023)**.
[10] Claimants' Counter-Memorial ¶ 26.
[11] *See also* Ascensio's Second Report ¶ 4 ("The Claimants' submissions on this point essentially maintain that no restriction should be introduced into the USMCA that is not contained therein, whereas the issue is exactly the opposite: it is a question of interpreting and applying the provisions that *are* contained therein.") (emphasis in original).
[12] U.S. Memorial, at 31.
[13] NAFTA, arts. 1116(1) & 1117(1) **(C-0001)**.

v. Mexico concluded in a December 2000 decision that it lacked jurisdiction under NAFTA Article 1117(1) to consider claims based on "measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when NAFTA came into force . . . ."[14] As the tribunal explained in reference to Article 1117(1):

> Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, *the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal* ratione temporis. Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. . . . Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.[15]

12. The *Feldman* tribunal was therefore clear that, in requiring a claimant to allege a breach of a NAFTA obligation, Article 1117(1) limited the tribunal's jurisdiction *ratione temporis* to the period during which the NAFTA was in force.

13. The USMCA Parties all expressed agreement with this principle long before the USMCA negotiations began:

- Canada: "[I]nvestors are limited as to the claims they may bring. They may bring only claims arising from a breach of NAFTA. . . . A measure may only potentially violate NAFTA if the measure is effective or continues to be effective on or after the NAFTA entered into force, January 1, 1994."[16]

[14] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 60 (Dec. 6, 2000) **(RL-080)**.
[15] *Id.* ¶ 62 (emphasis added).
[16] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Submission of the Government of Canada ¶ 18 (Oct. 6, 2000) **(RL-081)**.

- Mexico: "[A]lleged acts or omissions of Mexico that occurred before the entry into force of the NAFTA on 1 January 1994 are beyond the Tribunal's jurisdiction *ratione temporis*."[17]

- United States: "[I]t is now undisputed that this Tribunal is competent to hear only claims for alleged breaches of Chapter Eleven based on acts or omissions of the United States that occurred after NAFTA's entry into force."[18]

14. Scholars likewise recognized the temporal limitation imposed by the reference in NAFTA Articles 1116(1) and 1117(1) to breaches of an obligation under NAFTA Chapter 11, Section A. For example, in their treatise on NAFTA Chapter 11, Meg Kinnear, Andrea Bjorklund and John Hannaford observe: "In *Feldman v. Mexico*, the tribunal made clear that the 'scope of application of NAFTA in terms of time' defined the jurisdiction of the tribunal *ratione temporis*. It held that no obligations adopted under NAFTA existed before January 1, 1994, and thus its jurisdiction did not extend before that date."[19]

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[17] *Bayview Irrigation District v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Mexico's Memorial on Jurisdiction ¶ 120 n.90 (Apr. 19, 2006) **(RL-082)** (citing *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶¶ 60-63 (Dec. 6, 2000)). *See also Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Mexico's Counter-Memorial on Preliminary Questions ¶ 232 (Sept. 8, 2000) **(RL-083)** ("It is open to an investor of another Party to claim compensation (subject to compliance with Section B, including the applicable limitation period) for breaches of Section A occurring after NAFTA's entry into force, whether they are entirely 'new' measures or continuing measures that became breaches of Section A when NAFTA entered into force. However, Chapter Eleven does not entitle an investor of another Party to claim compensation 'for loss or damage by reason of, or arising out of' an obligation under Section A before such obligations came into existence.") (emphasis in original).

[18] *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, U.S. Rejoinder on Competence and Liability at 5 (Oct. 1, 2001) **(RL-084)**. *See also Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, U.S. Counter-Memorial on Competence and Liability at 21 (June 1, 2001) **(RL-085)** ("[A]s the *Feldman* tribunal correctly found, because no Party was bound by an obligation under the NAFTA prior to January 1, 1994, acts or omissions that took place prior to that date cannot constitute breaches of the NAFTA.").

[19] MEG KINNEAR ET AL., *Article 1116 – Claim by an Investor of a Party on its Own Behalf*, *in* INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1116-28 (2006) **(RL-086)** (internal citations omitted). *See also* BORZU SABAHI ET AL., INVESTOR-STATE ARBITRATION ¶ 12.28 (2d ed. 2019) (**RL-087**) ("Where the BIT dispute resolution provision limits the scope of admissible claims to violations of the treaty's substantive

15. Professor Schreuer has addressed the same issue in a number of his publications. In a 2008 book chapter, Professor Schreuer explained:

> If the consent to arbitration is limited to claims alleging a violation of the treaty that contains the consent, the date of the treaty's entry into force is also the date from which acts and events are covered by the consent. Put differently, the entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law. For instance, under the NAFTA, the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA itself.[20]

16. And in 2022, Professor Schreuer reiterated:

> If consent to arbitration contained in a treaty is limited to violations of that treaty, the date of the treaty's entry into force is also necessarily the date from which acts and events are covered by consent to jurisdiction. For instance, under the NAFTA and under the ECT the scope of the consent to arbitration is limited to claims arising from alleged breaches of the respective treaties. In that case, the entry into force of the substantive law also determines the Tribunal's jurisdiction *ratione temporis* since the Tribunal may only hear claims for violation of that law.[21]

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provisions, there is no practical difference between temporal jurisdiction and the temporal application of substantive treaty provisions.").

[20] CHRISTOPH SCHREUER, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 859-60 (Peter Muchlinski et al., eds., 2008) **(RL-014)**.

[21] CHRISTOPH SCHREUER, *Landmark Investment Cases on State Consent*, *in* INTERNATIONAL INVESTMENT LAW: AN ANALYSIS OF THE MAJOR DECISIONS 265 (Hélène Ruiz Fabri & Edoardo Stoppioni, eds., 2022) (internal citations omitted) **(RL-088)**. *See also* Christoph H. Schreuer, *Consent to Arbitration*, 2(5) TRANSNAT'L DISP. MGMT. 33 (2005, updated Feb. 2007) **(RL-089)** ("If the consent to arbitration is limited to claims alleging a violation of the treaty that contains the consent, the date of the treaty's entry into force is also the date from which acts and events are covered by the consent. Put differently, the entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law. For instance, under the NAFTA, the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA itself."); CHRISTOPH H. SCHREUER, ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 - Jurisdiction* ¶ 510 (2d ed. 2009) **(RL-090)** ("A clause in a treaty or in legislation providing for consent may be broad and refer to investment disputes in general terms. Or it may be restricted to disputes concerning alleged violations of the document containing the consent. If consent to arbitration contained in a treaty is limited to violations of that treaty, the date of the treaty's entry into force is also necessarily the date from which acts and events are covered by consent to jurisdiction. For instance, under the NAFTA and under the ECT the scope of the consent to arbitration is limited to claims arising from alleged breaches of the respective treaties. In that case the entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims

17. Nor was this concept new in the NAFTA. Humphrey Waldock discussed jurisdictional clauses of the type found in Articles 1116(1) and 1117(1) in his Third Report on the Law of Treaties (1964):

> [W]hen a jurisdictional clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit *ratione temporis* the application of the jurisdictional clause. The reason is that the "disputes" with which the clause is concerned are *ex hypothesi* limited to "disputes" regarding the interpretation and application of the substantive provisions of the treaty which, as has been seen, do not normally extend to matters occurring before the treaty came into force.[22]

18. While these examples concern the starting point of the tribunal's *ratione temporis* jurisdiction – *i.e.*, the entry into force of the treaty whose obligations must be breached to give rise to an arbitrable claim – the principle is the same with respect to the end point – *i.e.*, the termination of such treaty.[23] Just as a treaty's obligations cannot be breached before they become binding on the parties (*i.e.*, when the treaty enters into force), the law of treaty interpretation is clear that they are likewise incapable of being breached after they cease to bind the parties (*i.e.*, after the treaty's termination).[24] In short, the tribunal's jurisdiction *ratione temporis* covers only the period during which the relevant treaty's obligations bound the treaty parties. Or, as the *Feldman* tribunal put

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for violation of that law.") (internal citations omitted); STEPHAN W. SCHILL, ET AL., SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *Article 25 - Jurisdiction* ¶ 941 (3rd ed. 2022) **(RL-091)** ("A treaty may also exclude jurisdiction in respect of acts that occurred before its entry into force. If consent to arbitration contained in a treaty is limited to violations of that treaty […], the date of the treaty's entry into force is also necessarily the date from which acts and events are covered by consent to jurisdiction. For instance, under the NAFTA, and under the ECT, the scope of the consent to arbitration is limited to claims arising from alleged breaches of the respective treaties. . . . In that situation, the entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law.") (internal citations omitted).

[22] Humphrey Waldock, Third Report on the Law of Treaties 11 (¶ 4), U.N. Doc. A/CN.4/167 (1964) **(RL-050)**.

[23] Ascensio's Second Report ¶ 28 ("The question at stake in the present case is not about the entry into force of NAFTA; it is about its termination. Yet, a symmetric reasoning applies: without an explicit provision to the contrary, obligations under NAFTA cannot apply to events arising after its termination.").

[24] *See* Vienna Convention on the Law of Treaties, art. 70(1)(a) **(RL-016)**.

it: "the scope of application of NAFTA in terms of time defines . . . the jurisdiction of the Tribunal *ratione temporis*."[25]

19. The meaning and effect of limiting NAFTA Articles 1116(1) and 1117(1) to claims alleging a "breach" of specified NAFTA "obligations" was therefore clear to the USMCA Parties. Incorporating the same limitation into Annex 14-C has precisely the same effect, constraining the scope of permissible claims to those based on alleged breaches occurring while the NAFTA was in force.

20. Expanding the jurisdiction *ratione temporis* of Annex 14-C tribunals to encompass claims based on events occurring when the USMCA Parties were no longer bound by the NAFTA's substantive investment obligations would have required a material change to the language from NAFTA Articles 1116(1) and 1117(1). The USMCA Parties made no such change. Instead, they not only chose to retain the key language from these NAFTA articles in Paragraph 1 of Annex 14-C but also made clear that the limitations in the NAFTA itself would continue to apply to claims under Annex 14-C, stating in Paragraph 1 that such claims must be submitted "in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994," which includes NAFTA Articles 1116(1) and 1117(1).[26]

21. In sum, the requirement in Paragraph 1 of Annex 14-C that a claimant allege a "breach of an obligation" under the specified NAFTA provisions, limits the Tribunal's jurisdiction *ratione temporis* to the period when the NAFTA was in force, consistent with the same limitation in NAFTA Articles 1116(1) and 1117(1). If the NAFTA was no longer in force, there was no obligation that could be breached. Claimants almost entirely avoid discussing the "breach of an

[25] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000) **(RL-080)**.
[26] Annex 14-C, ¶ 1 **(C-0002)**.

obligation" requirement,[27] because they cannot meaningfully fit the language into their new, strained interpretation of Annex 14-C. Moreover, this is a requirement that Claimants cannot satisfy because their claims are based exclusively on events occurring after the NAFTA's termination.

B. Claimants' Interpretations of Annex 14-C Are Divorced from the Ordinary Meaning of Its Terms

22. At the bifurcation stage, Claimants appeared to accept the temporal limitation in Paragraph 1 of Annex 14-C but argued that they satisfied it because, in their view, the USMCA Parties had agreed to extend the NAFTA's substantive obligations for three years after its termination. Claimants are wrong – the USMCA Parties made no such agreement, as the U.S. Memorial makes clear. Claimants have now shifted focus in their Counter-Memorial, arguing that because the USMCA Parties chose the NAFTA as the applicable law for Annex 14-C arbitrations, this allows them to assert claims for breaches of the NAFTA's obligations, regardless of when the events underlying the alleged breach occurred, as long as they satisfy Annex 14-C's other requirements.

23. In the next two sections, the United States will address **(1)** the little that Claimants have to say in their Counter-Memorial in support of their original argument that the USMCA extended the NAFTA's substantive arguments, before turning to **(2)** the applicable law argument on which Claimants now appear to hang their jurisdictional case. Neither argument has merit.

1) The USMCA Did Not Extend the NAFTA's Substantive Obligations

24. Claimants' original jurisdictional theory was based on the Protocol Replacing the NAFTA with the USMCA (the "USMCA Protocol"). Claimants focused on the USMCA Protocol's first paragraph, which provides: "Upon entry into force of this Protocol, the USMCA, attached as an

[27] As discussed below, Professor Schreuer's theory depends on rewriting this requirement, rather than explaining how Claimants' claims satisfy it as written. *See infra*, Section II.B(2).

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."[28] According to Claimants, the "without prejudice" clause in this paragraph gave continued binding force to all NAFTA provisions referenced in the USMCA: "when provisions of USMCA refer to provisions of NAFTA 1994, the NAFTA provisions remain applicable despite the fact that USMCA replaced NAFTA 1994."[29] By referring to the NAFTA's substantive investment obligations, Claimants argued, Annex 14-C thereby "preserve[d] the obligations in Section A of Chapter 11 of NAFTA 1994 for the entirety of the transition period, with respect to legacy investments."[30]

25. As the United States explained during the bifurcation phase and again in its Memorial, the problem with Claimants' argument is that it is not supported by the ordinary meaning of the relevant USMCA terms.[31] The USMCA Protocol's text addresses only the avoidance of prejudice to certain "provisions set forth in the USMCA," namely those that "refer to provisions of the NAFTA."[32] The Protocol's concern was that the mere reference to the terminated NAFTA in a USMCA provision would render the latter moot, and makes clear that such provisions would be effective despite the NAFTA's termination. The Protocol says nothing about "NAFTA provisions remain[ing] applicable despite the fact that USMCA replaced NAFTA 1994."[33] And while Annex 14-C contains references to the NAFTA, it does *not* contain any reference to a "transition period" or any text binding the USMCA Parties to the continued application of the NAFTA's substantive

[28] USMCA Protocol ¶ 1 **(R-0001)**.
[29] Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection ¶ 27; Claimants' Rejoinder on Bifurcation ¶ 27; Claimants' Counter-Memorial ¶ 81.
[30] Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection ¶ 28.
[31] U.S. Reply to Claimants' Observations on the U.S. Request for Bifurcation ¶¶ 13-20; U.S. Memorial ¶¶ 40-43.
[32] USMCA Protocol ¶ 1 **(R-0001)**.
[33] Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection ¶ 27.

investment obligations.[34] Rather, the Protocol ensures that the references to the NAFTA in Annex 14-C, which extended a claimant's ability to bring claims for an additional three years for a breach of the NAFTA that occurred while it was in force, would not be rendered moot by the NAFTA's termination. The USMCA Protocol and the NAFTA references in Annex 14-C, whether separately or in combination, do not alter the fact that the NAFTA's obligations ceased to bind the USMCA Parties following the NAFTA's termination on July 1, 2020.[35]

26. In their Counter-Memorial, Claimants have not expressly abandoned their counter-textual reading of the USMCA Protocol, but they spend little time defending it. Claimants now argue that "the only way to avoid prejudice to the USMCA provisions that refer to provisions of NAFTA is to give effect to those NAFTA provisions" and that "[i]n 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."[36]

27. But this is simply not true. While Paragraph 1 of Annex 14-C references the substantive investment obligations in Section A of NAFTA Chapter 11, it does so only in imposing a requirement that a claimant seeking to bring an Annex 14-C claim assert a "breach" of one of those "obligation[s]" (or of the obligations under the two specified provisions in NAFTA Chapter 15).[37] Giving force to this requirement does not necessitate binding the USMCA Parties to the continued application of the obligations in Section A of NAFTA Chapter 11 after the NAFTA's termination. This provision is effective, in keeping with the Protocol, by allowing for claims to be filed for an

[34] Ascensio's Second Report ¶ 8 ("Annex 14-C does not set out a 'transition period', but deals with 'claims' only, as is evident in its title ('Legacy Investment Claims and Pending Claims'). It aims at specifying the procedures that may be used to settle certain categories of claims.").
[35] *See* Ascensio Report ¶ 14.
[36] Claimants' Counter-Memorial ¶ 81.
[37] Annex 14-C, ¶ 1 **(C-0002)**. Paragraph 3 of Annex 14-C does not reference the NAFTA's substantive investment obligations at all, stating only that "[a] Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994." *Id.*, ¶ 3.

additional three years for a "breach of an obligation" of the NAFTA that arose while the NAFTA was in force.

28. As discussed above, the "breach of an obligation" requirement limits the Tribunal's jurisdiction *ratione temporis* to claims based on events occurring when the NAFTA's substantive investment obligations were binding on the USMCA Parties and capable of being breached by them. Reading the USMCA Protocol to extend the application of the obligations in Section A of NAFTA Chapter 11 would not avoid prejudice to Paragraph 1 of Annex 14-C. It would instead amend Annex 14-C, abrogating the jurisdictional limit otherwise imposed by its text, which is inconsistent with customary international law principles of treaty interpretation.[38]

29. The ordinary meaning of the USMCA Protocol thus does not support Claimants' interpretation, as Claimants seem to tacitly acknowledge by shifting this aspect of their jurisdictional case to the periphery in their Counter-Memorial. The Tribunal should reject Claimants' contention that the USMCA Protocol, coupled with a reference to Section A of NAFTA Chapter 11 in Paragraph 1 of Annex 14-C, bound the USMCA Parties to the continued application of the NAFTA's substantive investment obligations for three years.

2) Claimants' Applicable Law Argument Is Meritless

30. Claimants' applicable law theory, which is now the focus of their jurisdictional case, rests on two propositions: *first*, that there exists an "arbitration agreement" between Claimants and the United States, allegedly formed when Claimants accepted the "offer of arbitration" contained in

[38] Gardiner's Supplementary Report ¶ 14 ("It is a principle of treaty interpretation, too well established to require great elaboration, that where terms are included in a treaty, proper interpretation requires that effect be given to them rather than no effect. This is inherent in the first part of the general rule of treaty interpretation. Failure to take account of the reference to 'obligation' in the formulation of the extent of consent to arbitration in Annex 14-C is not in accordance with this principle of treaty interpretation and results in misinterpretation of the treaty.") (internal citations omitted).

Annex 14-C;[39] and, *second*, that this agreement includes the choice of "NAFTA as the applicable substantive law[,]"[40] a choice that, Claimants say, "is binding on the tribunal, regardless of whether NAFTA would otherwise apply."[41]

31. Claimants focus the majority of their argument on the second proposition, discussing the freedom of parties to choose the law applicable to their dispute and the consequences of that choice.[42] None of this matters, however, because the first of Claimants' foundational propositions is wrong: no agreement to arbitrate exists between Claimants and the United States because Claimants did not – and could not – accept the offer made by the USMCA Parties in Annex 14-C.

32. As Professor Schreuer has explained elsewhere:

> Where ICSID's jurisdiction is based on an offer made by one party, subsequently accepted by the other, the parties' consent exists only to the extent that offer and acceptance coincide. . . . It is evident that the investor's acceptance may not validly go beyond the limits of the host State's offer. Therefore, any limitations contained in the legislation or treaty would apply irrespective of the terms of the investor's acceptance. *If the terms of acceptance do not coincide with the terms of the offer there is no perfected consent*.[43]

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[39] Claimants' Counter-Memorial ¶ 29.
[40] *Id.* ¶ 24.
[41] *Id.* at 13. *See also id.* ¶ 24 ("[T]he 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.").
[42] Claimants' Counter-Memorial ¶¶ 28-48.
[43] CHRISTOPH H. SCHREUER, ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 – Jurisdiction* ¶ 514 (2d ed. 2009) **(RL-090)** (emphasis added); STEPHAN W. SCHILL, ET AL., SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *Article 25 – Jurisdiction* ¶ 950 (3rd ed. 2022) **(RL-091)** (same); Christoph Schreuer, *Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, *in* U.N. CONF. ON TRADE & DEV. DISPUTE SETTLEMENT: ICSID: 2.3 CONSENT TO ARBITRATION, at 30 (2003) **(RL-092)** (same). *See also* Paul C. Szasz, *The Investment Disputes Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)*, 5 J.L. & ECON. DEV. 23 at 29 (1970-1971) **(RL-093)** ("The related point to be observed when consent is expressed in diverse instruments, is the extent to which these overlap—for it is only in the area of coincidence that the consent is both effective and irrevocable."); *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award ¶ 6.2.1 (July 2, 2013) **(RL-094)** ("It is a fundamental principle that an agreement is formed by offer and acceptance. But for an agreement to result, there must be acceptance of the offer *as made*. It follows that an arbitration agreement, such as would provide for the Centre to have jurisdiction under Article 25 of the ICSID Convention, can only come into existence through a qualifying investor's acceptance of a host state's standing offer as made (*i.e.*, under its terms and conditions).") (emphasis in original).

33. As already discussed, the USMCA Parties did not consent in Paragraph 1 of Annex 14-C to arbitrate *any* dispute concerning a legacy investment. Rather, they limited their consent to claims "alleging breach of an obligation under" certain specified NAFTA provisions.[44] An investor seeking to accept the offer in Annex 14-C must therefore submit a claim that complies with this limitation. Events occurring after the NAFTA's termination, when the NAFTA's obligations were no longer binding on the USMCA Parties, cannot constitute a breach of the NAFTA. Accordingly, a claim that is based on such events – like Claimants' claims in this case – "go[es] beyond the limits of the . . . offer" in Annex 14-C.[45] In the absence of a claim that "coincide[s] with the terms of the offer" in Annex 14-C, "there is no perfected consent."[46]

34. Paragraph 2 of Annex 14-C is in accord. Paragraph 2 provides in relevant part:

> 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) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; . . .[47]

35. Paragraph 2 makes clear that the mere submission of a claim is insufficient to satisfy the requirement in Article 25(1) of the ICSID Convention for "consent in writing." Instead, only submission of a claim that accords with the requirements in Section B of NAFTA Chapter 11 and Annex 14-C will qualify. As already noted, both NAFTA Articles 1116 and 1117, which form

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[44] Annex 14-C, ¶ 1 **(C-0002)**. *See also* CHRISTOPH H. SCHREUER, ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 – Jurisdiction* ¶¶ 526-39 (2d ed. 2009) **(RL-090)** (providing examples of different types of consent clauses that States include in their treaties).
[45] CHRISTOPH H. SCHREUER, ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 – Jurisdiction* ¶ 514 (2d ed. 2009) **(RL-090)**; STEPHAN W. SCHILL, ET AL., SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *Article 25 – Jurisdiction* ¶ 950 (3rd ed. 2022) **(RL-091)**.
[46] *Id.*
[47] Annex 14-C, ¶ 2 **(C-0002)** (emphases added).

part of Section B of NAFTA Chapter 11, and Paragraph 1 of Annex 14-C are limited to claims for "breach of an obligation" under the specified NAFTA provisions.

36. Claimants make little effort to explain how their purported "acceptance of Respondent's offer of arbitration"[48] aligned with the text of Annex 14-C. Professor Schreuer suggests that it was sufficient for Claimants to allege a "breach of certain substantive standards, including those of Section A of Chapter 11 of NAFTA."[49] But this is not what Paragraph 1 of Annex 14-C requires. Paragraph 1 instead provides that an investor must allege "breach of an obligation" under the specified NAFTA provisions.[50] As Professor Gardiner explains, there is a significant difference between a "standard" and an "obligation":

> A "standard" is a measure by which something is evaluated. An "obligation" is a commitment which is legally binding. The condition of consent in the Annex is not expressed in terms of allegations of failure to meet specified standards but of allegations of breach of obligations under the stated treaty provisions. The existence of those obligations circumscribes the consent that is given. The obligations did not arise except when the specified NAFTA treaty provisions had force, which they did not after being superseded.[51]

In accordance with Paragraph 1 of Annex 14-C, an investor's claims must therefore be based on conduct that occurred while the NAFTA's obligations were binding on, and could be breached by, a Party. In the absence of claims satisfying this requirement, there is no agreement to arbitrate.

37. The tribunal's decision in *CSOB v. Slovak Republic*, on which Claimants attempt to rely, helpfully highlights the distinction between a case in which the disputing parties have entered into a binding agreement to arbitrate and cases, like this one, in which they have not. Claimants rely

[48] Claimants' Counter-Memorial ¶ 29.
[49] Legal Opinion by Christoph Schreuer ¶ 26 **(CER-1)**.
[50] Annex 14-C, ¶ 1 **(C-0002)**.
[51] Gardiner's Supplementary Report ¶ 11.

on *CSOB* because, in their view, it "confirm[s] that disputing parties are free to choose a treaty as the applicable law, even if that treaty is not otherwise in force."[52] This is true as far as it goes, but there is a critical difference between *CSOB* and this case. In *CSOB*, the disputing parties' choice of law was embodied in a contract, the so-called Consolidation Agreement concluded between the claimant (CSOB), the respondent (the Slovak Republic), and the Czech Republic several years before the dispute arose.[53] The Consolidation Agreement specified that it "shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Mutual Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992."[54] The *CSOB* tribunal concluded that, by specifying the Czech-Slovak bilateral investment treaty as the governing law, the parties to the Consolidation Agreement "intended to incorporate Article 8 of the BIT by reference . . . in order to provide for international arbitration as their chosen dispute-settlement method."[55] In other words, "the parties have consented in the Consolidation Agreement to ICSID jurisdiction and . . . the date of such Agreement is, for all relevant purposes, the date of their consent."[56]

38. The disputing parties in *CSOB* had therefore formed an agreement to arbitrate as part of the broader Consolidation Agreement between them. While the *CSOB* tribunal found "uncertainties relating to the entry into force of the BIT[,]"[57] there was no doubt that the Consolidation Agreement, including its governing law provision and its agreement to arbitrate, was binding on the disputing parties. Consent to arbitrate had already been perfected. Here, by

[52] Claimants' Counter-Memorial ¶ 47.
[53] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction ¶ 1 (May 24, 1999) **(CL-123)**.
[54] *Id.* ¶ 49 (quoting Article 7 of the Consolidation Agreement).
[55] *Id.* ¶ 55.
[56] *Id.* ¶ 59.
[57] *Id.* ¶ 43.

contrast, there was no preexisting contractual relationship between Claimants and the United States, and no pre-existing agreement to arbitrate. An agreement to arbitrate could only have been formed if Claimants had accepted the offer contained in Paragraph 1 of Annex 14-C. Claimants did not do so, however, and no such agreement was formed.

39. On a separate tack, Professor Schreuer seems to suggest that the *ratione temporis* jurisdictional limitation embodied in the "breach of an obligation" requirement is ineffective because it would, in his view, be inappropriate to consider at the jurisdictional phase whether the breaches alleged by Claimants occurred while the NAFTA was in force. Specifically, Professor Schreuer asserts that "[i]t is not permissible to argue that certain substantive rules of law are applicable or not applicable and to draw conclusions as to the jurisdiction of a tribunal on this basis."[58] That assertion cannot, however, be squared with either the *Feldman* decision or Professor Schreuer's own prior writings on the NAFTA's *ratione temporis* limitations; such jurisdictional limitations rely entirely on whether "certain substantive rules of law are applicable."[59]

40. The linchpin of the *Feldman* tribunal's jurisdictional assessment was whether Mexico took the challenged measures before or after the NAFTA entered into force – the tribunal's jurisdiction *ratione temporis* extended to the latter but not the former.[60] As the *Feldman* tribunal explained, "its jurisdiction under NAFTA Article 1117(1)(a) . . . is only limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA."[61] This

[58] Legal Opinion by Christoph Schreuer ¶ 51 **(CER-1)**.
[59] Taken to its logical extreme, Professor Schreuer's position would mean that Claimants could accept the offer to arbitrate in Annex 14-C by alleging a breach of any rule of law – even one embodied in a treaty other than the NAFTA or the USMCA – and the United States would be barred from arguing that the Tribunal lacks jurisdiction over such a claim.
[60] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 63 (Dec. 6, 2000) **(RL-080)**.
[61] *Id.* ¶ 61.

limitation determined the scope of the tribunal's jurisdiction *ratione temporis*, as explained above.[62]

41. On the basis of its interpretation of NAFTA Article 1117(a)(1), the *Feldman* tribunal concluded as a jurisdictional matter "that only measures alleged to be taken by the Respondent after January 1, 1994, when NAFTA came into force, and which are alleged to be in violation of NAFTA, are relevant for the support of the claim or claims under consideration."[63] Thus, the tribunal's jurisdictional assessment turned entirely on the applicability (or inapplicability) of the NAFTA's substantive rules.

42. It is notable, moreover, that the same provisions that Claimants rely on in the Annex 14-C context also applied in the NAFTA context without having the impact that Claimants urge here. *First,* the same language from NAFTA Articles 1116(1) and 1117(1), incorporated into Paragraph 1 of Annex 14-C, was never interpreted to be the applicable law clause for disputes under NAFTA Chapter 11. Rather, the applicable law clause was NAFTA Article 1131, 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."[64]

43. *Second,* Article 1131 did not relieve the Tribunal of determining its jurisdiction *ratione temporis*. If Claimants were correct that designating the NAFTA as the law applicable to the substance of the dispute obviates the need to consider whether a claim is based on events occurring when the NAFTA was in force, the same would have necessarily held true in the NAFTA context. Yet, that is not how the *Feldman* tribunal and others interpreted the NAFTA. To the contrary, as discussed above, the *Feldman* tribunal concluded that events predating the NAFTA's entry into

[62] *Id.* ¶ 62. *See supra*, Section II.A.
[63] *Id.* ¶ 63.
[64] NAFTA, art. 1131 **(C-0001)**.

force were outside the scope of its jurisdiction *ratione temporis*. Nowhere did the *Feldman* tribunal suggest that NAFTA Article 1131 might abrogate this limitation. Nor would Professor Schreuer's earlier observations on the *ratione temporis* limitation imposed by NAFTA Articles 1116 and 1117 make sense if, as Claimants argue, such a limitation could be undermined by a provision specifying the law applicable to the substance of the dispute.

44. To sum up, Claimants' applicable law theory fails at the outset because it hinges on the existence of an agreement to arbitrate that was never formed. The USMCA Parties limited their consent in Paragraph 1 of Annex 14-C to claims "alleging breach of an obligation" under the specified NAFTA provisions. Claimants' Request for Arbitration did not and could not allege such a breach, because no such obligation existed at the time of the permit revocation. Claimants' attempted acceptance of the USMCA Parties' offer to arbitrate in Annex 14-C went beyond the scope of that offer. Accordingly, "there is no perfected consent,"[65] no agreement to arbitrate, and no agreement to apply the obligations in Section A of NAFTA Chapter 11 to the substance of Claimants' claims.[66]

C. Claimants' Analysis of the Relevant Context Is Flawed

45. The context of Paragraph 1 of Annex 14-C does not support either of Claimants' theories regarding its interpretation. As Professor Gardiner explains, "[t]he primary role of context in treaty interpretation is to assist in identifying the ordinary meaning of the terms used in the treaty being

[65] CHRISTOPH H. SCHREUER, ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 - Jurisdiction* ¶ 514 (2d ed. 2009) **(RL-090)**; STEPHAN W. SCHILL, ET AL., SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *Article 25 – Jurisdiction* ¶ 950 (3rd ed. 2022) **(RL-091)**.

[66] Claimants also spend considerable time in the section of their Counter-Memorial pertaining to the "ordinary meaning" of Annex 14-C discussing various treaties other than the USMCA and the NAFTA. Claimants' Counter-Memorial ¶¶ 49-63. However, the provisions of these treaties are, at best, supplementary means of interpretation and have no place in the application of Article 31 of the Vienna Convention. They will be addressed below, together with the other materials that Claimants attempt to enlist under Article 32.

interpreted."[67] Context may not be used to interpret a treaty in a manner that is inconsistent with the ordinary meaning of its terms.[68] By its plain terms, Paragraph 1 of Annex 14-C provides the USMCA Parties' consent to arbitrate claims for "breach of an obligation" of Section A of NAFTA Chapter 11, which could only have arisen while the NAFTA was still in effect. The context of Paragraph 1 cannot change this meaning and does not support Claimants' erroneous interpretation.[69] In any event, the relevant context is completely in accord with the plain meaning of Annex 14-C, Paragraph 1.

1) The Preamble and the USMCA Protocol Support the Ordinary Meaning of Annex 14-C

46. Claimants do not dispute that, as provided in the Preamble and the USMCA Protocol, the NAFTA was replaced and superseded by the USMCA.[70] As the United States explained in its Memorial, the Preamble and the USMCA Protocol provide useful context for interpreting Annex 14-C.[71] Among other things, they establish that the NAFTA's substantive investment obligations ceased to bind the USMCA Parties when the USMCA entered into force, meaning that events occurring thereafter could not constitute breaches of those obligations. Claimants have little to say about the Preamble and the USMCA Protocol in their Counter-Memorial beyond the arguments they made at the bifurcation stage. The United States has addressed the few new points above in Section II.B(1), concerning Claimants' original theory that the USMCA Protocol played a role in extending the NAFTA's obligations post-termination, and below in Section II.D, concerning the USMCA's object and purpose.

[67] Gardiner's Supplementary Report ¶ 26.
[68] *Id*.
[69] *See id*. ¶ 28.
[70] U.S. Memorial ¶ 34.
[71] *Id*. ¶¶ 34-43.

2) Annex 14-C's Placement Outside the Body of Chapter 14 Confirms That It Does Not Extend Substantive Investment Obligations

47. Although Claimants argue that context is important when interpreting a treaty provision,[72] they fail to address the United States' argument that Annex 14-C, as a dispute resolution annex, does not itself impose substantive investment obligations.[73]

48. The treaty structure of both the USMCA and the NAFTA includes (1) a set of substantive rules for treatment of investments, found in the body of Chapter 14 of the USMCA and Section A of Chapter 11 in the NAFTA; and (2) a set of jurisdictional and procedural rules for arbitration of disputes concerning the substantive rules, found in Annexes 14-C, 14-D, and 14-E of the USMCA and Section B of Chapter 11 in the NAFTA.[74]

49. Annex 14-C, titled "Legacy Investment Claims and Pending Claims," simply sets forth the USMCA Parties' consent to arbitrate certain claims. While the body of Chapter 14 addresses substantive rules for treatment of investments, Annex 14-C addresses only procedural matters and does not impose substantive investment obligations. There is no language in Annex 14-C providing for the extension of the NAFTA's substantive investment obligations beyond its termination, nor would any such language fit within the confines of this type of dispute settlement annex.

[72] Claimants' Counter-Memorial ¶ 64.
[73] U.S. Memorial ¶¶ 44-46. *See also* Ascensio's Second Report ¶ 13.
[74] Gardiner Report ¶ A.6.

3) The Definition of "Legacy Investment" Confirms that the USMCA Parties' Consent is Limited to Breaches Predating the NAFTA's Termination

50. Claimants insist that the definition of "legacy investment" reflects an intention to allow investors to bring claims under Paragraph 1 of Annex 14-C based on conduct occurring after the NAFTA's termination.[75] But the definition of "legacy investment" nowhere provides or even suggests that the NAFTA's substantive investment protections will continue to apply following its termination. Had the USMCA Parties intended to provide "continuing protection" of legacy investments as Claimants suggest,[76] they would have included clear and express language extending the NAFTA's substantive investment protections. They did not do so.

51. Paragraph 6 of Annex 14-C defines "legacy investment" as an investment established or acquired while the NAFTA was in force, and in existence on the date of entry into force of the USMCA. The consent to arbitration in Paragraph 1 of Annex 14-C is limited to "legacy investments." Thus, a "legacy investment" claim must be one involving a "legacy investment" that was subject to a breach of a NAFTA obligation as required by Paragraph 1.[77]

52. The definition of "legacy investment" does not suggest an intention, either explicitly or implicitly, to allow the arbitration of claims arising from measures taken *after* the NAFTA's termination.[78] As the United States has explained, the default outcome after the NAFTA's

[75] Claimants' Counter-Memorial ¶ 85; Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection ¶ 33; Claimants' Rejoinder on Bifurcation ¶ 60.
[76] Claimants' Rejoinder on Bifurcation ¶ 61; Claimants' Counter-Memorial ¶ 88 n.130.
[77] Gardiner Report ¶ E.5 (noting that the definition of legacy investment serves to show that "consent is given only for acts or events while those [NAFTA] obligations were in force"). *See also* Ascensio's Second Report ¶¶ 8-10.
[78] *But see* Claimants' Counter-Memorial ¶ 86. Claimants' reference to the CAFTA-DR and the U.S.-Morocco Free Trade Agreement are inapposite and do not support Claimants' interpretation of Annex 14-C. The United States did not terminate the BITs with Honduras and Morocco after entering into the CAFTA-DR and the U.S.-Morocco Free Trade Agreement, respectively. Instead, the substantive obligations under the BITs remained in effect despite the entry into force of the CAFTA-DR and the U.S.-Morocco FTA. Accordingly, claimants with qualifying investments were allowed to submit claims to arbitration for breaches of the BITs occurring before and after the entry into force of the subsequent agreements. Here, the USMCA Parties terminated the NAFTA and replaced it with the USMCA, and did not extend the NAFTA's substantive investment obligations.

termination was that there would be no recourse to arbitration for alleged breaches of the NAFTA. Annex 14-C makes an exception for legacy investment claims that arose prior to the NAFTA's termination (*i.e.*, while Section A of Chapter 11 was still in effect). By requiring that legacy investments be in existence on the date of entry into force of the USMCA, Annex 14-C limits the submission of arbitration claims to those investors with ongoing investments in the host states after the NAFTA's termination. At most, the legacy investment definition signals the USMCA Parties' preference for permitting claims by investors who maintained their investments as of the USMCA's entry into force, as opposed to those investors who did not.[79] There is no language in the definition of "legacy investment" that suggests that NAFTA's obligations were extended after its termination.

4) The Footnotes to Annex 14-C Do Not Support Claimants' Interpretation

53. Claimants spend substantial time in their Counter-Memorial on the two footnotes to Annex 14-C, but they add little to the arguments that they raised, and the United States rebutted, during the bifurcation phase. In the bifurcation briefing, the United States' submissions demonstrated that (i) Footnote 20 merely acknowledges "[f]or greater certainty" that NAFTA Chapter 11 and related provisions apply to claims based on alleged breaches that occurred when the NAFTA was in force, despite the NAFTA's termination,[80] and (ii) Footnote 21 operates to bar claimants who are eligible to submit claims under Annex 14-E from bringing Annex 14-C claims.[81] The bottom line remains the same: the two footnotes do not provide any support for Claimants' interpretation of Annex 14-C.

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[79] USMCA Article 14.1 defines "covered investment" as "an investment in its territory of an investor of another Party *in existence as of the date of entry into force of this Agreement* or established, acquired, or expanded thereafter." **(C-0002)** (emphasis added).
[80] U.S. Reply to Claimants' Observations on the U.S. Request for Bifurcation ¶ 17.
[81] *Id.* ¶ 31.

a. Footnote 20 confirms that NAFTA Chapter 11 applies to claims for alleged breaches that occurred while the NAFTA was in force

54. In their bifurcation briefs, Claimants argued that the reference to NAFTA Chapter 11 in Footnote 20 "preserve[d] the obligations in Section A of Chapter 11" for three years following the NAFTA's termination with respect to claims asserted under Paragraph 1 of Annex 14-C.[82] In their Counter-Memorial, Claimants added a new argument: that Footnote 20 confirms the supposed choice of law indicated by Paragraph 1 of Annex 14-C.[83] Neither Claimants' original argument nor their new argument on Footnote 20 supports Claimants' interpretation of Paragraph 1 of Annex 14-C.

55. As explained in Section II.A above, the USMCA Parties in Paragraph 1 of Annex 14-C consented to the arbitration of claims "alleging breach of an obligation" under Section A of NAFTA Chapter 11 and two articles in NAFTA Chapter 15. Footnote 20 provides that "[f]or greater certainty, the relevant provisions" in various chapters of the NAFTA "apply with respect to such a claim." As the United States has consistently demonstrated,[84] Footnote 20 simply confirms "for greater certainty" the general principle of intertemporal law: for a claim properly brought under Paragraph 1 – based on events that occurred while the NAFTA was in force – the relevant chapters of the NAFTA relating to such a claim will apply despite the NAFTA's termination.[85] This is the proper role of a "for greater certainty" footnote: it spells out expressly,

[82] Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection ¶ 28; Claimants' Rejoinder on Bifurcation ¶ 32.
[83] Claimants' Counter-Memorial ¶ 38.
[84] U.S. Reply to Claimants' Observations ¶ 17; U.S. Memorial ¶¶ 48-49.
[85] Ascensio's Second Report ¶ 38 ("As for the applicable law, it is quite obvious that NAFTA substantive provisions will apply to disputes arising out of its breach at a time it was in force. This is why the substantive provisions of NAFTA concerned are mentioned in footnote 20 'for greater certainty' only. Since the cause of action is a breach of NAFTA in respect of events that occurred when this treaty was in force, NAFTA and the choice of law clause it contains will apply to the substance of the claim."); Gardiner's Supplementary Report ¶ 29 ("Footnote 20 to the Annex confirms that the provisions listed there are included in the listed sources of obligations set out in paragraph 1

for the sake of clarity, the treaty parties' understanding of how a provision of their treaty would operate even if the footnote were absent.

56. Claimants' use of Footnote 20, on the other hand, is not spelling out an otherwise unwritten understanding between the USMCA Parties. Rather, by Claimants' reading, Footnote 20 is a mere repetition of Paragraph 1. According to Claimants, Paragraph 1 itself designates the NAFTA as the applicable law to a dispute under Annex 14-C[86] and Footnote 20 purportedly does the exact same thing; in Claimants' own words, through Footnote 20, "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."[87] Claimants' reading of Paragraph 1 and Footnote 20 renders the two provisions entirely redundant.

b. Footnote 21 has no bearing on the interpretation of Paragraph 1 of Annex 14-C

57. Claimants devote eight pages of their Counter-Memorial to the discussion of Footnote 21, even though this provision has no direct bearing on their claims. Footnote 21 does not apply to Claimants in this case because they are not eligible to submit claims under Annex 14-E. Nor does Footnote 21 provide any express support for the existence of the three-year "transition period" that Claimants have alleged, during which the NAFTA's substantive investment obligations would continue to apply despite the NAFTA's termination.[88] Rather, as the United States has previously explained, Footnote 21 excludes a particular group of investors – those who can bring a claim under Annex 14-E – from the offer to arbitrate in Annex 14-C, Paragraph 1.[89] If an investor's

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of the Annex. The provisions listed in paragraph 1 of the Annex and in footnote 20 ceased to be in force when the NAFTA was superseded and accordingly no continuing or further obligations were created by the provisions listed there.").

[86] Claimants' Counter-Memorial ¶ 35.

[87] *Id.* ¶ 38.

[88] Gardiner's Supplementary Report ¶ 30.

[89] U.S. Memorial ¶ 51.

claims extend to measures that both pre-date and post-date NAFTA's termination, and the measures that post-date the NAFTA give rise to a claim under Annex 14-E, the investor is constrained to asserting just the Annex 14-E claims.

58. Once again abandoning their previous arguments, in their Counter-Memorial Claimants adopted a new but equally unavailing strategy regarding Footnote 21, urging the Tribunal to rewrite the footnote so that it better supports their arguments. Even though Footnote 21 plainly excludes a specific category of *investors* from the consent of Paragraph 1, Claimants insist Footnote 21 should in effect be "adjusted"[90] to refer to "claims" in order to align with the "claim" referenced in Paragraph 1.[91]

59. Claimants' attempt to revise Footnote 21 of Annex 14-C should be rejected by the Tribunal. The USMCA Parties agreed in plain language to exclude a certain category of *investors – i.e.*, those "eligible to submit claims to arbitration under paragraph 2 of Annex 14-E"[92] – from pursuing claims under Annex 14-C.[93] Footnote 21 reflects a choice made by the USMCA Parties to limit the availability of Annex 14-C and exclude certain investors.

60. Claimants reject this ordinary reading because it is critical to their argument regarding Paragraph 1 that Footnote 21 exclude certain claims, rather than certain investors. Claimants therefore urge the Tribunal to ignore the plain meaning of Footnote 21:

> [E]ven 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 . . . Respondent's interpretation would lead to an absurd result.[94]

[90] Claimants' Counter-Memorial ¶ 70.
[91] *Id.* ¶ 69.
[92] Annex 14-C, ¶ 1 n.21 **(C-0002)**.
[93] Gardiner's Supplementary Report ¶ 31.
[94] Claimant's Counter-Memorial ¶ 70 (emphasis added).

61. Claimants' petition to rewrite Footnote 21 can be easily denied. *First*, as Professor Gardiner explains, "[t]here is nothing in the context to indicate that the reference in the footnote is limited by reference to claims rather than, as stated in the footnote, investors."[95] It is not for a tribunal "to adjust the clear terms chosen by the parties to a treaty."[96] "If the relevant words in their natural and ordinary meaning make sense in their context, and are consistent with the application of the rest of the general rule of interpretation, that is an end of the matter."[97]

62. *Second*, contrary to Claimants' assertions, Footnote 21 is not "counterintuitive," nor does it produce "absurd results."[98] The language in Footnote 21 directing certain investors to pursue their claims under Annex 14-E, rather than Annex 14-C, is consistent with the USMCA's object and purpose to replace the NAFTA with USMCA Chapter 14's investor-State dispute settlement regime. As Professor Gardiner explains, "[t]here is nothing manifestly absurd or unreasonable in the provisions of footnote 21, which are to the effect that an investor in a specified group who enters into, or continues in, a relationship with a party to the USMCA that would enable them to bring claims under Annex 14-E of that treaty loses the right to bring claims under the superseded NAFTA regime via Annex 14-C."[99] Accordingly, there is no reason to revise the ordinary meaning of the provisions in Footnote 21, particularly for the sole purpose of interpreting another treaty provision.[100]

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[95] Gardiner's Supplementary Report ¶ 31.
[96] *Id.*
[97] *Id.*
[98] Claimants' Counter-Memorial ¶ 67.
[99] Gardiner's Supplementary Report ¶ 31. *See also* RICHARD GARDINER, TREATY INTERPRETATION 185 (2d ed. 2015) ("[T]he 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 contra-indication is found, is the ordinary meaning determinative.") **(RL-095)**.
[100] Gardiner's Supplementary Report ¶ 31.

63. *Third*, Claimants continue to rely on extra-contextual considerations about hardship for hypothetical investors to support their attempt to rewrite Footnote 21. In any event, even if the ordinary meaning interpretation of Footnote 21 could have had a negative impact for some theoretical investors, this does not justify revising either Footnote 21 or Paragraph 1 of Annex 14-C. To the extent that Footnote 21 would have eliminated certain otherwise meritorious NAFTA claims, this was the choice made by the USMCA Parties in shifting to and favoring the new USMCA regime. Treaty parties entering into an investment agreement are free to condition their consent however they choose, including by limiting the dispute resolution mechanisms available to certain categories of investors.

64. *Fourth*, as the United States explained in its Memorial, Footnote 21 has clear utility under the U.S. interpretation of Annex 14-C.[101] But in any event, the principle of *effet utile* cannot be used to revise the plain wording of a treaty.[102] Claimants cite to the International Law Commission's commentary on the Vienna Convention to support their attempted revision of Footnote 21.[103] But Claimants conveniently omit that the Commission concluded that "[p]roperly limited and applied, the maxim [*ut res magis valeat quam pereat*] does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty."[104] The Commission did not include a separate provision on *effet utile* in the Vienna Convention because "to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of 'effective interpretation'."[105]

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[101] U.S. Memorial ¶¶ 53-54.
[102] *Id.* ¶¶ 56-57.
[103] Claimants' Counter-Memorial ¶ 66 n.93.
[104] International Law Commission, Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 219 (¶ 6), U.N. Doc. A/CN.4/SER.A/1966/Add.l **(CL-032)**.
[105] *Id.*; U.S. Memorial ¶ 56 n.53.

65. In sum, Footnote 21 has no bearing on the interpretation of Paragraph 1 of Annex 14-C. This provision merely specifies the conditions that apply to a certain group of investors (to which Claimants do not belong). There is no basis for this Tribunal to revise the Footnote in order to adopt Claimants' interpretation of Annex 14-C, Paragraph 1.

5) USMCA Article 14.2(3) Confirms that the USMCA Parties Intended Annex 14-C to Apply to Claims Based on Events Predating the USMCA's Entry into Force

66. In their Counter-Memorial, Claimants contend 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."[106] Claimants' argument relies on the rule expressed in Article 28 of the Vienna Convention, which provides: "Unless 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."[107] Claimants' reliance on this rule is wrong on multiple counts.

67. *First*, the presumption against retroactivity stated in Article 28 may be overcome if "a different intention appears from the treaty or is otherwise established"[108] – there is no requirement for an "express agreement" to the contrary, as Claimants assert. *Second*, there *is* in any event "an express agreement to the contrary" in Article 14.2(3) of the USMCA and it is hard to understand how Claimants could argue otherwise.[109] Article 14.2(3) provides:

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[106] Claimants' Counter-Memorial ¶ 25 (emphasis omitted).
[107] Vienna Convention on the Law of Treaties, art. 28 **(RL-016)**.
[108] *Id*. *See also* International Law Commission, Draft Articles on the Law of Treaties with commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 211 (¶ 1), U.N. Doc. A/CN.4/SER.A/1966/Add.l **(CL-032)** ("There is nothing to prevent the parties from giving a treaty, or some of its provisions, retroactive effects if they think fit. It is essentially a question of their intention. The general rule, however, is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms.").
[109] *See* Ascensio's Second Report ¶ 12.

> 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.[110]

68. The meaning of the italicized text is plain: the USMCA Parties expressly agreed to override the presumption against retroactivity with respect to Annex 14-C.[111] This supports the ordinary meaning of Annex 14-C: that it applies to breaches of obligations that were in force before the NAFTA terminated.[112]

69. *Third*, Claimants misconstrue the presumption against retroactivity as a presumption in favor of prospective effect. Claimants seem to believe that the rule expressed in Article 28 of the Vienna Convention requires the Tribunal to give Annex 14-C the specific forward-looking interpretation that they favor, namely, to allow for claims based on breaches allegedly occurring after the NAFTA's termination and the USMCA's entry into force. But that is a twisting of the principle embodied in Article 28. The presumption against retroactivity is just that: a presumption against the retroactive application of a treaty term. It does not require a tribunal to identify a prospective effect for a provision that does not, based on the ordinary meaning of its terms, have

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[110] USMCA, art. 14.2(3) **(C-0002)** (emphasis added).

[111] Claimants reference in a footnote talking points prepared by the Office of the U.S. Trade Representative explaining the need for this language in the following terms: "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*." Attachment to Email from Daniel O'Brien to John M. Melle et al. (Nov. 28, 2018) **(C-114)** (emphasis added). The United States does not believe that these talking points are properly considered preparatory work of the treaty (because they were not, it appears, shared with the other USMCA Parties) or that it is, in any event, necessary to consider preparatory work of the treaty to interpret Annex 14-C. However, to the extent Claimants attempt to rely on this document, it is notable that it contains no reference to the ability of investors to bring ISDS claims with respect to alleged breaches taking place *after* the entry into force of the USMCA.

[112] Ascensio Report ¶ 21 ("The language of Article 14.2 supports the conclusion that the temporal scope of Annex 14-C is thus events that occurred before the entry into force of USMCA."); Gardiner Report ¶ C.3 ("[A]nnex 14-C is identified [in Article 14.2(3)] as being an exception in relation to matters pre-dating the USMCA. This sets a basis for understanding Annex 14-C to relate to acts, facts or situations within the investment treatment regime in force under NAFTA, not that under USMCA.").

one. This is especially true where, as here, the treaty parties have overridden the presumption against retroactivity in Article 14.2 of the USMCA, allowing for a provision to bind them with respect to acts or facts that took place before the treaty's entry into force.

70. Regardless, the United States does not deny that Annex 14-C has certain prospective effects. In particular, the consent in Paragraph 1 is forward-looking: claimants may only submit claims under Annex 14-C after the USMCA's entry into force, for breaches of the NAFTA. Likewise, Paragraph 5 binds the USMCA Parties to allow arbitrations initiated while the NAFTA was in force to proceed to their conclusion, even after the NAFTA's termination and the USMCA's entry into force. Given these plainly prospective applications of Annex 14-C, the fact that Annex 14-C does not have the *specific* prospective effect that Claimants desire is no violation of the presumption against retroactivity.

6) USMCA Article 34.1 Confirms that the USMCA Parties Did Not Extend the NAFTA's Substantive Investment Obligations

71. Claimants allege that the reference in USMCA Article 34.1(1) to a "smooth transition from NAFTA to this Agreement" supports their interpretation that Annex 14-C provides for the "continuation of Sections A and B of NAFTA Chapter 11 through Annex 14-C."[113] Claimants are mistaken.

72. *First*, Claimants ignore that the Panel in *Crystalline Silicon* concluded that the reference to a "smooth transition from NAFTA to [USMCA]" in Article 34.1(1) did not "impl[y] continuity in obligations."[114] The Panel noted that such reference could not be treated "as an implicit carryover of the NAFTA obligations into the USMCA when there are no other words in the USMCA doing

[113] Claimants' Counter-Memorial ¶¶ 92, 94.
[114] *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report ¶ 42 (Feb. 1, 2022) **(RL-059)**.

that."[115] Rather, "a 'smooth transition' is facilitated by clarity in the obligations under the [USMCA] and clarity in how the Parties are to carry them out."[116] This is precisely what the USMCA Parties accomplished with respect to investment. They replaced NAFTA Chapter 11 with USMCA Chapter 14 and provided new dispute resolution provisions in the annexes to Chapter 14. The USMCA Parties agreed in Annex 14-C to allow holders of legacy investments to submit claims to arbitration based on alleged breaches that occurred while the NAFTA was in force for three additional years following the NAFTA's termination. Thus, contrary to what Claimants suggest, there was not an abrupt cessation of an investor's rights to submit claims to arbitration under the NAFTA after its termination.

73. *Second*, when interpreting Article 34.1, the *Crystalline Silicon* Panel emphasized that "[i]t would have been possible for the [USMCA] 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 [USMCA] Parties created self-standing USMCA obligations[,]" and "[w]here the Parties wanted to carry over specific NAFTA obligations, such as NAFTA Chapter Nineteen, they did so explicitly in Article 34."[117] The USMCA Parties did not provide, explicitly or implicitly, for the continuation of the NAFTA's substantive investment obligations in Annex 14-C or in Article 34.1.

74. USMCA Article 34.1 and the reasoning in the *Crystalline Silicon* decision support the ordinary meaning of Annex 14-C. Annex 14-C facilitates a "smooth transition" by giving investors three years following the NAFTA's termination to submit claims to arbitration "alleging breach of an obligation" under Section A of Chapter 11 of the NAFTA – *i.e.*, an alleged breach that occurred

[115] *Id.*
[116] *Id.*
[117] *Id.* ¶ 41.

when the NAFTA was still in force. Unlike the express extension of the substantive obligations of NAFTA Chapter 19 as provided in USMCA Article 34.1, there is nothing in Annex 14-C or Article 34.1 that expressly extends the substantive obligations of NAFTA Chapter 11.[118]

D. Claimants Misapply the USMCA's Object and Purpose

75. As the United States explained in its Memorial, the object and purpose of the USMCA – as stated in the Preamble and the USMCA Protocol – was to "replace" and "supersede" the NAFTA with a "high standard new agreement" to support trade and robust economic growth. Among other changes, the USMCA included a new investor-State dispute settlement regime in Chapter 14 that was different in scope than the one in the NAFTA. The ordinary meaning of Annex 14-C is consistent with the USMCA's object and purpose because it guarantees that claims based on conduct occurring after the USMCA's replacement of the NAFTA will be governed by the substantive investment obligations and dispute settlement regime in USMCA Chapter 14.

76. Claimants offer two responses to this point. *First*, Claimants contend it could not be contrary to the USMCA's object and purpose for the USMCA Parties to bind themselves to the continued application of the NAFTA's substantive obligations because, according to Claimants, "there are numerous instances throughout USMCA that extend the substantive obligations of NAFTA."[119] Claimants do not, however, identify "numerous instances" of this in the USMCA, nor could they. Claimants in fact reference only *one* example, from USMCA Chapter 4.[120]

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[118] Ascensio's Second Report ¶ 14 ("If the drafters of USMCA had wanted to extend the effect over time of the NAFTA's substantive provisions, this would be expressly stated in one of its clauses. It would most probably appear in the transitional provision of USMCA (Article 34(1)), where other provisions extending NAFTA obligations are located. But it was not done, and it is completely implausible that a new survival clause would be included in an annex, using obscure language supposed to have an equivalent effect. A treaty cannot extend the effects of the treaty it terminates beyond what is provided for by customary international law without express wording.") (internal citations omitted).

[119] Claimants' Counter-Memorial ¶ 96. Claimants also seem to suggest that the "without prejudice" language in the USMCA Protocol signaled an intention by the USMCA Parties "to continue . . . provision[s] of NAFTA," *id.*, but as discussed above that is not what the "without prejudice" language accomplishes.

[120] *Id.* ¶ 96 n.145 (citing U.S. Memorial ¶ 59 n.58).

Another example, as discussed above, is USMCA Article 34.1, which provides for the continued application of certain provisions of NAFTA Chapter 19 in certain circumstances.[121] In both instances, the continued application of the substantive NAFTA obligation was made explicit.

77. What is significant, therefore, is not how many examples of this phenomenon can be found in the USMCA, but how few. The continuation of a small set of NAFTA provisions was the narrow exception, not the rule, which is entirely consistent with the intention stated in the Preamble to "REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement."[122] Moreover, it would be inconsistent with that stated intention effectively to delay the implementation of an important part of the "high standard new agreement" for three years by permitting investors to have continued access to the NAFTA's broader ISDS framework and different substantive obligations for claims based on conduct occurring after the USMCA's entry into force.

78. *Second*, overlap between the NAFTA and USMCA regimes would be inconsistent with the USMCA Parties' stated desire to establish "a clear, transparent, and predictable legal and commercial framework[.]"[123] Such overlap would mean that for the three-year period of Annex 14-C, States would be bound by two different sets of legal obligations with respect to investment, which would not be a "clear, transparent, and predictable legal . . . framework." Claimants argue that the USMCA Parties "clearly thought of that and expressly addressed the issue in Footnote 21 to Annex 14-C."[124] Claimants ignore, however, that Footnote 21 only deals with investors "eligible to submit claims to arbitration under paragraph 2 of Annex 14-E"[125] – *i.e.*, investors that

[121] U.S. Memorial ¶ 59.
[122] Preamble to the USMCA ¶ 3 **(C-0002)**.
[123] *Id.* ¶ 7.
[124] Claimants' Counter-Memorial ¶ 97.
[125] Annex 14-C, ¶ 1 n.21 **(C-0002)**.

have entered into government contracts in specific sectors, such as oil and gas and power generation.[126] Footnote 21 does not address the broader class of investors that are eligible to submit claims under Annex 14-D, which contains no sectoral limitations and does not require that an investor be a party to a government contract. Accordingly, if Annex 14-C were interpreted to allow investors to assert claims based on conduct occurring after the USMCA's entry into force, those investors may also have been able to submit the same claims under Annex 14-D, and tribunals hearing such claims would be faced with two different sets of applicable substantive obligations. In sum, the ordinary meaning of Annex 14-C is consistent with the object and purpose of the USMCA and the general principles in the Preamble to replace the NAFTA with the USMCA, and to provide clarity, transparency, and predictability to the legal framework.[127] In contrast, Claimants' interpretation of Annex 14-C is not consistent with the USMCA's object and purpose.

E. Claimants Continue to Focus on Ambiguous and Irrelevant Supplementary Means of Interpretation

79. As the United States has previously stated, the meaning of Annex 14-C, in context and in light of the USMCA's object and purpose, is clear. As a result, it is unnecessary for the Tribunal to have recourse to supplementary means of interpretation.[128] Claimants, however, continue to

[126] U.S. Memorial ¶ 53.

[127] Claimants' example of alleged "overlapping obligations" under the NAFTA/USMCA and the CPTPP is irrelevant. Claimants' Counter-Memorial ¶ 98. Claimants seem to forget that Canada opted out of the investor-State dispute settlement regime in USMCA Chapter 14 and that the United States is not a Party to the CPTPP. It is also unclear how the alleged existence of overlapping obligations under different treaties supports Claimants' interpretation of the object and purpose of the USMCA and Annex 14-C.

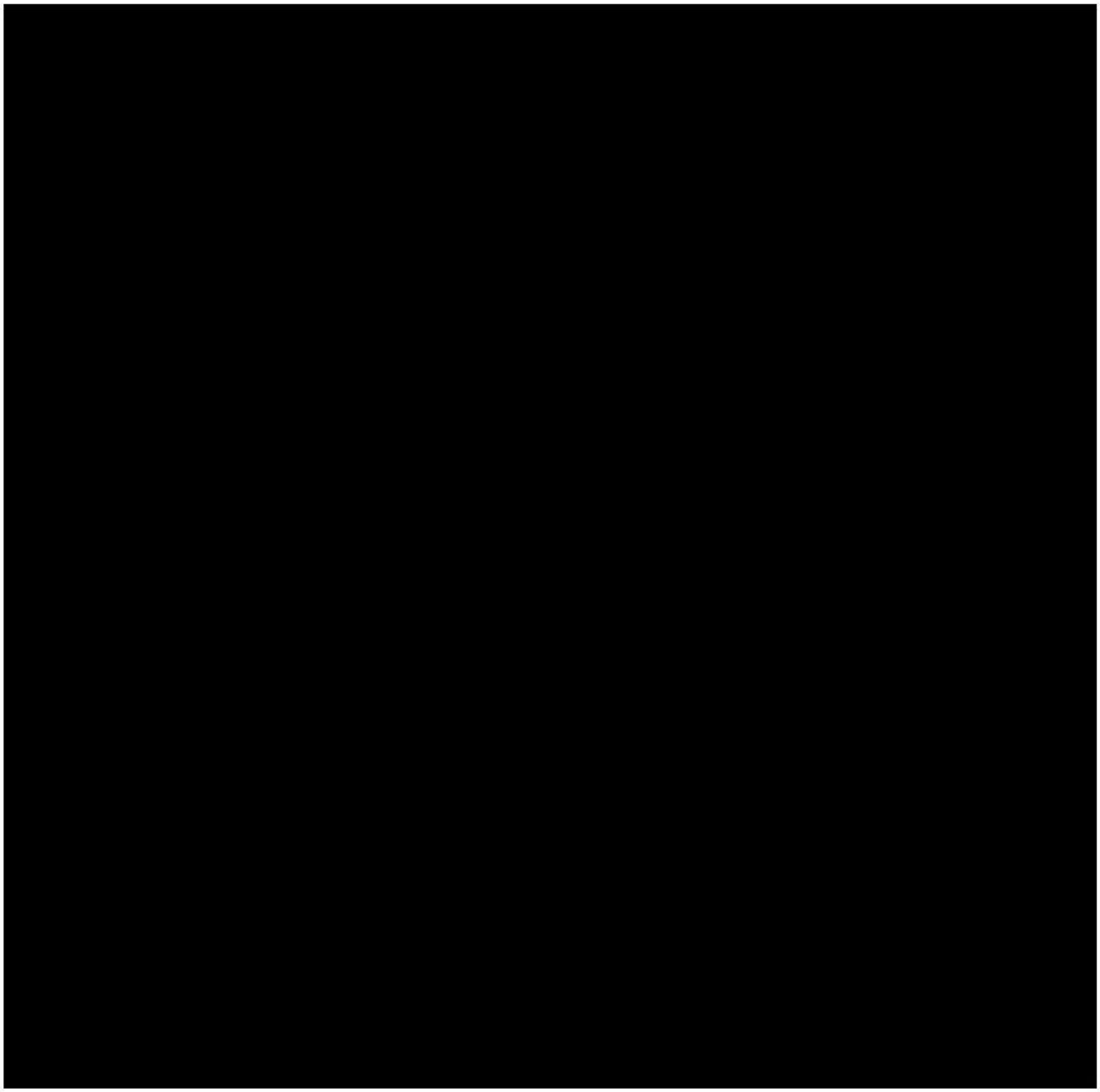
[128] U.S. Memorial ¶ 65. Claimants' assertion, based on Professor Gardiner's work, that "[r]ecourse to preparatory work is always *permissible* under the Vienna rules to 'confirm' the meaning reached by the general rule in article 31" gets them nowhere. Claimants' Counter-Memorial ¶ 99 n.151 (emphasis added) (quoting RICHARD GARDINER, TREATY INTERPRETATION 354 (2d ed. 2015) **(CL-163)**). *First*, none of the material that Claimants have identified in their Counter-Memorial is preparatory work of the USMCA. Though Claimants reference a few emails exchanged within USTR during negotiations, these do not reflect the joint intentions of the three USMCA Parties. The other materials, *e.g.*, examples of past treaty practice and statements made by individuals involved in the negotiations long after their conclusion, are even more remote from the *travaux*. *Second*, the fact that recourse to preparatory work may be "permissible" does not mean that it is *necessary*. Indeed, as Professor Gardiner has opined in this case: "[T]here is nothing in the interpretative process to suggest an outcome that leaves the meaning [of Annex 14-C]

rely on three categories of supplementary means as purported support for their interpretation, each of which is addressed below. These supplementary means do not support Claimants' position, but instead either confirm the correctness of the U.S. position or contribute nothing to the interpretive process. Before addressing the documents on which Claimants rely, the United States discusses documents reflecting the Parties' negotiation of the relevant USMCA provisions, which it produced during the document discovery phase.

[redacted]

ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Hence, no requirement arises to seek to determine the meaning from supplementary means of interpretation." Gardiner Report ¶ F.3.

[redacted]



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2) Claimants Ignore Relevant Past Treaty Practice in Favor of Irrelevant Practice Relating to Legacy Agreements with Survival Clauses

91. Claimants rely in their Counter-Memorial on the same irrelevant examples of successive treaties involving Canada and Mexico that they discussed in their opposition to bifurcation. These examples are no more compelling now than they were when Claimants first raised them.

92. As an initial matter, Claimants incorrectly situate their treaty examples in the Vienna Convention's interpretive framework. While Claimants discuss these treaties in the section of their

[redacted]

Counter-Memorial related to the "ordinary meaning" of Annex 14-C, suggesting that they could have a role in the application of the general rule of interpretation under Article 31 of the Vienna Convention, they are properly considered at most supplementary means of interpretation. Accordingly, it is only appropriate for the Tribunal to have recourse to them under the circumstances and for the purposes prescribed in Article 32 of the Vienna Convention.

93. Moreover, even as supplementary means, Claimants' treaty examples carry little weight. The first problem with Claimants' examples of past treaty practice by Canada and Mexico is that they provide no affirmative support for Claimants' own interpretation of Annex 14-C. Each of Claimants' examples involves a new free trade agreement negotiated between parties with a preexisting BIT, but none allow for claims to be asserted under the legacy BIT(s) based on events occurring after its termination/suspension and the entry into force of the new agreement. Accordingly, they provide no insight with respect to the language that Canada and Mexico – let alone the United States, which is not a party to any of the treaties on which Claimants rely – might have used to achieve such an outcome, had that been their intent.

94. By contrast to Claimants, the United States has provided examples of how each of the USMCA Parties previously allowed for the post-termination survival of a treaty's substantive obligations for a set period, including obligations with respect to the settlement of disputes. That type of language can be found in the survival clauses present in *all* of the USMCA Parties' model BITs: "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."[141] If the USMCA

[141] 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) **(RL-017)** (emphasis added). *See also* U.S. Memorial ¶¶ 73-74 (citing Canadian and Mexican model BITs).

Parties had intended for the NAFTA's substantive investment obligations to continue to bind them after the NAFTA's termination, they would have used this treaty language (with minor adjustments for the context of the USMCA), particularly since it was common language between them for extending substantive obligations of otherwise terminated treaties.

95. Claimants have no meaningful response to this point. In their Counter-Memorial, Claimants relegate the discussion of the survival clause language in the USMCA Parties' model BITs to a single footnote, in which they assert this language is irrelevant because it does not show "how one treaty (*e.g.*, USMCA) can extend the obligations of another treaty (*e.g.*, NAFTA)."[142] Claimants' objection is meritless. While the survival clauses from the USMCA Parties' model BITs could not be inserted verbatim into the USMCA, the operative language could easily have been adapted for the purpose that Claimants contend the USMCA Parties intended to achieve in Annex 14-C, as the United States pointed out in its Memorial.[143] The USMCA Parties could have included language in Annex 14-C providing that the obligations in Section A of NAFTA Chapter 11 "shall continue to apply"[144] or "shall remain in force"[145] or "shall continue to be effective"[146] for three years with respect to legacy investments, but they did not. The absence of this language from Annex 14-C (or any other part of the USMCA) is further confirmation that Claimants' interpretation is incorrect.

96. Apart from the survival clause language, the only treaty examples in the record that are relevant to assessing the correctness of Claimants' interpretation are the U.S. free trade agreements with Morocco and Panama and the exchange of letters between the United States and Honduras

[142] Claimants' Counter-Memorial ¶ 50 n.67.
[143] U.S. Memorial ¶ 75.
[144] 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) **(RL-017)**.
[145] 2021 Canada Model Agreement for the Promotion and Protection of Investments, art. 57(4) **(RL-019)**.
[146] 2008 Mexican Model of Investment Promotion and Protection Agreement, art. 30(4) **(RL-022)**.

concerning the CAFTA-DR. In each case, the United States and its counterparty had a preexisting BIT and chose to allow claimants with qualifying investments to assert claims under that BIT based on events occurring both before and for ten years *after* the free trade agreement's entry into force.[147] The parties accomplished this by leaving the legacy BIT and its substantive obligations in force. As a result, those obligations remained binding on – and could be breached by – the parties despite the entry into force of a new free trade agreement between them. After ten years, the new free trade agreements fully suspended each BIT's dispute resolution provisions, barring further claims based on breach of the BIT's obligations.

97. The Morocco, Panama, and Honduras examples demonstrate another way for treaty parties to permit investors to assert claims under a legacy agreement based on events occurring after the entry into force of a successor agreement. And, again, the USMCA Parties plainly did not adopt this approach: rather than leaving their legacy agreement in force, they expressly terminated the NAFTA with no express exceptions to overcome the presumptions under the rule stated in Article 70 of the Vienna Convention associated with such a termination.

98. Instead of engaging with these examples – or providing their own – of how treaty parties bind themselves to the continued application of obligations in an agreement that has been terminated or supplanted by a new agreement, Claimants' treaty examples focus on a different issue. Specifically, Claimants contend that their examples show how parties to a new treaty can expressly limit "disputes under the[ir] old treaty only with respect to claims, acts, or facts that arose before termination of the earlier treaty,"[148] that is, to link a tribunal's jurisdiction *ratione temporis* to the period during which a treaty was in force.

[147] U.S. Memorial ¶ 76.
[148] Claimants' Counter-Memorial ¶ 50.

99. As already explained, the NAFTA itself offered in Articles 1116 and 1117 another example much closer to hand for reaching this result, which had already been agreed among all three USMCA Parties (unlike Claimants' examples, which involve only Canada and Mexico). That is the text that the USMCA Parties chose to incorporate into Paragraph 1 of Annex 14-C, limiting claimants to the submission of claims "alleging breach of an obligation" under the specified NAFTA provisions.[149] As the NAFTA/USMCA Parties, tribunals, and scholars agreed prior to the USMCA's negotiation, the language in Articles 1116(1) and 1117(1) served to limit a tribunal's *ratione temporis* jurisdiction. The absence of language comparable to that found in Claimants' examples is therefore irrelevant to the Tribunal's interpretation of Annex 14-C; the same goal was accomplished through the use of the language from Articles 1116(1) and 1117(1).

100. Claimants' examples are also flawed because they address different types of legacy agreements in a different context. *First*, as the United States pointed out in its Memorial, Claimants' examples each involved an attempt by the parties to the new treaty to override a survival clause contained in the legacy agreement(s).[150] This is not a situation that the USMCA Parties had to address because the NAFTA contained no survival clause. Claimants respond to this point only in their discussion of the Canada-European Union Comprehensive Economic and Trade Agreement ("CETA") and a non-final "agreement in principle"[151] between Mexico and the European Union. Claimants contend that both the CETA and the EU-Mexico agreement in principle "fully abrogate[d] the earlier BITs," including their survival clauses, and that, as a result, the parties' inclusion of express temporal limits could not have been a response to these survival

[149] Annex 14-C, ¶ 1 **(C-0002)**.
[150] U.S. Memorial ¶ 79.
[151] European Commission, "EU-Mexico agreement: The agreement in principle" **(CL-068)**.

clauses.[152] But this is pure supposition on Claimants' part. Neither agreement is in force[153] – the EU-Mexico agreement in principle has not even been signed – and it is unclear whether the abrogation provision by itself would have been sufficient to overcome the express survival clause in the earlier treaty.

101. For purposes of the Tribunal's analysis of Annex 14-C, what matters is that the default position under the numerous legacy BITs addressed in the CETA and the EU-Mexico agreement in principle was that they would continue to apply for a period between 10 and 20 years after termination and would allow claims based on events occurring during that post-termination period.[154] In seeking to alter this outcome expressly, the parties agreed on the language highlighted by Claimants. Whatever each individual clause was meant to achieve, they were addressing a

[152] Claimants' Counter-Memorial ¶¶ 58, 61.

[153] Government of Canada, "View the timeline" **(RL-096)** ("The [CETA] will take full effect once all EU member states have formally ratified it. This process is ongoing.").

[154] U.S. Memorial ¶ 79 & n.79 (identifying survival clauses in treaties to be terminated by the CETA). Consistent with its preliminary character, the EU-Mexico Agreement does not include a list of legacy BITs to be terminated. However, the legacy BITs between Mexico and EU member states all have survival clauses. Agreement Between the United Mexican States and the Slovak Republic on the Promotion and Reciprocal Protection of Investments, art. 32(4), Oct. 26, 2007 **(RL-097)**; Agreement on the Promotion and Reciprocal Protection of Investments Between the United Mexican States and the Kingdom of Spain, art. XXIII, Oct. 10, 2006 **(RL-098)**; Agreement Between the Czech Republic and the United Mexican States on the Promotion and Reciprocal Protection of Investments, art. 25(4), Apr. 4, 2002 **(RL-099)**; Agreement Between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, art. 21(3), Nov. 30, 2000 **(RL-100)**; Agreement Between the Government of the Kingdom of Sweden and the Government of the United Mexican States Concerning the Promotion and Reciprocal Protection of Investments, art. 21(3), Oct. 3, 2000 **(RL-101)**; Agreement Between the Government of the United Mexican States and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, art. 23(2), Apr. 13, 2000 **(RL-102)**; Agreement Between the Government of the United Mexican States and the Government of the Italian Republic for the Promotion and Mutual Protection of Investments, art. 12(2), Nov. 24, 1999 **(RL-103)**; Agreement Between the Portuguese Republic and the United Mexican States on the Reciprocal Promotion and Protection of Investments, art. 21(3) (Nov. 11, 1999) **(RL-104)**; Agreement Between the Government of the Republic of Finland and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, art. 24(3), Feb. 22, 1999 **(RL-105)**; Agreement Between the Government of the French Republic and the Government of the United Mexican States for the Reciprocal Promotion and Protection of Investments, art. 13, Nov. 12, 1998 **(RL-106)**; Agreement Between the Belgo-Luxemburg Economic Union and the United Mexican States on the Reciprocal Promotion and Protection of Investments, art. 22, Aug. 27, 1998 **(RL-107)**; Agreement Between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments, art. 22(3), Aug. 25, 1998 **(RL-108)**; Agreement between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments, art. 30(3), June 29, 1998 **(RL-109)**; Agreement on Promotion, Encouragement and Reciprocal Protection of Investments Between the United Mexican States and the Kingdom of the Netherlands, art. 13(3), May 13, 1998 **(RL-110)**.

multi-treaty succession problem that was fundamentally different from the situation that confronted the USMCA Parties in terminating the NAFTA. The language that the parties negotiating the CETA and the EU-Mexico agreement in principle chose to address the circumstances before them therefore cannot help the Tribunal in interpreting Annex 14-C. These treaties simply have no place in the interpretive process in this case.

102. *Second*, in addition to the difference in the underlying circumstances, Claimants ignore important textual differences in their examples, which further undercut their relevance. As demonstrated in the table below, the majority of Claimants' treaty examples include language expressly binding the parties to the continued application of the legacy agreement – language that is entirely absent from the USMCA. Moreover, this language appears *immediately before* the temporal limitation on which Claimants rely:[155]

Agreement	**Provision**
Free Trade Agreement Between Canada and the Republic of Peru	[T]he [legacy BIT] *shall remain operative* for a period of fifteen years after the entry into force of this Agreement for the purpose of any breach of the obligations of the [legacy BIT] that occurred before the entry into force of this Agreement. . . . [156]
Free Trade Agreement Between Canada and the Republic of Panama	[T]he [legacy BIT] *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 [legacy BIT] that occurred before the entry into force of this Agreement. . . . [157]

[155] *See also* U.S. Memorial ¶¶ 80-81.
[156] Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, art. 845(2), May 29, 2008 **(CL-035)** (emphasis added).
[157] Free Trade Agreement Between Canada and the Republic of Panama, Can.-Pan., art. 9.38(2), May 14, 2010 **(CL-036)** (emphasis added).

Agreement	**Provision**
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	The [legacy BIT] *shall 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 Agreement . . . with respect to any act or fact that took place or any situation that existed before the date of termination.[158]

103. Claimants argue that the distinction drawn by the United States between these treaties and the USMCA is invalid: "Respondent simply assumes the answer it wants by asserting that Annex 14-C did not extend the substantive obligations of NAFTA."[159] But the U.S. position is based, among other things, on the absence of language in the USMCA comparable to what the excerpts above contain, providing, for example, that the NAFTA's obligations "shall continue to apply" or "shall remain operative" with respect to legacy investments for a specified period (language that closely resembles the language discussed above from the survival clauses in the USMCA Parties' model BITs).[160] Given that such language is not found in the USMCA, the absence of a temporal limitation like the ones found in the above excerpts tells the Tribunal nothing about how to interpret Annex 14-C.

104. In sum, the Tribunal need not have recourse to any of the past treaty examples discussed in this section in interpreting Annex 14-C. But to the extent that the Tribunal chooses to consider them, Claimants' examples are simply not helpful – they involve legacy agreements that differ

[158] 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) **(CL-038)** (emphasis added).
[159] Claimants' Counter-Memorial ¶ 52.
[160] *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) **(RL-017)** ("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).

from the NAFTA in a critical respect and include language not found in the USMCA – or support the U.S. position by demonstrating the sort of language the USMCA Parties could have used if they sought to extend the NAFTA's applicability. The examples that the United States has offered, by contrast, provide insight into how the USMCA Parties have in the past either (1) crafted language to bind themselves to the continued application of obligations in a terminated treaty (the language found in their model BITs) or (2) chosen not to terminate a legacy agreement upon the entry into force of a new agreement in order to permit claims to be made under the legacy agreement on an ongoing basis (as in the Morocco, Panama, and Honduras treaties). The USMCA Parties took neither approach here, which confirms the U.S. interpretation of Annex 14-C.

3) Claimants' Convoluted Argument About NAFTA's Three-Year Limitations Period Gets Them Nowhere

105. The United States explained in its Memorial that the three-year limitations period set out in NAFTA Articles 1116(2) and 1117(2) corresponds to the length of the USMCA Parties' consent to arbitration of legacy investment claims in Paragraph 3 of Annex 14-C.[161] Thus, in most cases, investors with claims based on alleged breaches occurring while the NAFTA was in force would be entitled to the same three-year period to submit their claims to arbitration under Annex 14-C that they would have received under the NAFTA. The transposition of Articles 1116(2) and 1117(2) into Annex 14-C effectively extended the NAFTA's dispute resolution period for three years past NAFTA's termination, giving claimants asserting alleged breaches of the NAFTA while that treaty was in force the benefit of NAFTA's three-year limitations period.

[161] U.S. Memorial ¶ 70.

106. In their Counter-Memorial, Claimants present a convoluted argument designed to show that the three-year period in Paragraph 3 of Annex 14-C does not (in each and every conceivable scenario) exactly correspond to the limitations period set out in NAFTA Articles 1116(2) and 1117(2). But Claimants' argument gets them nowhere.

107. *First*, there does not need to be a perfect alignment between the three-year period in Annex 14-C and NAFTA Articles 1116(2) and 1117(2) in every hypothetical case Claimants may fabricate to support the U.S. interpretation of Annex 14-C. Claimants focus on the possibility that an investor "might have acquired knowledge of loss or damage [caused by a NAFTA breach] long past the time when USMCA entered into force" and thereby be denied the three years to which it would have been entitled under NAFTA Articles 1116(2) and 1117(2) to bring its claim.[162] As the United States explained in its Memorial, however, ensuring that this hypothetical investor would have three years to assert a NAFTA claim after the NAFTA's termination would have required an indefinite and indeterminate extension of the USMCA Parties' consent under Annex 14-C, expiring only when the last investor affected by an alleged breach of the NAFTA had acquired, or should have acquired, knowledge of the loss or damage caused by the breach.[163] The fact that the USMCA Parties did not attempt to preserve the full NAFTA limitations period for *all* investors does not in any way undermine the conclusion that this was the outcome they intended to achieve for *most* investors.

108. *Second*, Claimants' reliance on email exchanges among USTR officials to support their argument that there is no correlation between the three-year period in Paragraph 3 of Annex 14-C and Articles 1116(2) and 1117(2) is misplaced. As an initial matter, a suggestion by a USTR

[162] Claimants' Counter-Memorial ¶ 101.
[163] U.S. Memorial ¶ 70 n.73. *See also* U.S. Reply to Claimants' Observations on the U.S. Request for Bifurcation ¶ 36 n.34 (Mar. 2, 2023).

official on an internal email exchange – that was not shared with the other USMCA Parties – cannot reflect the Parties' common intention and is not, therefore, properly considered part of the USMCA's preparatory work.[164] In any event, Claimants misconstrue the discussion. The USTR officials were grappling with difficulties created by potential delays between signing, ratification, and entry into force of the USMCA. The suggestion by one official (Lauren Mandell) that Annex 14-C cover either "3 years from entry into force, or 5/6 years from signature, whichever is sooner" was intended to provide a "safeguard in the event [entry into force] takes longer than anticipated."[165] That suggestion was dismissed as a "nonstarter" by Deputy U.S. Trade Representative C.J. Mahoney and never even proposed to the other USMCA Parties.[166] Regardless, it does not suggest a desire to change the effective length of Annex 14-C's coverage, as measured from the date of the NAFTA's termination. It was merely an attempt to account for uncertainty that would result if the period of Annex 14-C's application were to be measured from the date of signature, instead of entry into force.

109. *Finally*, Claimants' continued reliance on inapposite agreements to support their argument that a "three-year transition period" has become "common practice" is unfounded.[167] Claimants do not explain (because they cannot) how such agreements may loosely be regarded as part of the circumstances of conclusion of the USMCA.[168] Moreover, resort to "agreements all around the

[164] *Canfor Corp. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 5, ¶ 19 (May 28, 2004) **(RL-066)** (noting that "the internal materials of an individual NAFTA Party established solely for that Party and not communicated to the other Parties during the negotiations of the Agreement do not reflect the common intention of the NAFTA Parties in drafting, adopting, or rejecting a particular provision"); Humphrey Waldock, Third Report on the Law of Treaties 58 (¶ 21), U.N. Doc. A/CN.4/167 (1964) **(RL-050)** ("Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties.").
[165] 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) **(C-116)**. *See also id.* at email from Lauren Mandell at 5:49 PM (pp. 1-2 of PDF) (referring to a "4-year safeguard").
[166] *Id.* at email from C.J. Mahoney at 11:44 AM (p. 2 of PDF).
[167] Claimants' Counter-Memorial ¶ 107.
[168] *Id.*

world"[169] is not necessary when the meaning of the three-year limit on the USMCA Parties' consent to arbitrate claims in Paragraph 3 of Annex 14-C is clear.

4) Claimants Offer No Reason for the Tribunal to Give Weight to Ambiguous and Contradictory Statements of Current or Former Officials

110. As the United States explained in its Memorial, Claimants have yet to introduce an official statement by any of the USMCA Parties, let alone all of them, that supports their interpretation of Annex 14-C. What Claimants instead put before the Tribunal are ambiguous statements referring, for example, to the continued ability to submit "NAFTA claims"[170] or "claim[s] for a breach of the investment obligations under the NAFTA."[171] Again, there is no dispute that investors could submit claims for an alleged "breach of an obligation"[172] under the NAFTA during the three-year period covered by Annex 14-C. The statements put forward by Claimants do not assert that the requisite "breach of an obligation" could be based on conduct occurring after the NAFTA's termination.

111. Claimants' Counter-Memorial offers more of the same. For example, Claimants highlight talking points prepared by a USTR official for an OECD meeting referring to the continued ability of investors to "bring ISDS claims under the NAFTA rules and procedures with respect to . . . 'legacy investments' for three years after the termination of the NAFTA."[173] But this adds nothing

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[169] *Id.* ¶ 106 n.168.
[170] U.S. Department of State, "2021 Investment Climate Statements: Canada" **(C-093)**.
[171] Michelle Hoffman, "Canada-United States-Mexico Agreement," The Canadian Bar Association (Feb. 1, 2019) **(C-103)**. *See also* Global Affairs Canada, "The Canada-United States-Mexico Agreement: Economic Impact Assessment" at 32 (Feb. 26, 2020) **(C-097)** ("With respect to the NAFTA ISDS, the parties agreed to a transitional period of three years, during which ISDS cases can still be brought forward under NAFTA for investments made prior to the entry into force of CUSMA.").
[172] Annex 14-C, ¶ 1 **(C-0002)**.
[173] Claimants' Counter-Memorial ¶ 109 (quoting 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" **(C-118)**). *See also id.* ¶ 110 (discussing a similar statement in Email from Karin Kizer to Lauren Mandell, "Background for Brussels Conference (11.16.18)" (Nov. 17, 2018), at p. 2 of attachment **(C-119)**).

to the text of Annex 14-C. As discussed, Paragraph 1 of Annex 14-C provides consent for claims "with respect to a legacy investment" and it requires that such claims be submitted "in accordance with" both the Annex itself and NAFTA's provisions on investor-State dispute settlement, as prescribed in Section B of NAFTA Chapter 11.[174] Claimants' reading of the talking points is only helpful to them insofar as one accepts the premise that "claims under the NAFTA rules and procedures" can include claims based on events occurring after the NAFTA was terminated, instead of being confined to the actual terms of Paragraph 1, which limit such claims to alleged breaches of obligations of the NAFTA.

112. It is also important to note that Claimants have misquoted the USTR talking points in their Counter-Memorial. According to Claimants:

> the U.S. Government's own documents regarding the meaning of Annex 14-C refer to the "continued applicability of NAFTA rules and procedures" during the transition period.[175]

The talking points do not, however, include the words "continued applicability."

113. Claimants offer no new statements from Mexico in their Counter-Memorial and the few new Canadian statements are for the most part similar in kind to the talking points just discussed.[176] Claimants also submit Canadian legislation implementing the USMCA, which provides (1) in general, "[n]o person has any cause of action and no proceedings of any kind are to be taken . . . to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the [USMCA]"; and (2) an exception to this general prohibition for "causes of action arising out of, and proceedings taken under, Annex 14-C of the Agreement."[177] Claimants contend that

[174] Annex 14-C, ¶ 1 **(C-0002)**.
[175] Claimants' Counter-Memorial ¶ 109 (emphases omitted).
[176] The Canadian statements refer, for example, to the continued availability of "NAFTA's existing ISDS mechanism." Government of Canada, "Minister of International Trade - Briefing book" (Nov. 2019) **(C-120)**.
[177] Canada–United States–Mexico Agreement Implementation Act, S.C. 2020, c. 1 (Can.), at Section 8 **(C-122)**.

"[t]he Canadian legislation makes it clear that Annex 14-C prescribes the substantive law applicable to disputes arising after USMCA entered into force,"[178] but this is merely wishful thinking. The statute neither states nor implies anything about the "substantive law applicable" under Annex 14-C or the period of its purported application. The statute does no more than acknowledge that causes of action may arise out of Annex 14-C but does not address the nature or permissible scope of such causes of action, which is left to the text of the Annex. As discussed above, Paragraph 1 of Annex 14-C permits only claims based on events that occurred while the NAFTA was in force. As with Claimants' other sources, the Tribunal can draw no insight on the proper interpretation of Annex 14-C from the Canadian legislation.

114. Finally, Claimants again attempt to rely on (i) statements made by Lauren Mandell, a former USTR official, after he left government service and (ii) statements in a WilmerHale client alert on which Mr. Mandell is listed as one of four "contributors." As the United States explained in its Memorial, these statements are not material to the Tribunal's analysis.[179] While they suggest that claims based on events occurring after the NAFTA's termination are viable, these statements contain no analysis of the text of Annex 14-C, description of the negotiation process, or other explanation of how such claims fall within the scope of Annex 14-C. Nor, of course, do they speak to the views of Canada and Mexico on the meaning and application of Annex 14-C.

115. And here it is important to recall that the USMCA Parties were not writing on a blank slate when negotiating Annex 14-C. As the United States has established,[180] Annex 14-C draws heavily on the language of Section B of NAFTA Chapter 11, specifically Articles 1116, 1117, and 1122, which were negotiated with the rest of the NAFTA in the early 1990s. These provisions had a

[178] Claimants' Counter-Memorial ¶ 113.
[179] U.S. Memorial ¶ 86.
[180] *Id*. ¶¶ 67-69.

well-understood meaning among the USMCA Parties, scholars, and tribunals long before the USMCA negotiations began. If an intention to depart from this well-understood meaning is not clear from the text of Annex 14-C, it cannot be inferred based on the views expressed by individual negotiators.

116. The types of statements Claimants have put into the record as supplementary means of interpretation are unhelpful standing alone, but the picture is far more problematic for Claimants when these statements are considered alongside other statements by the USMCA Parties that the United States highlighted in its Memorial.[181] These statements describe, among other things, the USMCA's new ISDS framework, including Canada's decision not to participate, without making any reference to a purported three-year "transition period" for investors to continue bringing NAFTA claims under Annex 14-C based on events occurring after the USMCA's entry into force.

117. For example, a statement issued by Canada's Deputy Prime Minister Chrystia Freeland was unequivocal that the USMCA "*removes* the investor-state dispute resolution system" with respect to Canada,[182] which meant that "Canada can make its own rules, about public health and safety, for example, without the risk of being sued by foreign corporations."[183] Likewise, a factsheet produced by the Undersecretary for North America in Mexico's foreign ministry stated without qualification that ISDS in the USMCA "will **not apply to Canada**."[184] And the U.S.

[181] *Id.* ¶¶ 87-91.
[182] Statement by the Deputy Prime Minister on the entry-into-force of the new NAFTA, at 2 (June 30, 2020) **(R-0008)** (emphasis added).
[183] *Chrystia Freeland says the new trade deal prevented possible widespread economic disruption*, Canada's National Observer (Oct. 19, 2018) **(R-0009)**.
[184] Secretaría de Relaciones Exteriores, United States – Mexico – Canada Agreement (USMCA): Investment and Investor-State Dispute Settlement Mechanism (emphases in original) **(R-0011)**.

Trade Representative, Ambassador Robert Lighthizer, was similarly silent about any "transition period" in answering questions from Congress about ISDS under the USMCA.[185]

118. Finally, while Claimants attempt to rely on a passage from the OECD talking points included in USTR's Freedom of Information Act production, another document disclosed in the same production is more directly on point. In talking points prepared for engagement with Congress, USTR explained a change to Article 14.2(3) in the following terms:

> 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*.[186]

The description of Annex 14-C included in these talking points aligns precisely with the U.S. position in this arbitration.

119. Claimants' repeated refrain in discussing the statements that they see as supportive of their position is that they do not expressly "indicate[] that Annex 14-C allows claims only in connection with measures that predated the entry into force of USMCA."[187] Claimants ask the Tribunal to infer from the absence of language excluding such claims that the USMCA Parties meant for them to be permitted under Annex 14-C. But silence cuts against Claimants in connection with the countervailing statements discussed in the U.S. Memorial and the preceding paragraphs. If the

[185] 2019 Trade Policy Agenda: Negotiations with China, Japan, the EU, and UK; new NAFTA/USMCA; U.S. Participation in the WTO; and other matters, Hearing Before the House Committee on Ways & Means, Serial No. 116-27, at 61, 85-86 (June 19, 2019) **(R-0014)**.
[186] Attachment to Email from Daniel O'Brien to John M. Melle et al. (Nov. 28, 2018) **(C-114)** (emphasis added).
[187] Claimants' Counter-Memorial ¶ 112. *See also id.* ¶ 109 n.173 ("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."); *id.* ¶ 113 ("There is no indication [in the Canadian legislation] that such causes of action are limited to claims regarding measures that predated the entry into force of USMCA.").

USMCA Parties intended to bind themselves to the continued application of the NAFTA's substantive investment obligations – contrary to the default rule under customary international law – and to expose themselves to potential liability for breach of these obligations for three years after the USMCA's entry into force, it is difficult to imagine that the above statements would not have been caveated to reflect this intention. For example, if Annex 14-C allowed claims based on events *after* the entry into force of the USMCA, the Congressional talking points would surely have included a mention of this after stating that the Annex permits claims based on alleged breaches "*before* entry into force of the USMCA."[188]

120. Likewise, it is hard to understand how Deputy Prime Minister Freeland could have celebrated the end of ISDS in multiple statements made about the USMCA if the reality had been, as Claimants argue, that Canada would in fact remain exposed to the threat of investor claims based on acts or omissions occurring in the three years after the USMCA's entry into force. Claimants' response to the Deputy Prime Minister's statements is telling: in the place of substantive argument, they offer the bare assertion that "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."[189] Claimants do not, however, provide any support for this reading of Deputy Prime Minister Freeland's statements, and their argument is inconsistent with the language of the statements themselves.

121. In her January 26, 2020, letter to Canadian party leaders at the outset of the ratification process for the USMCA, Deputy Prime Minister Freeland stated: "The investor-state dispute resolution system – which has allowed large corporations to sue the Canadian government for

[188] Attachment to Email from Daniel O'Brien to John M. Melle et al. (Nov. 28, 2018) **(C-114)** (emphasis added).
[189] Claimants' Counter-Memorial ¶ 114.

regulating in the public interest – *is now gone*."[190] Similarly, in a statement released to mark the entry into force of the USMCA, Deputy Prime Minister Freeland was clear that the USMCA "*removes* the investor-state dispute resolution system, which has allowed large corporations to sue the Canadian government for regulating in the public interest."[191] In these statements, Deputy Prime Minister Freeland did not say that ISDS would be eliminated in three years or after a "transition period." Instead, she said simply that ISDS "is now gone"[192] and that the USMCA "removes" it.[193] These statements are not compatible with Claimants' interpretation of Annex 14-C and Claimants' response that the Deputy Prime Minister "clearly" meant something other than what she said is entirely unpersuasive.

122. Claimants offer an almost identical response to Mexico's USMCA factsheet. Claimants argue that, in stating "the Investor-State Dispute Settlement mechanism will not apply to Canada,"[194] the factsheet "is clearly referring to the termination of ISDS after the end of the transition period."[195] But, as with Claimants' characterization of Deputy Prime Minister Freeland's statements, putting the word "clearly" before an assertion does not make it true. The factsheet has nothing to say about a "transition period" and contains no mention of the continued ability of investors, including Canadian investors, to assert claims for breach of the NAFTA's substantive investment obligations after the USMCA's entry into force.

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[190] Deputy Prime Minister letter to party leaders regarding the new NAFTA, at 3 (Jan. 26, 2020) **(R-0010)** (emphasis added).
[191] Statement by the Deputy Prime Minister on the entry-into-force of the new NAFTA, at 2 (June 30, 2020) **(R-0008)** (emphasis added).
[192] Deputy Prime Minister letter to party leaders regarding the new NAFTA, at 3 (Jan. 26, 2020) **(R-0010)**.
[193] Statement by the Deputy Prime Minister on the entry-into-force of the new NAFTA, at 2 (June 30, 2020) **(R-0008)** (emphasis added). Deputy Prime Minister Freeland used the future tense (stating that ISDS "will be gone") in an op-ed published shortly after negotiations concluded in October 2018, but that was presumably because ratification and entry into force of the new agreement were still to come.
[194] Secretaría de Relaciones Exteriores, United States – Mexico – Canada Agreement (USMCA): Investment and Investor-State Dispute Settlement Mechanism (emphases omitted) **(R-0011)**.
[195] Claimants' Counter-Memorial ¶ 116.

123. Nor is there any need to guess at Mexico's interpretation of Annex 14-C. As explained in the U.S. Memorial,[196] Mexico has taken a position on the interpretation of Annex 14-C in the *Legacy Vulcan v. Mexico* arbitration that is entirely consistent with the U.S. position: the "USMCA Parties did not consent to allow NAFTA claims to be based on measures subsequent to the entry into force of the USMCA."[197] Claimants obviously cannot quibble with the meaning of this and other statements in Mexico's pleadings, so they instead seek to delegitimize them on the basis that they were made in an arbitration or are the product of "coordinat[ion]" with the United States.[198] There is nothing, however, about positions taken in litigation or arbitration that makes them any less authentic as an expression of a treaty party's views on the meaning of its treaty.[199] Indeed, for a dispute settlement provision like Annex 14-C, it is only natural that opportunities for the USMCA Parties to interpret and apply its terms arise in the course of disputes. Discounting the USMCA Parties' views as expressed in that context would be inappropriate.

124. With respect to Ambassador Lighthizer's testimony, Claimants contend that it is irrelevant because "[n]one of Ambassador Lighthizer's statements discusses Annex 14-C or claims made in connection with legacy investments."[200] But that is precisely the point. Ambassador Lighthizer was given several opportunities during his testimony to discuss the USMCA's new ISDS framework, but he never mentioned that the implementation of this framework would, in effect,

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[196] U.S. Memorial ¶ 89.

[197] *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Mexico's Counter-Memorial on the Ancillary Claim ¶ 414 (Dec. 19, 2022) **(RL-064)** (English free translation) ("Partes del T-MEC no dieron su consentimiento para permitir que reclamaciones del TLCAN se basen en medidas posteriores a la entrada en vigor del T-MEC.") (Spanish original).

[198] Claimants' Counter-Memorial ¶ 117.

[199] The International Law Commission has, for example, identified "statements in the course of a legal dispute" as among the types of "official statements regarding [a treaty's] interpretation" that are capable of constituting "subsequent practice" under Article 31(3)(b) of the Vienna Convention. *See, e.g.*, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, Conclusion 4, commentary ¶ 18, U.N. Doc. A/73/10 (2018) **(RL-111)**.

[200] Claimants' Counter-Memorial ¶ 111.

be delayed by three years while the NAFTA's broader ISDS options remained available for investors to challenge activity occurring even after the USMCA's entry into force.

125. In sum, the statements of current and former government officials that Claimants have submitted to the Tribunal as supplementary means of interpretation are ambiguous or otherwise unhelpful and at odds with other similar statements made by such officials. Accordingly, even if the Tribunal considers it appropriate to have recourse to supplementary means of interpretation under Article 32 of the Vienna Convention, it should give these statements no weight. In this regard it is important that any supplementary means considered by the Tribunal reflect the official views of all three USMCA Parties, and not the privately-expressed views of individuals.[201]

F. The U.S. Interpretation of Annex 14-C Is Correct, But Even If Ambiguity Remained, the Tribunal Must Hold Claimants to Their Burden and Decline Jurisdiction

126. Claimants and Professor Schreuer dedicate considerable space in their submissions to the burden of proof, in an attempt to deflect from their own burden to establish jurisdiction and place a burden on the United States.[202] These arguments are unavailing. The burden only comes into play if the Tribunal finds Annex 14-C to be ambiguous, and in that unlikely event, Claimants' failure to establish jurisdiction means that this case must be dismissed.

127. First, Claimants are simply incorrect that they bear no burden of proof to establish jurisdiction. It is well-established that where "jurisdiction rests on the existence of certain facts,

[201] The United States anticipates that, nonetheless, Claimants will rely on such statements rather than the plain text of the Treaty. To the extent that the Tribunal is inclined to consider such arguments, the United States has attached, as Annex B, internal documents that may be relevant to Claimants' assertions.

[202] Claimants' Counter-Memorial ¶¶ 18-22; Schreuer Report ¶¶ 11-23. In contrast, the United States provided only two sentences on the burden of proof in its Memorial. U.S. Memorial ¶ 8.

they have to be proven at the jurisdictional stage."[203] This means, according to a long line of arbitration decisions, that the Claimants bear the burden to provide evidence that there is jurisdiction in this case.[204]

128. Claimants' burden is particularly relevant if the evidence yields an ambiguous interpretation of the treaty terms under which the Claimants assert jurisdiction. The International Court of Justice ("ICJ") summarized the operation of these principles in *Djibouti v. France*, writing that "[t]he consent allowing for the Court to assume jurisdiction must be certain . . . . [W]hatever the basis of consent, the attitude of the respondent State must be capable of being regarded as an unequivocal indication of the desire of that State to accept the Court's jurisdiction in a voluntary and indisputable manner."[205] Drawing on this and other ICJ cases, the tribunal in *ICS v. Argentina* held:

> a State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. *The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent.*

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[203] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009) **(RL-112)**; *see also Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶ 150 (June 14, 2013) **(RL-113)** ("Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction . . . ."); *see also Pugachev v. Russia*, Award on Jurisdiction ¶ 248 (June 18, 2020) **(RL-049)** (noting that "it is an accepted principle of international law that the claimant in an arbitration bears the legal burden of showing that the tribunal has jurisdiction to consider its claim").

[204] *Vito G. Gallo v. Canada*, NAFTA/PCA Case No. 2008-03, Award ¶ 277 (Sept. 15, 2011) (citation omitted) **(RL-114)** ("Both parties submit, and the Tribunal concurs, that the maxim 'who asserts must prove,' or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration: a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage[.]"); *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award ¶ 250 (Oct. 22, 2018) **(RL-115)** (finding that "[t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends."); *see also Westmoreland Mining Holdings LLC v. Government of Canada*, NAFTA/ICSID Case No. UNCT/20/3, Final Award ¶ 193 (Jan. 31, 2022) **(RL-116)** ("If the Claimant cannot establish, on the balance of probabilities, those facts which are critical to founding jurisdiction, there is no jurisdiction.").

[205] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 I.C.J. 177, 204 ¶ 62 (quotations and citations omitted) **(RL-117).**

> Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.[206]

129. Here, for the reasons described above, the treaty is *not* ambiguous as to the scope of the United States' consent; the USMCA does not provide jurisdiction for claims of breaches of the NAFTA that occurred after that treaty terminated. To the extent, however, that the Tribunal concludes that the treaty is ambiguous, Claimants' burden has not been met, consent has not been established, and the case must be dismissed. In the case of ambiguity, the Tribunal must conclude that Claimants have failed to establish that the United States provided an "unequivocal indication" for claims alleging a breach of the NAFTA arising after the NAFTA's termination.

III. Claimants' Equitable Arguments Are a Meritless Distraction

130. Claimants ask the Tribunal to ignore the clear and definitive jurisdictional defect in their claims on the grounds of equity. But their arguments based on a putative "principle of consistency" theory and "unclean hands" lack seriousness, and add nothing to the Tribunal's analysis of the treaty.

A. Claimants' "Principle of Consistency" Argument Fails Because Claimants Have Not Demonstrated Manifest Inconsistency or Reliance

131. Claimants are asking the Tribunal to find – assuming that the U.S. jurisdictional objection is meritorious[207] – that the Tribunal can nonetheless accept jurisdiction over this case because the United States allegedly asserted different views about the interpretation of Annex 14-C prior to

[206] *ICS Inspection & Control Services Ltd. v. Argentina*, PCA Case No. 2010-09, Award on Jurisdiction ¶ 280 (Feb. 10, 2012) **(RL-048)** (emphasis added); *see also Mobil Cerro Negro Holding, Ltd. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction ¶¶ 139-140 (June 10, 2010) **(RL-118)** ("If it had been the intention of Venezuela to give its advance consent to ICSID arbitration in general, it would have been easy for the drafters of Article 22 to express that intention clearly by using any of those well known formulas. The Tribunal thus arrives to the conclusion that such intention is not established. As a consequence, it cannot conclude from the ambiguous text of Article 22 that Venezuela, in adopting the 1999 Investment Law, consented in advance to ICSID arbitration for all disputes covered by the ICSID Convention.").

[207] If the U.S. jurisdictional objection lacks merit, then the "good faith" argument is moot.

this arbitration.[208] Although Claimants couch this argument solely in terms of a putative "principle of consistency,"[209] they have in no way established the content of such a principle, much less its character as a binding rule that unequivocally and permanently bars a State or party from taking an inconsistent position on a matter of fact or law.

132. Rather, when the sources Claimants rely upon are reviewed closely, it is plain that they in fact are discussing the principle of estoppel. For example, while Claimants now eschew the word "estoppel" (unlike in their bifurcation pleadings) in favor of Bin Cheng's famous statement that "a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another,"[210] Claimants omit the remainder of Cheng's sentence: "*and whether it is called estoppel*, or by any other name, it is one which courts of law have in modern times most usefully adopted."[211]

133. Similarly, while Claimants quote at length from the Separate Opinion of Vice-President Alfaro to the ICJ's Jurisdictional Judgment in *Temple of Preah Vihear (Cambodia v. Thailand)*, they chose to omit critical language from the Opinion (which is bolded below) making clear that inconsistent statements alone are insufficient to have preclusive effect:

> **Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same:** inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible **(*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). *A fortiori*, the State must not be allowed to benefit by**

[208] The United States does not agree that "good faith" can be a basis for finding jurisdiction where such jurisdiction does not otherwise exist. The argument in this section is presented on the assumption, *arguendo*, that a Tribunal would be empowered to find exercise jurisdiction where it lacked such jurisdiction on the basis of "good faith" as asserted by Claimants.
[209] Claimants' Counter-Memorial, Section VIII.A.
[210] Claimants' Counter-Memorial ¶ 127 (citing Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* at 141 (1953) (internal quotation and footnote omitted) ("Cheng") **(CL-50)**).
[211] Cheng at 141-42 **(CL-50)** (emphasis added).

> **its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. (*Nullus commodum capere de sua injuria propria*.)** Finally, the 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 . . . .[212]

134. As the United States pointed out during the bifurcation pleadings, and consistent with the above sources, in order to rely on estoppel, Claimants would have to demonstrate (1) that there has been some "declaration, representation, or conduct" on the part of the United States that is inconsistent with its current position, and (2) that the previous statement "has in fact induced reasonable reliance by" Claimants.[213] Claimants cannot meet either prong of this test.

135. *First*, the United States has not contradicted itself with respect to the import of Annex 14-C. The decision on which Claimants primarily rely with respect to good faith, the second partial award in *Chevron v. Ecuador II*, makes clear that the alleged contradictory statements of the respondent must be "manifestly inconsistent" and "unequivocal."[214] The tribunal in *Resolute v. Canada* – while casting some doubt on whether good faith could ever be used as a basis to deny a jurisdictional objection[215] – ruled for the Respondent on this very basis, finding that Respondent's previous statements were not "manifestly inconsistent" with its current litigation position.[216]

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[212] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 1962 I.C.J. 6 (June 15), at Separate Opinion of Judge Alfaro, p. 40 **(CL-138)** (emphases added).
[213] *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award ¶ 246 (Aug. 18, 2008) **(RL-046)**.
[214] *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 ¶ 7.111 (Aug. 30, 2018) **(CL-171)**; *see also Resolute Forest Product v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Final Award ¶ 441 (July 25, 2022) **(RL-119)** ("*Resolute* Award").
[215] *Resolute* Award ¶ 442.
[216] *Id.* ¶ 460.

136. As demonstrated in Section II.E(4) above, the public statements of U.S. officials, made in their official capacities, between the conclusion of the USMCA negotiation and the assertion of its jurisdictional defense in this case have been consistent: Annex 14-C extended NAFTA's investor-State dispute settlement provisions (as opposed to NAFTA's substantive investment obligations) for an additional three years after the NAFTA was terminated. In such disputes, as Annex 14-C makes plain, the "rules" and "procedures" of NAFTA Chapter 11 would apply. The very best that Claimants might be able to argue is that the statements of U.S. officials were vague on this point. As for the statements made by former U.S. officials after they returned to private practice, while they may reflect the personal views of such individuals, they cannot be ascribed to the United States. It therefore cannot credibly be argued that public U.S. statements on the import of Annex 14-C are "manifestly inconsistent" with its current jurisdictional objection.[217]

137. *Second*, Claimants have nowhere asserted that they reasonably relied upon the alleged statements of the United States. Claimants have not explained what opportunity they have missed or steps they have been deprived of by (allegedly) having been misled by the United States' previous statements concerning USMCA Annex 14-C. Not once do Claimants describe what they would have done differently had they known that Annex 14-C would not permit claims for alleged

[217] The Tribunal is invited to examine the statements made in the cases relied upon by Claimant with the alleged "contradictory" statements made in this case. *See* Claimants' Counter-Memorial ¶ 128 n.200 and cases cited therein. In *Stabil v. Russian Federation*, Russia attempted to argue that Crimea was not Russian territory for purposes of the relevant treaty, whereas it had publicly proclaimed the opposite on numerous occasions. *Stabil LLC and others v. Russian Federation*, PCA Case No. 2015-35, Award on Jurisdiction ¶ 170 (June 26, 2017) **(CL-174)**. In *Chevron v. Ecuador (II)*, the Ecuadorian courts had unequivocally found that Chevron had been an investor in Ecuador as a successor to Texaco, while Ecuador asserted in the investor-state dispute that Chevron was not an "investor" for purposes of the relevant treaty. *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 ¶ 7.112 (Aug. 30, 2018) **(CL-171)**. In *Mobil v. Argentina*, the government of Argentina had consistently treated Mobil's investment as legally-made and valid, while claiming in the arbitration that the investment was illegal. *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 ¶¶ 217-30 (Apr. 10, 2013) **(CL-179)**. In each of these cases, the previous statements were manifestly inconsistent with the respondent's jurisdictional objection, in sharp contrast to this case.

breaches post-dating NAFTA's termination. Nor have they explained why such a step is foreclosed to them now.

138. For these reasons, Claimants' "principle of consistency" argument should be rejected.

B. Claimants' Unclean Hands Argument Requires the Tribunal to Prejudge the Merits of the Case Before It Has Found Jurisdiction

139. Turning to unclean hands, Claimants argue that, even if the USMCA conferred no jurisdiction on this Tribunal to arbitrate Claimants' claims, the principle of "unclean hands" nonetheless provides a basis for this case to continue. As legal support for this argument, Claimants make selective reference[218] to the Permanent Court of International Justice's Judgment in *Chorzów Factory*, where, after concluding that its jurisdiction was uninhibited, the Court observed that (again placing in bold text that Claimants omit from their Counter-Memorial):

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that **one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress**, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.[219]

140. Claimants scarcely make an effort to explain how this reasoning applies to the facts of this case. The United States' jurisdictional defense does not rely upon an argument that Claimants have not first "fulfilled some obligation" or "had recourse to some means of redress" which prevents invocation of the jurisdiction of a tribunal pursuant to USMCA Annex 14-C. Nor, for that matter, have Claimants identified any "illegal act" on the part of the United States that

[218] Claimants' Counter-Memorial ¶ 143.
[219] *Factory at Chorzów (Germany v. Poland) (Jurisdiction)*, Judgment, 1927 P.C.I.J. (ser. A) No. 9 (July 26) at p. 31 **(CL-180)**.

"prevented [Claimants] from fulfilling the obligation in question" or from "having recourse to the tribunal which would have been open, to [them]."[220]

141. Claimants summarize their "unclean hands" argument in paragraph 142 of their Counter-Memorial as follows:

> In short, as President Trump himself conceded, 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.[221]

142. In a footnote, Claimants state further that:

> Through its preliminary objection, Respondent seeks to leverage its own misconduct to avoid liability by preventing Claimants from asserting their claims.[222]

143. The only "act" that the United States "seeks to leverage" to assert its jurisdictional defense is the conclusion of the USMCA with Canada and Mexico. The conclusion of a treaty by three sovereign nations is self-evidently not a wrongful act. The alleged "illegal act" upon which Claimants rely, on the other hand, is the revocation of the Presidential Permit in 2021. Even if, *arguendo*, this act was wrongful, Claimants have not (and cannot) explain how the revocation of a pipeline permit itself is being "leveraged" to prevent them from bringing a claim pursuant to USMCA Annex 14-C.[223]

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[220] *Id.*
[221] Claimants' Counter-Memorial ¶ 142.
[222] *Id.* ¶ 143 n.230.
[223] It should be noted that in investment arbitration, the "unclean hands" doctrine has been applied almost exclusively to claimants – not respondents – on the theory that even if there has been a treaty violation, the claimant should not be able to benefit from its own illegality in making and/or operating the investment. Even if the doctrine

144. Claimants' assertion of wrongfulness in the recission of the Presidential Permit is the very question they have posed for the merits. Claimants cannot rely on the doctrine of "unclean hands" to have that question judged during the jurisdictional phase of this case, in order to avoid the conclusion that this Tribunal must reach: that it lacks jurisdiction under the USMCA. To hold otherwise would mean that no jurisdictional objections could ever be raised in ISDS cases. After all, in every ISDS case, a claimant alleges a wrongful act by a respondent; tribunals still must nonetheless assess whether they have jurisdiction to hear that claim on the merits. An "unclean hands" argument based solely on the alleged claim on the merits cannot confer jurisdiction where none exists.

IV. Conclusion

145. In summary, Claimants have failed to establish that this Tribunal has jurisdiction under the USMCA to hear the claims they have alleged. Annex 14-C, by its plain terms, only applies to breaches of certain obligations of the NAFTA. Those obligations ceased to bind the NAFTA Parties on July 1, 2020. Thus, the alleged NAFTA breaches asserted by Claimants, which did not occur until January 2021, cannot be subject to an Annex 14-C claim. Claimants' attempt to read the word "obligation" out of Annex 14-C is unavailing; this Tribunal must apply the words chosen by the USMCA Parties in the treaty text.

146. In light of the above, the United States respectfully requests the Tribunal to conclude that it lacks jurisdiction over Claimants' claims and to dismiss them in their entirety.[224]

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applied to arguments a respondent raises in jurisdiction, it would not apply here: the United States has not asserted that Claimants' alleged investment was procured by fraud, corruption, or any other illegal means. Nor is there any fraud or illegality associated with the U.S. jurisdictional objection, on the part of Claimants or the United States; it is simply a matter of treaty interpretation.

[224] The United States' bifurcated jurisdictional objection is without prejudice to other jurisdictional objections or defenses that the United States may raise in other phases of this arbitration.

Respectfully submitted,

[Signed]

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Summary of Redacted Pages

The summary of pages that have been redacted in their entirety from the U.S. Reply on its Preliminary Objection pursuant to paragraph 13 of the Confidentiality Order is below:

Document	Number of Redacted Pages
Annex A	9
Annex B	17

Supplementary Report on the Interpretation of Annex 14-C to the Agreement between the United States of America, the United Mexican States and Canada attached to the Protocol signed at Buenos Aires, 30 November, 2018 ("USMCA")

Preliminary Statement

This Supplementary Report should be read in conjunction with my Report of June 9, 2023. Since my Report I have read the Legal Opinion by Professor Christoph Schreuer of August 11, 2023, and the Claimants' Counter-Memorial on Respondent's Preliminary Objection of the same date. I have also reviewed the documents produced by the Respondent concerning the U.S.-Mexico-Canada Agreement (USMCA).

I reiterate that I have no relationship with or interest in any of the parties to this arbitration, nor do I have a connection to the matters in dispute.

Further, I reiterate that my Report and Supplementary Report represent my true professional assessment of the matters to which it refers based on my academic research and on experience in the application of international law.

Introduction

1. The report which the present one supplements showed that the consent in paragraph 1 of Annex 14-C to USMCA, by its meaning established by application of the 1969 Vienna Convention rules on interpretation, is for arbitration of claims alleging breach of an obligation under Section A of Chapter 11 of NAFTA or of the other provisions listed in the paragraph. Paragraph 3 of that Annex to USMCA provides for expiry of such consent three years after the provisions of Section A of Chapter 11 of NAFTA were superseded, without changing the point in time at which those provisions of Section A were superseded. Thus the consent to arbitration extends only to submission to arbitration of claims alleging breach of obligations relating to acts and events taking place before the NAFTA, as the source of those obligations, was superseded on 1 July 2020.

2. This Supplementary Report shows how the proper interpretation of Annex 14-C needs to focus on the actual terms in the Annex defining the consent to arbitration. These terms limit consent by reference to allegations of breach of the specified "obligations" under NAFTA, not merely breach of "standards". The term "obligations" in the context of the USMCA indicates legally binding commitments which could only flow from provisions that were in force at the time of the matters to which the claims relate. Annex 14-C does not provide for extension of those obligations or make provision for an application or choice of law such as to extend the consent to arbitration to relate to allegations concerning provisions that do not constitute "obligations" under NAFTA. This Supplementary Report also provides further guidance on what is material to proper interpretation of the treaty provisions and how such an interpretation is established.

General Considerations

3. Good faith requires that an interpreter of a treaty applies properly the rules and principles at the time of interpretation and excludes from consideration extraneous, irrelevant, and inadmissible allegations, assertions, and material. In applying the rules of treaty interpretation it is necessary to consider the actual text of the treaty and not adopt an interpretation derived from what the text might have meant had its wording been different. Jurisdiction of an arbitral tribunal being dependent on consent, where the consent is expressed in a treaty the limits of the consent are those set out in the terms of the treaty. Determining the extent of such consent is not, in this case, a matter of proving facts; nor is it a situation where "the decision-maker looks at the preponderance of authority for or against jurisdiction".[1] What is required is a proper application of the rules of treaty interpretation to the terms of this treaty and in particular the terms used in expressing consent to arbitration.

4. Assumptions or implications which depart from the clear text of a treaty are not to be made. The International Court of Justice has repeatedly referred to the work of the International Law Commission when the Court has been seeking to elucidate treaty provisions derived from work of the ILC.[2] The ILC Commentary on the draft articles leading to the text of the 1969 Vienna Convention states:

> ". . . the text must be presumed to be an authentic expression of the intentions of the parties; . . . in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties."[3]

5. That the rules of interpretation incorporate a strongly textual approach is too well established to require extensive support. In the same ILC Commentary on what became article 31(1) of the 1969 Vienna Convention, the ILC stated:

> "Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual

[1] Cf Opinion of Professor Schreuer of August 11, 2023, at para 12 **(CER-1)**.
[2] The Final Act of the Vienna Conference 1968-9 notes the relevant records of the International Law Commission and their role at the Conference (Final Act, paras 10 and 11(a), Documents of the Conference, p 284) **(RG-0009)**. The relevance of this ILC material in interpreting the provisions of the 1969 Vienna Convention has been amply confirmed in the practice of the International Court of Justice and elsewhere: see citation of twenty-three ICJ decisions referring to ILC material in contentious cases up to 31 January 2020: D Azaria, '"Codification by Interpretation": The International Law Commission as an Interpreter of International Law' (2020) 31 EJIL 171, 173 **(RG-0010)**; since then, there have been further such references by the ICJ in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (judgment of 9 February 2022) **(RG-0011)** and in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Judgment of 21 April 2022) **(RG-0012)**.
[3] [1966] Yearbook of the ILC, vol II, p 220, para 11 **(RG-0013)**.

> approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain."[4]

The Consent to Arbitration

6. Paragraph 1 of Annex 14-C to the USMCA sets out the provision on consent to arbitration. This defines the consent to arbitration by reference to allegations of breach of an "obligation" in the NAFTA. Obligations arise when a treaty is in force. The obligations here are identified in paragraph 1 and the range of obligations defining the consent to arbitration is confirmed as including the provisions listed in footnote 20 to Annex 14-C.

7. Paragraph 1 of Annex 14-C does not purport to apply provisions which have ceased to be in force. Neither paragraph 1 of the Annex nor any other provisions of the Annex or USMCA recreate, extend, or prolong the provisions of the regime in Section A of Chapter 11 of NAFTA 1994 or the specified elements of Articles 1502 and 1503 of NAFTA 1994 that have been superseded. Further, none of these provisions in any way purport to apply those regimes for treatment of investments when the provisions are not in force. They do not specify any "transitional period" during which that previous regime for treatment of investments is to continue to apply.

8. To bring provisions into force or to apply provisions to particular facts, transactions or as a regime, an express provision is necessary. This cannot be presumed from a provision which states that it is doing something else, a provision which in this case is expressing consent to arbitration. Paragraph 1 is defining the extent of consent by reference to obligations in NAFTA's substantive regime, making no reference to any transitional period during which that regime was to continue to create obligations.

The Boundaries of Consent to Arbitration

9. The Opinion of Professor Schreuer of August 11, 2023, sets out four conditions each of which, the Opinion asserts, must be met as being within the ordinary meaning of Annex 14-C to USMCA. The second of these conditions is represented as:

> "Another condition is that the claim alleges the breach of certain substantive standards, including those of Section A of Chapter 11 of NAFTA."[5]

10. This does not correctly reflect what the Annex provides. The relevant condition in Annex 14-C is not that a claim alleges the breach of certain "substantive standards". Paragraph 1 of that Annex expresses consent with respect to submission to arbitration of a claim alleging "breach of an obligation" under certain NAFTA provisions including Section A of Chapter 11 of NAFTA. This condition does not point to a claim

[4] Idem, pp 220-21, para 11, footnote omitted.
[5] Opinion of Professor Schreuer of August 11, 2023, at para 26 **(CER-1)**.

merely of breach of standards. It indicates that consent is circumscribed by reference to breach of an obligation under listed elements of a legal regime. The difference is most material. A list of standards is simply that: a list of standards; whereas "an obligation" arising from listed provisions is a consequence of the legal force of those provisions.

11. A "standard" is a measure by which something is evaluated. An "obligation" is a commitment which is legally binding. The condition of consent in the Annex is not expressed in terms of allegations of failure to meet specified standards but of allegations of breach of obligations under the stated treaty provisions. The existence of those obligations circumscribes the consent that is given. The obligations did not arise except when the specified NAFTA treaty provisions had force, which they did not after being superseded.

12. The characteristic of an international obligation that it must have been in force at the time when a breach is asserted to have occurred is stated in the ILC's 'Draft Articles on Responsibility of States for Internationally Wrongful Acts'. These draft articles have been commended by the General Assembly of the United Nations and have been given recognition in references by the ICJ and arbitral tribunals considering investment disputes.[6] The articles include:

> *Article 13. International obligation in force for a State*
> 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.[7]

[6] See eg: General Assembly Resolution 56/83 of 12 December 2001 **(RG-0014)**, and subsequent resolutions until Resolution 77/97 of 7 December 2022 **(RG-0015)**; ICJ, *Jurisdictional Immunities of the State (Germany* v. *Italy)*, ICJ Reports 2012, p 99 at 124, para 58 **(RG-0016)**: "The Court observes that, in accordance with the principle stated in Article 13 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred"; *Corn Products International Inc. v. The United Mexican States* (International arbitral tribunal under the ICSID Additional Facility Rules) ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, para 76 **(RG-0017)**: "The rules on State responsibility (of which, it is accepted, the most authoritative statement is to be found in the ILC Articles) are in principle applicable under the NAFTA save to the extent that they are excluded by provisions of the NAFTA as *lex specialis*."; *The Rompetrol Group N.V.* v. *Romania* (International arbitral tribunal under the ICSID Convention) ICSID Case No. ARB/06/3, Award, 6 May 2013, para 189 (footnotes omitted) **(RG-0018)**: "It is convenient therefore to begin with an examination of the draft Articles on State Responsibility, bearing in mind that their status remains that of a draft, although the degree of approval accorded to them by the UN General Assembly and in subsequent international practice amply justifies treating the draft Articles as guidelines for present purposes."

[7] [2001] Yearbook of the ILC, vol II, Part Two, at p 57 **(RG-0019)**.

13. Thus the significance of the term "obligation" is that the provision in point must have been in force at the time to which an assertion of breach relates. The NAFTA provisions listed in paragraph 1 of Annex 14-C had ceased to be in force at the time of the act underlying the alleged breaches in this arbitration. Hence there were no obligations meeting the parameters of the consent given in that Annex.

14. It is a principle of treaty interpretation, too well established to require great elaboration, that where terms are included in a treaty, proper interpretation requires that effect be given to them rather than no effect. This is inherent in the first part of the general rule of treaty interpretation.[8] Failure to take account of the reference to "obligation" in the formulation of the extent of consent to arbitration in Annex 14-C is not in accordance with this principle of treaty interpretation and results in misinterpretation of the treaty.

15. Far from adding an additional element to the USMCA, understanding Annex 14-C as requiring that the NAFTA treaty be in force at the time of the alleged breaches respects this key principle of treaty interpretation that effect be given to all the terms of the treaty. The requirement that the NAFTA provisions be in force or be given express effect is explicit in the term "obligation". It is a condition of the consent to arbitration. Conversely, to subtract from the Annex the requirement that an allegation be of breach of an obligation, and to replace it by merely allegation of breach of certain substantive standards, is to ignore an essential element in interpretation of the Annex.

16. Thus it is manifestly ill-founded to suggest that it is adding an impermissible additional requirement to the conditions of consent to arbitration when concluding that the NAFTA regime for protection of investments must have been in force for it to have established obligations. That the regime must have had legal force in order to establish obligations respects the terms of the treaty which a mere requirement to show breach of certain standards does not.

[8] This principle is commonly expressed in its Latin form: *ut res magis valeat quam pereat*. It was in that form treated by the ILC as inherent in the draft that became Article 31(1) of the 1969 Vienna Convention:

> "The Commission, however, took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*." (ILC 'Commentary on Draft Articles' [1966] Yearbook of the ILC, vol II, p 219, para (6), emphasis in original **(RG-0013)**)

Consenting to Arbitration is a Separate Act from Application of a Superseded Treaty

17. Consent to arbitration is not a means of expressing consent to be bound by a treaty or of establishing treaty relations. If a treaty which is not in force is to be made applicable to a transaction or relationship this must be done expressly. This is well illustrated by the two instruments relevant to jurisdiction of the arbitral tribunal in *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic (Jurisdiction*).[9] In that case Article 7 of a "Consolidation Agreement" stated that:

> "this Agreement shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Reciprocal Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992."

18. The Treaty on the Promotion and Reciprocal Protection of Investments was there denominated as governing the Consolidation Agreement. The Treaty included in its Article 8 the requirements for a dispute (as described there) to be referred to arbitration, expressing therein the terms on which the states as putative parties to the bilateral investment treaty consented to arbitration.[10]

19. Thus the governing law in that case was established by the Consolidation Agreement, while consent to arbitration was given separately in the bilateral Treaty. This shows well the distinction between specifying the law applicable to a transaction or relationship and the expression of consent to submit to arbitration a dispute relating to that transaction or relationship. In the *Ceskoslovenska Obchodni Banka* case the consent to arbitration was not the means by which a legal regime or law governing the treatment of investments was brought into force or made applicable. The separate Consolidation Agreement did the latter. The consent to arbitration in the Annex to the

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[9] ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para 4 **(RG-0020)**.

[10] Article 8 of the BIT reads as follows:

1. Any dispute which may arise between the investor of one Party and the other Party in relation to any investments made in the territory of such other Party, shall be subject to negotiations between the parties to the dispute.
2. If the dispute between the investor of one Party and the other Party continues after a period of three months, the investor and the Party shall have the right to submit the dispute to either:
   1) the International Center for the Resolution of Investment-Related Disputes with special regard to the applicable provisions of the Treaty on the Resolution of Investment-Related Disputes arising between States and nationals of other States, open for signature in Washington D.C. on 18 March 1965, provided, however, that both Parties are parties to such Treaty; or
   2) an arbitrator or an ad hoc international arbitration tribunal established in accordance with the arbitration rules of the United Nations Organization Committee for International Trade Law. Parties to the dispute may agree in writing upon modifications of such rules. The arbitration award shall be final and binding on both parties to the dispute.
3. The dispute shall be resolved by such agency referred to in Section 2 above as was the first one to which a proposal for the resolution of the dispute was submitted. [As stated in Decision of the Tribunal on Objections to Jurisdiction (cited above), para 4 **(RG-0020)**]

USMCA is similarly not a means of applying a superseded regime beyond its expiry or as specified governing law. There is no provision having that effect in the USMCA or elsewhere.

Implied terms and absence of necessity for implication

20. Finding that terms are implied by a treaty is not acceptable where the terms of a treaty are clear and there is no necessity for an implication created by absence of provision. Still less acceptable is suggesting that a state has consented to obligations by implication. Rejection of any suggestion of such implication is the position encapsulated in the principle stated by the ICJ in the *General Assembly Admissions* case.[11] This Opinion of the ICJ was noted by the ILC as a factor underlying the textual approach to interpretation and the first element of the general rule of interpretation:

> "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."[12]

21. The ILC supported its formulation of the general rule of interpretation by further reference to the same Advisory Opinion where the Court stated:

> "When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning."[13]

22. Thus consent to arbitration circumscribed by reference to specified obligations should be interpreted as just that, giving the term "obligation" its ordinary meaning, without omitting reference to the term or changing it by imputing to it reference to a time at which the specified provisions could not have created obligations as they were not in force or otherwise applied.

23. There is nothing absurd or unreasonable in giving the provision on consent in paragraph 1 of Annex 14-C its ordinary meaning. There is no ambiguity in these terms. There is no gap or omission making it necessary to imply terms. The test for

[11] Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] ICJ Reports 4 **(RG-0021)**.
[12] *Competence of the General Assembly* (above) at p 8 **(RG-0021)**, quoted in [1966] Yearbook of the ILC, vol II, p 221, para 12 **(RG-0013)**. The continuing applicability of this principle in more recent times has been recognized in *Louis Dreyfus Armateurs SAS (France) v The Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction, 22 December 2015, at para 77 **(RG-0022)**.
[13] *Competence of the General Assembly* (above) at p 8 **(RG-0021)**.

implying terms to supplement those in a treaty is whether such implication is essential to make sense and to give effect to the treaty. The arena of international law where there is a developed practice of implied terms is the case of implied powers to enable an international organization to carry out its functions. This does not extend to implying terms extending jurisdiction of an arbitral tribunal beyond those specified in consent to arbitration. The powers of an international organization depend on interpretation of its constitution where powers are often expressed in general terms while the jurisdiction of an arbitral tribunal is circumscribed by the specific terms of consent of the parties or putative parties.

24. In the present instance there is no lacuna or absence of provision relating to the manner in which the USMCA supersedes the NAFTA. The ICJ has made it clear that silence on a matter is not a ground for making assumptions or implications that a provision extends beyond its terms. In *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia / Malaysia)*, an issue was whether a line in a treaty establishing the line of a boundary across an island could be interpreted as extending beyond the coast and whether that line was to be viewed as a "boundary" line or an "allocation" line. The judgment of the ICJ stated:

> "It should moreover be observed that a 'boundary', in the ordinary meaning of the term, does not have the function that Indonesia attributes to the allocation line that was supposedly established by Article IV out to sea beyond the island of Sebatik, that is to say allocating to the parties sovereignty over the islands in the area. The Court considers that, in the absence of an express provision to this effect in the text of a treaty, it is difficult to envisage that the States parties could seek to attribute an additional function to a boundary line."[14]

25. In the present case there is no ambiguity in Annex 14-C. There is nothing to suggest that consent to arbitration extends beyond the boundaries created by the reference to specified obligations. The are no grounds for synthesizing a "transition period" to extend the obligations identified in Annex 14-C beyond the period in which they were in force. Nor are there grounds for re-characterising a provision which is formulated clearly in terms of defining consent to arbitration so as to convert it into a choice of law, an application of law, or an extension of law provision.

Context and the Object and Purpose of the USMCA

26. The primary role of context in treaty interpretation is to assist in identifying the ordinary meaning of the terms used in the treaty being interpreted. In the same way, the object and purpose of the treaty may assist in identifying the relevant ordinary meaning. Neither the context nor the object and purpose of the treaty may be used to read into its terms meanings or assumptions which are not consistent with the ordinary meaning of the words used.

[14] [2002] ICJ Reports 625, at 648, para 43 **(RG-0023)**.

27. Context is limited to the text, agreements, and instruments identified in the 1969 Vienna Convention as context. Thus, excluded from the scope of context is any unilateral document unless not only was it made in connection with the conclusion of the treaty but also accepted by the other parties as an instrument related to the treaty.

28. Neither the context in which the provision on consent to arbitration is found, nor the object and purpose of the USMCA provide any basis for converting an expression of consent whose extent is defined by reference to allegations of breach of specific obligations into a reference to mere standards or into an extension of those obligations beyond the period when they were in force by reference to a purported "transition period". Such a concept is neither identified in the USMCA nor open to derivation from any element of the context or of the object and purpose of that treaty.

29. The footnotes to the Annex provide no such transition period. Footnote 20 to the Annex confirms that the provisions listed there are included in the listed sources of obligations set out in paragraph 1 of the Annex. The provisions listed in paragraph 1 of the Annex and in footnote 20 ceased to be in force when the NAFTA was superseded and accordingly no continuing or further obligations were created by the provisions listed there.

30. Footnote 21 of the Annex to the USMCA is also part of the context but does not stipulate a transition period for the substantive regime of treatment of investments in the NAFTA. Thus the footnote has no bearing on the interpretation of paragraph 1 of the Annex beyond specifying conditions applying to a particular group of investors (i.e., those eligible to submit claims under Annex 14-E).

31. There is nothing manifestly absurd or unreasonable in the provisions of footnote 21, which are to the effect that an investor in a specified group who enters into, or continues in, a relationship with a party to the USMCA that would enable them to bring claims under Annex 14-E of that treaty loses the right to bring claims under the superseded NAFTA regime via Annex 14-C. In giving continuing consent to arbitration of disputes in relation to allegations of breach of obligations established when the superseded NAFTA regime was in force, it is unremarkable that that consent should have been excluded for a certain category of investors if the parties to the treaty agreed so in plain language. There is nothing in the context to indicate that the reference in the footnote is limited by reference to claims rather than, as stated in the footnote, investors. It follows from the *Competence of the General Assembly for the Admission of a State to the United Nations* case (in the extracts quoted in paragraphs 20 and 21 above), that it is not for a court or tribunal to adjust the clear terms chosen by the parties to a treaty. If the relevant words in their natural and ordinary meaning make sense in their context, and are consistent with the application of the rest of the general rule of interpretation, that is an end of the matter.

Comparison of Treaty Provisions

32. Reference to provisions in other treaties and their interpretation by other tribunals has a circumscribed role in treaty interpretation. It may assist in identifying the ordinary meaning of the terms used in the treaty that is being interpreted where those terms have a common history among the parties to the treaty being interpreted. There is also the possibility of reference to treaties other than that being interpreted where those other agreements establish relevant rules applicable in relations between the parties (1969 Vienna Convention, art 31(3)(c)).

33. The clearest indication of the need for caution when examining treaties other than the one being interpreted and not within the scope of the 1969 Vienna Convention, article 31(3)(c), is in the judgment of the ICJ concerning the term "negotiation" in compromissory clauses and the nature and modalities of negotiation as a prerequisite to arbitral or judicial proceedings:

> "The Court further recalls that, like its predecessor, the Permanent Court of International Justice, it has had to consider on several occasions whether the reference to negotiations in compromissory clauses establishes a precondition to the seisin of the Court.
> As a preliminary matter, the Court notes that, though similar in character, compromissory clauses containing a reference to negotiation (and sometimes additional methods of dispute settlement) are not always uniform. Some contain a time-element for negotiations, the expiry of which would trigger a duty to arbitrate or to have recourse to the Court. Furthermore, the language used contains variations such as 'is not settled by' or 'cannot be settled by'. Sometimes, especially in older compromissory clauses, the expression used is 'which is not' or 'cannot be adjusted by negotiation' or 'by diplomacy'."[15]

34. The ICJ then considered past cases where the wording in different treaties was the same or close to that in the treaty under consideration and concluded:

> "The Court observes that in each of the above-mentioned cases where the compromissory clause was comparable to that included in CERD, the Court has interpreted the reference to negotiations as constituting a precondition to seisin.
> Accordingly, the Court concludes that in their ordinary meaning, the terms of Article 22 of CERD, namely '[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for in this Convention', establish preconditions to be fulfilled before the seisin of the Court."[16]

35. This shows that the ICJ used its previous consideration of closely comparable cases only to assist in establishing the ordinary meaning of the terms used in the treaty under consideration. Comparison of terms among treaties is admissible where the actual words in use are illustrative of the meaning of the particular provision in issue.

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[15] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p 70 at 126, para 136 **(RG-0024)**.
[16] Ibid at paras 140-141.

Reference to earlier decisions of arbitral tribunals may assist in determining the correct interpretation of the provision in issue if an earlier decision has properly reasoned its interpretation in accordance with the rules of interpretation.

36. While stressing that their task is to interpret the treaty provisions before them, some arbitral tribunals have referred to awards and decisions of arbitral tribunals concerned with investments on the basis that such awards or decisions are supplementary means of interpretation. However, such use must be either to confirm the meaning as determined by application of the general rule of interpretation or to determine the meaning if the qualifying conditions for such use of supplementary means are met. Thus, for example, in *Canadian Cattlemen v. United States* the tribunal recognized its task as interpreting the NAFTA itself, but also saw other decisions as admissible supplementary means:

> "Both Parties have cited in argument various decisions and awards by arbitral tribunals for their relevance to the issues currently before this Tribunal. The Tribunal deems it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of arriving at the proper meaning to be given to those particular provisions in the context of the NAFTA in which they appear.
> On the other hand, Article 32 VCLT permits, as supplementary means of interpretation, not only *preparatory work* and *circumstances of conclusion* of the treaty, but indicates by the word "*including*" that, beyond these two means expressly mentioned, other supplementary means may be applied. Article 38 [paragraph 1.d.] of the Statute of the International Court of Justice provides that judicial decisions are applicable for the interpretation of public international law as "subsidiary means". Therefore, they must be understood to be also *supplementary means of interpretation* in the sense of Article 32 VCLT."[17]

37. In its conclusions, the tribunal showed that it was, in effect, using awards and decisions of other tribunals only in a confirmatory role:

> "In reaching this conclusion, the Tribunal gives limited weight to the authorities put forward by the Respondent involving the terms of subsequent free trade agreements. Our focus on textual analysis of the NAFTA and the mandates of the VCLT gives these authorities limited probative value to the issues at hand except to demonstrate that certain terminology used in the NAFTA (*e.g.* the term "free trade area") has no unique significance."[18]

> "After a review of the relevant decisions in other cases as supplementary means of interpretation (Article 32 VCLT) it can thus be concluded that some of these decisions provide support to the interpretation the present Tribunal

[17] *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, paras 49 and 50 (emphasis in original) **(RG-0025)**.
[18] Id at para 170.

has chosen in earlier sections above of this Award, and that none of these decisions has been found to contradict this Tribunal's interpretation."[19]

38. The above principles justify reference to an investment dispute concerning the NAFTA, shortly described as *Marvin Feldman v. Mexico*, where words in NAFTA Article 1117(1) directly comparable to those in paragraph 1 of Annex 14-C governed the consent to jurisdiction.[20] NAFTA Article 1117(1) included the phrase "An investor of a Party, ... may submit to arbitration under this Section a claim that the other Party has breached an obligation under [specified provisions]". One issue was whether measures alleged to have been taken by the Respondent between late 1992 and January 1, 1994, when NAFTA came into force, and which were alleged to be in violation of NAFTA, were relevant to support the claims of breach of any of the specified obligations.

39. The Tribunal had the complete texts of Articles 31 and 32 of the 1969 Vienna Convention before it.[21] The Tribunal observed that its jurisdiction was "limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA".[22] The Tribunal concluded that since the NAFTA only came

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[19] Id at para 223 **(RG-0025)**; and see to similar effect *Chevron-Texaco v. Ecuador*, UNCITRAL, Interim Award of December 1, 2008, paras 119-124 **(RG-0026)**.

[20] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, December 6, 2000, para 25 **(RG-0027)**. NAFTA, Article 1117 states:

> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

[21] See Counter-Memorial on Preliminary Questions submitted by Mexico, September 8, 2000, para 10, as reported at < https://www.italaw.com/cases/435>, document ITA 7855 **(RG-0028)**.

[22] Interim Decision at para 61 **(RG-0027)**; see also ibid at paras 61 and 62:

> "The Tribunal has taken due knowledge of the parties' respective allegations and observes that its jurisdiction under NAFTA Article 1117 (1) (a), which is relied upon in this arbitration, is only limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law. ...
>
> Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994. ..."

into force on January 1, 1994, "no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date".[23]

40. This shows an arbitral tribunal paying proper attention to the words actually used in the provision in issue. These were a plain and unambiguous reference to obligations which, the Tribunal found, had not existed before the NAFTA came into force. By parity of reasoning the words of paragraph 1 of Annex 14-C limit the consent to arbitration to matters which occurred while the NAFTA was in force.

41. In formulations of consent to jurisdiction, not only is there considerable variety in the wording of provisions that have been adduced from agreements other than the USMCA but also no general pattern has been shown of expressions of consent to arbitration being qualified by reference to allegations of breach of specified obligations in the same terms as those in the USMCA and the NAFTA. No general conclusion can therefore be drawn from treaties which do not use the same manner of formulating consent as that in the USMCA. Other agreements which do not use that manner of formulating consent are therefore of no relevance in establishing the ordinary meaning of the consent to arbitration in the USMCA which is consent circumscribed by reference to specified obligations.

42. Other agreements between other states cited by the claimants do not constitute context as defined in Article 31(1) and (2) of the 1969 Vienna Convention. They are not material to be taken into account under Article 31(3)(a) or (b) of that Convention being neither express agreements nor agreements through practice as to the meaning of the USMCA. They are not treaties to be considered within the scope of Article 31(3) since they do not establish relevant rules of international law nor rules applicable in the relations between the parties to the USMCA. No evidence has been adduced that they form part of the preparatory work of the USMCA nor that they are part of the circumstances of its conclusion having no basis in a common model or other systematic relationship upon which reliance was placed.

Jurisdiction and Applicable Law

43. Professor Schreuer's Opinion addresses jurisdiction and applicable law, referring to arbitral awards, including those interpreting Articles 25 and 42 of the 1965 Washington (ICSID) Convention.[24] He concludes:

> "It follows that questions of jurisdiction and of the law applicable to the merits of a case must be examined separately. It is not permissible to argue that certain substantive rules of law are applicable or not applicable and to draw conclusions as to the jurisdiction of a tribunal on this basis."[25]

44. Whatever the role of this assessment in interpreting the ICSID Convention, it does not assist in the interpretation of Annex 14-C to the USMCA. Article 25 of the ICSID

[23] Ibid at para 62.
[24] Opinion of Professor Schreuer of August 11, 2023, at paras 45-50 **(CER-1)**.
[25] Ibid at 51.

Convention provides for the jurisdiction of the Centre to extend to "any legal dispute arising directly out of an investment". This is quite different wording from that in issue in the present case which defines consent by reference to allegations of breach of specified obligations, not simply arising out of an investment. Thus the distinction made in relation to the ICSID Convention's provisions on jurisdiction and applicable law has no relevance for the interpretation of the terms of paragraph 1 of Annex 14-C which specifically identify the substantive treaty provisions that provide the source of any obligations that are alleged to have been breached.

45. The central issue for interpretation and application of paragraph 1 of Annex 14-C is, therefore, whether the substantive rules identified there (Section A of Chapter 11 (Investment) of NAFTA 1994, Articles 1503(2) and 1502(3)(a) as further there particularized) were applicable to establish obligations such that allegations of their breach could bring a matter within the terms of consent necessary to found jurisdiction for an arbitral tribunal. As these substantive rules in NAFTA had been superseded at the time of the alleged breaches, the provisions could not establish obligations within the defined limits of the consent necessary to found jurisdiction.

Preparatory Work of the USMCA

46. Preparatory work generally consists of properly recorded accounts of the negotiations that assist in identifying the common understanding of the prospective parties whose meaning is primarily revealed in the eventual text of a treaty. However, for such material to be considered as supplementary means of interpretation under Article 32 of that Convention, it must either be potentially 'confirming' an interpretation achieved by applying the general rule of interpretation or 'determining' the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

47. Professor Waldock, who as Special Rapporteur was the ILC's architect of the rules on interpretation, characterised *travaux préparatoires*, where admissible to confirm or determine meaning as:

> "simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties."[26]

48. The arbitral award in the *Iron Rhine* arbitration furnishes further evidence that the test for admissibility of statements of individual parties during the negotiations is whether

[26] Waldock, 'Third Report on the Law of Treaties' [1964] *Yearbook of the ILC*, vol II, p 58, para 21 **(RG-0029)** (emphasis in original). For the admissibility of this material, see note 2 above.

the statements, where assented to by the other parties, furnish proof of the "common understanding of the parties" as to the meaning to be attached to the terms of the treaty:

> "At the same time, it is convenient for the Tribunal to make certain more general observations at the outset. Although the Parties have provided it with extracts from the prolonged diplomatic negotiations leading up to the conclusion of the 1839 Treaty of Separation, these do not, in the view of the Tribunal, have the character of *travaux préparatoires* on which it may safely rely as a supplementary means of interpretation under Article 32 of the Vienna Convention. These extracts may show the desire or understanding of one or other of the Parties at particular moments in the extended negotiations, but do not serve the purpose of illuminating a common understanding as to the meaning of the various provisions of Article XII."[27]

49. Further, the ICJ has disregarded material where records were fragmentary. This was in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*: "The *travaux préparatoires* of the Doha Minutes must be used with caution in the present case, on account of their fragmentary nature."[28] The Court concluded in that case:

> "As a result, it does not consider that the *travaux préparatoires,* in the form in which they have been submitted to it – i.e., limited to the various drafts mentioned above – can provide it with conclusive supplementary elements for the interpretation of the text adopted; whatever may have been the motives of each of the Parties, the Court can only confine itself to the actual terms of the Minutes as the expression of their common intention, and to the interpretation of them which it has already given."[29]

50. The Court also stated:

> "In support of their arguments, the Parties have also invoked the circumstances in which the Minutes were signed. In the opinion of the Court those circumstances do not – any more than the *travaux préparatoires* – provide any conclusive supplementary elements for the interpretation of the text.[30]

51. It appears that the USMCA Parties maintained few systematic or agreed records of the negotiations leading to the USMCA. There are some brief Joint Reports.[31] These are

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[27] *Arbitration regarding the Iron Rhine ("IJzeren Rijn") Railway (Belgium/Netherlands),* (2005) XXVII RIAA 35, p 63 para 48 **(RG-0030)**.
[28] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p 6 at 21, para 41 ad fin **(RG-0031)**.
[29] Ibid p 22, para 41.
[30] Ibid p 23, para 42.
[31] These include, for example: *Mexico City, 01-05 September 2017*, RESP0000156 **(RG-0032)**; *Arlington, VA October 13-17, 2017* RESP0004287 **(RG-0033)**; *Mexico City,*

little more than headings or brief descriptions of items discussed or to be discussed. They furnish nothing that assists in identifying a common understanding of the words used in Annex 14-C. Nor do the successive drafts considered during the negotiations reveal anything that assists in confirming the meaning of the eventual text of paragraph 1 of Annex 14-C, there being no record of detailed discussion of these drafts. This conclusion is in line with the indications by the International Court of Justice in *Qatar v. Bahrain* (considered above).

52. The various extracts of communications and statements adduced by the Claimants and revealed in document production are fragmentary, do not amount to an agreed record such as could constitute a formal account of preparatory work recording understandings agreed by all prospective parties, other than the understandings in the "Drafter's Notes", and thus do not assist in confirming the meaning of the provision on consent to arbitration in Annex 14-C.

Statements of Negotiators and Officials

53. Statements, observations, recollections, and other utterances of negotiators do not constitute interpretative declarations if they are not made with the imprimatur of the government for whom they act or acted and are also accepted by all the parties to a treaty as made in connection with the conclusion of a treaty. No such statements or other material proffered in these proceedings meet these requirements. None is therefore admissible under the general rule of interpretation and, in particular, Article 31(2)(b) of the 1969 Vienna Convention.

54. For such material to be considered as supplementary means of interpretation under Article 32 of that Convention, it must either be potentially confirming an interpretation achieved by applying the general rule of interpretation or determining the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

55. Application of the general rule of interpretation to the terms used in Annex 14-C indicates clearly how consent is limited by reference to allegations of breach of obligations in the NAFTA provisions specified there. Thus in the present case there is no such ambiguity or obscurity or manifestly absurd or unreasonable result such that supplementary means might be determinative. Accordingly any potential role for statements made by negotiators forming part of the preparatory work is here limited to investigating whether this confirms the interpretation reached by applying the general rule.

November 19-21, 2017 RESP0000485 **(RG-0034)**; *Montreal, Canada, January 2018* RESP0000515 **(RG-0035)**; *Mexico City, 25-05* [sic] *February 2018* RESP0002364 **(RG-0036)**.

56. As regards statements by individual participants made during the negotiations or thereafter as to the intended meaning of the words proposed or used in the USMCA, these are not admissible in the interpretative process. The fundamental basis of the rules of interpretation of treaties is that it is the text which is to be taken as recording the agreement of the parties not the intentions of the negotiators as stated during the negotiations. Even more clearly inadmissible are their recollections or personal attributions of meaning to the text after conclusion of the negotiations. The textual basis on which the Vienna rules of interpretation are predicated is clear from the content of those rules as confirmed by their preparatory work (see paras 4-5 above)

57. Further, such statements of negotiators made after conclusion of the USMCA as have been adduced in relation to the meaning of the provisions of the USMCA do not show any relevant agreement of the parties at the time of conclusion of that treaty or thereafter and are not statements authorised by any of the parties to the USMCA such as could amount to any interpretative declarations. They are not admissible elements in the interpretative process.

Conclusion

58. Interpretation of the provisions on consent to arbitration requires that the meaning established by application of the 1969 Vienna Convention rules on interpretation be given to paragraph 1 of Annex 14-C to the USMCA. This meaning is that consent is given for the submission of a claim to arbitration that alleges breach of an obligation under those elements of NAFTA that are specified there. Such obligations could only arise while the NAFTA was in force. Accordingly, no consent is given in respect of allegations relating to matters after the listed provisions of NAFTA were superseded and thus ceased to have effect as obligations.

Respectfully submitted,

[Signed]

Richard K. Gardiner
22 December 2023
London, U.K.

EXHIBIT LIST

Exhibit No.	Description
Gardiner Report	
RG-0001	Vienna Convention on the Law of Treaties (1969)
RG-0002	Merriam-Webster.com Dictionary online "Supersede." <https://www.merriam-webster.com/dictionary/supersede> accessed 1 Jun. 2023
RG-0003	E de Vattel, *The Law of Nations*, Book II, Chap XVII, of *The Interpretation on Treaties* (1758 edition, trans by C G Fenwick) (Washington DC: Carnegie Institution, 1916)
RG-0004	The International Law Commission's *Guide to Practice on Reservations to Treaties* (Addendum to Report of ILC Sixty-third session (2011), UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1), endorsed by General Assembly Resolution A/RES/68/111 (2013)
RG-0005	Advisory Opinion of the ICJ on the International Status of South West Africa [1950] ICJ Reports 128
RG-0006	C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279
RG-0007	C Schreuer, 'Consent to Arbitration', Chapter 21 in *The Oxford Handbook of International Investment Law* (Peter Muchlinski et al., eds., 2008)
RG-0008	C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1:1 McGill Journal of Dispute Resolution 1, Part IV, The Separate Lives of Jurisdiction and Applicable Law
Gardiner Supplementary Report	
RG-0009	*The Final Act of the United Nations Conference on the Law of Treaties*, U.N. Doc. A/Conf.39/26 (1971)
RG-0010	D. Azaria, *"Codification by Interpretation": The International Law Commission as an Interpreter of International Law*, 31 EURO J. INT'L L. 171 (2020)
RG-0011	*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2022 I.C.J. 13 (Feb. 9)
RG-0012	*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, 2022 I.C.J. 266 (Apr. 21)
RG-0013	*Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. I.L.C. 172, U.N. Doc. A/CN.4/SER.A/1966/Add.l.
RG-0014	G.A. Res. 56/83, Responsibility of States for internationally wrongful acts (12 Dec. 2001)
RG-0015	G.A. Res.77/97, Responsibility of States for internationally wrongful acts (7 Dec. 2022)
RG-0016	*Jurisdictional Immunities of the State (Germany* v. *Italy)*, 2012 I.C.J. 99 (Feb. 3)
RG-0017	*Corn Products International Inc. v. The United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (Jan. 15, 2008)

RG-0018	*The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013)
RG-0019	*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2)
RG-0020	*Československa obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999)
RG-0021	*Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4 (Mar. 3)
RG-0022	*Louis Dreyfus Armateurs SAS (France) v. The Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction (Dec. 22, 2015)
RG-0023	*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia),* 2002 I.C.J. 625 (Dec. 17)
RG-0024	*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation*), Preliminary Objections, 2011 I.C.J. 70 (Apr. 1)
RG-0025	*The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction (Jan. 28, 2008)
RG-0026	*Chevron-Texaco v Ecuador*, UNCITRAL, Interim Award (Dec. 1, 2008)
RG-0027	*Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 6, 2000)
RG-0028	*Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Counter-Memorial on Preliminary Questions (Sept. 8, 2000)
RG-0029	Humphrey Waldock, Special Rapporteur, *Third Report on the Law of Treaties*, [1964] 2 Y.B. INT'L L. COMM'N 5, U.N. Doc. A/CN.4/167 and Add.1-3
RG-0030	*Arbitration regarding the Iron Rhine ("IJzeren Rijn") Railway (Belgium/Netherlands),* 27 R.I.A.A. 35 (2005)
RG-0031	*Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* Jurisdiction and Admissibility, Judgment, 1995 I.C.J. 6 (Feb. 15)
RG-0032	*North America Free Trade Agreement (NAFTA 2.0): II Round,* Mexico City, 01-05 Sep. 2017, RESP0000156
RG-0033	*North America Free Trade Agreement (NAFTA 2.0): IV Round*, Arlington, VA, Oct. 13-17, 2017, RESP0004287
RG-0034	*North America Free Trade Agreement (NAFTA 2.0): V Round*, Mexico City, Nov. 19-21, 2017, RESP0000485
RG-0035	*North America Free Trade Agreement Modernization: Round 6,* Montreal, Canada, Jan. 2018, RESP0000515
RG-0036	*North America Free Trade Agreement (NAFTA 2.0): VII Round,* Mexico City, 25-05 [sic] Feb. 2018, RESP0002364

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED

v.

UNITED STATES OF AMERICA

(ICSID Case No. ARB/21/63)

SECOND EXPERT REPORT OF PROFESSOR HERVE ASCENSIO

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December 22, 2023

1. In the matter of the arbitration between *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, the undersigned submitted an expert report dated June 9, 2023 (hereinafter "First Expert Report"), at the request of the Government of the United States of America. This report dealt with the consequences of the termination of the North American Free Trade Agreement (hereinafter "NAFTA"), and the interpretation of the provisions on intertemporal law of the Agreement between the United States, Mexico and Canada (hereinafter "USMCA"), notably its Annex 14-C on "Legacy Investment Claims and Pending Claims".

2. Since then, the expert was provided with a copy of the United States of America's Memorial on its Preliminary Objection dated June 12, 2023 (hereinafter "Memorial"), of the Claimants' Counter-Memorial on Respondent's Preliminary Objection dated August 1, 2023 (hereinafter "Counter-Memorial"), including its Annex and its supporting documentation, of the Legal Opinion by Professor Christoph Schreuer on The Interpretation of Annex 14-C of the USMCA Dealing with Legacy Investments (hereinafter "Legal Opinion"), and of the materials produced by the United States in the present proceedings concerning their exchanges with the other NAFTA Parties during the USMCA negotiations. The expert was asked by the Government of the United States of America to look at these documents in order to draw up a second expert report on the same matter.

3. As in the previous phase of the proceedings, the expert certifies that he has no previous relationship with or interest in any of the parties to this arbitration, nor a connection to the matters at issue. This second expert report represents the expert's true professional assessment of the matters to which it refers based on his experience in the application of international law.

4. In the opinion of the undersigned, the legal reasoning developed in the Claimants' submissions does not call into question the conclusion of his first legal opinion, which is that Annex 14-C of USMCA does not cover an alleged breach of the NAFTA based on events that took place after it terminated, as occurs in the present case. The Claimants' submissions on this point essentially maintain that no restriction should be introduced into the USMCA that is not contained therein, whereas the issue is exactly the opposite: it is a question of interpreting and applying the provisions that *are* contained therein. Moreover, the arguments developed in the Counter-Memorial and the Legal Opinion seem to rely on the omission of certain terms of the treaty that are crucial to its interpretation, notably the word "claim" and expressions including it. Lastly, they create confusion between the cause of action and the law applicable to the dispute.

5. This second expert report will not reiterate all the elements set out in the first report, but will confine itself to some clarifications, considering the arguments raised by the Claimants and their expert. These clarifications will first focus on the function of Annex 14-C in the context of the whole treaty, which is to deal with claims arising from events predating the entry into force of USMCA (I). Secondly, this report will underline that the Annex refers to NAFTA as the cause of action for those claims, a legal concept distinct from applicable law (II).

I. THE FUNCTION OF ANNEX 14-C OF USMCA: DEALING WITH CLAIMS ARISING FROM EVENTS PREDATING THE ENTRY INTO FORCE OF USMCA

6. According to both the Counter-Memorial and the Legal Opinion, Annex 14-C of USMCA would provide for a "transition period" that would be equivalent to a three-year survival clause, and that would extend the *substantive* protections previously offered by NAFTA for a period of three years for investments made at the time NAFTA was in force. However, such an interpretation cannot be based on any express provision of the Treaty, including its Annex 14-C, and it would contradict the rules of customary international law concerning the consequences of the termination of a treaty, as explained in the First Expert Report.[1]

7. In contrast to the approach proposed in the Claimants' submissions, it is necessary to start from the exact terms of USMCA (a). They clearly show that Annex 14-C only deals with claims arising from events predating its entry into force. This is in line with the usual practice of States concluding investment treaties where a treaty terminates an earlier treaty between the same parties while containing provisions for claims arising under the earlier treaty (b). It is also consistent with arbitral decisions in cases where the jurisdiction *ratione temporis* of the tribunal was challenged because of the date of entry into force or termination of an investment treaty (c).

(a) Provisions of USMCA

8. Annex 14-C does not set out a "transition period", but deals with "claims" only, as is evident in its title ("Legacy Investment Claims and Pending Claims"). It aims at specifying the procedures that may be used to settle certain categories of claims. It is regrettable that, both in the Counter-Memorial and in the Legal Opinion, the word "claims" and its connection with the other terms of the Annex is undermined, whereas it is present in all Annex 14-C's provisions and determines their meaning. Its function is to define the categories of disputes for which the Annex provides resolution procedures, and for which the Parties consent to arbitration. It is not to modify in any respect the subject-matter of the claims or the law applicable to them. As a consequence, the expression "legacy investment *claims*" must be understood as a category of claims that determines the limits of the jurisdiction of the arbitral tribunal that may be seized on the basis of the relevant provision of Annex 14-C.

9. From a time perspective, three categories of claims can logically be distinguished, those:

> i/ arising from events predating termination of NAFTA and for which a settlement procedure was initiated before that date;
>
> ii/ arising from events predating termination of NAFTA but for which no procedure was initiated before that date;
>
> iii/ arising from events posterior to the termination of NAFTA.

10. The first category corresponds to the "pending claims" of Annex 14-C, the second to the "legacy investment claims" of Annex 14-C and the third is not covered by Annex 14-C. What "pending claims" and "legacy investment claims" have in common is that the claims all relate to events that occurred before the treaty ended.

11. Moreover, it is worth pointing out here what seems obvious, but is not in the Claimants' submissions, namely that Annex 14-C is not an agreement isolated in a vacuum, but an annex, in this case an annex to Chapter 14 of USMCA, which it therefore clarifies or supplements. It is therefore essential to ask the following question: where does Chapter 14 refer to this annex? And the answer is: in Article 14.2 only ("Scope"), in its paragraphs 3 and 4.

[1] First Expert Report, par. 9, 16-17.

12. Article 14.2(3) deals with "an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement", in order to exclude them from the scope of USMCA. This vocabulary echoes Article 28 and Article 70 of the Vienna Convention on the Law of Treaties concerning, respectively, non-retroactivity of treaties and the consequences of the termination of a treaty,[2] a reason for which it is stated "for greater certainty". In this context, Annex 14-C is mentioned as an exception to the general rule on temporal restrictions to the scope of the Treaty for past events. It is then clearly stated in USMCA that Annex 14-C is about "an act or fact that took place" or about "a situation that ceased to exist" "*before*" the entry into force of USCMA only.

13. The second and final reference to Annex 14-C in Chapter 14 of USMCA appears in Article 14.2(4), which states that claims may only be submitted to arbitration under Annexes 14-C, 14-D or 14-E. This provision therefore expressly states that the function of Annex 14-C, like that of the other two, is exclusively procedural. At no point is it suggested that this annex might modify the substantive obligations of the Parties.

14. If the drafters of USMCA had wanted to extend the effect over time of the NAFTA's substantive provisions, this would be expressly stated in one of its clauses. It would most probably appear in the transitional provision of USMCA (Article 34(1)), where other provisions extending NAFTA obligations are located.[3] But it was not done, and it is completely implausible that a new survival clause would be included in an annex, using obscure language supposed to have an equivalent effect. A treaty cannot extend the effects of the treaty it terminates beyond what is provided for by customary international law without express wording.

(b) Treaty practice

15. In his Legal Opinion, Professor Schreuer refers to a "standard practice" in the context of the succession of two investment treaties between the same parties that would favour a "continued application of a treaty" – the old one – because of a transition clause in the new treaty.[4] This practice should, according to him, be viewed as a departure from the customary rules of international law on the consequences of the termination of a treaty, which is possible because Article 70 VCLT allows the parties to "otherwise agree", *ie* to derogate from customary international law.[5] Although the expression "continued application of a treaty" is a bit vague, the Legal Opinion therefore suggests that it would not be uncommon for States to provide for the continued application of the *substantive* provisions of the former treaty and their applicability to disputes arising after the entry into force of the new treaty.

16. First of all, it should be emphasized that the role of a "standard practice" in the interpretation of a treaty can only be very limited. At most, it might be linked to the subsidiary means of interpretation of Article 32 VCLT, which are to be used for confirmation or in case of an unclear, absurd or unreasonable result after the use of the general rule of Article 31 VCLT. And it would probably be necessary to demonstrate that such a practice played a role when drafting the treaty, so as to help understand the common intent of the parties. In the present case, the interpretation of Article 14(2) and Annex 14-C according to the general rule of interpretation (Article 31 VCLT) does not lead to any ambiguous, absurd, or unreasonable result. The text clearly reflects the intention of the parties to deal with only two categories of claims, pending claims and legacy claims, all of them arising from events predating the termination of NAFTA.

[2] *Ibid*., par. 9.
[3] On the transitional provision in USMCA, see the First Expert Report, par. 19.
[4] Legal Opinion, par. 61 **(CER-1)**.
[5] *Ibid*., par. 55-61.

And the documents relating to the USMCA negotiations to which the expert had access do not show any discussion on a standard practice.

17. Secondly, neither the examples cited in the Legal Opinion, nor our knowledge of investments treaties make it at all possible to identify a "standard practice" that would extend the temporal effects of the substantive provisions of a previous investment treaty by means of a transitional clause in a new investment treaty.

18. In the event of the succession of two investment treaties, there are a number of drafting options if the parties wish to address the fate of disputes relating to investments made before the termination of the previous treaty and the entry into force of the new treaty. Frequently, they do not derogate from customary international law, but merely reiterate its effects. And, more importantly in the context of the present case, they relate only to disputes arising out of events that occurred before the end of the previous treaty.

19. A first option is to expressly exclude disputes arising from prior events and situations from the scope of the new treaty, without providing any exceptions or procedural details on the means of settling them. In so doing, these treaties do not depart from customary international law, and also do not spell out the effect of customary law on pending claims.

20. A second solution is to exclude disputes arising from previous events and situations, except where a settlement procedure was initiated before the previous treaty came to an end. It is then specified that these procedures continue on the basis of the previous treaty. As explained in the First Expert Report, this is fully in line with the transitional effect of dispute settlement clauses under customary international law.[6] The precision is therefore made for clarification purposes only. In the USMCA, this corresponds to the category of "pending claims", the drafters having taken care to say that this was included in Annex 14-C "for greater certainty".

21. There is a third solution, which consists of covering not only pending claims but also claims arising from events or situations that occurred when the previous treaty was still in force but without a settlement procedure being initiated at that date. A classic example was provided in the First Expert Report, *ie* the Treaty of 1926 on the basis of which the famous *Ambatielos* case was settled.[7] This solution is rarer and corresponds to the case of USMCA, which mentions both "pending claims" and "legacy investment claims". The addition of claims that have arisen previously but have not yet been submitted to a dispute settlement procedure goes further than customary international law.[8]

22. The BITs cited in the Legal Opinion illustrate these drafting techniques and do not extend the effect in time of the substantive provisions of the old treaty to disputes or claims arising from events posterior to its termination.

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[6] See First Expert Report, par. 17 and 24.

[7] *Ibid*., par. 14. In the Counter-Memorial, p. 28, footnote 74, the Claimants underline that the facts were different, and that the 1926 Declaration did not create "a cause of action" for claims based on the provisions of the 1886 Treaty. These two arguments are not objections. Despite the inevitable difference in factual context, the same legal question on the settlement of disputes in case of two successive treaties between the same parties was at stake. And the Declaration referred to arbitration, under the procedure of the 1886 Treaty, of all claims arising from breaches of this treaty that occurred before its termination, including those that had not yet been subject to arbitration, like the "Ambatielos case" (see the text of the Declaration reproduced as Annex 6 to the Ambatielos award, in *RIAA,* vol. XII, p. 150 **(HA-0009)**). Without the Declaration, "there would have been no remedy in the event of the failure of the two Governments to arrive at amicable settlements by direct means" (ICJ, *Ambatielos Case*, judgment of 19 May 1953, *ICJ Report 1953*, p. 10 ff., at 15 **(HA-0021)**). Moreover, the 1926 Declaration, just like Annex 14-C in the present case, did not create any transitional regime and did not apply to disputes arising from events posterior to the entry into force of the new treaty.

[8] See First Expert Report, par. 25.

23. In the 2006 BIT between the Belgium-Luxemburg Economic Union and Korea, Article 11 excludes its application to "disputes … which are subject of a dispute settlement procedure" under the previous treaty, which means pending claims.[9] The third sentence of the same article, when saying that the previous treaty "shall continue to apply to these investments, *as far as it concerns the disputes*" points out that the applicable law for such pending claims must be the previous treaty.[10] As those disputes predate the entry into force of the new treaty, there is no question of extending the effect in time of the substantive provisions of the previous treaty, and no departure from the rules of customary law as codified in Article 70 VCLT. The provision only recognizes that the previous treaty still governs events that occurred at the time it was in force, and that its dispute settlement clause has a transitional effect for pending claims, in conformity with Article 70 VCLT.

24. Article 9 of the 2003 BIT between the Netherlands and Korea is similar to Article 11 of the BLEU-Korea BIT. It applies only to "disputes … which are subject of a dispute settlement procedure" under the previous treaty, *ie* pending claims, without extending the effect of the previous treaty to events occurring after its termination; and the previous treaty applies in the most normal way to events predating its termination.[11]

25. In the 1998 BIT between the Netherlands and Tunisia, the second sentence of Article 12(5) is about "[d]isputes arisen *before* the entry into force of the present Agreement", not about future disputes.[12] Consequently, the previous treaty applies to such disputes, since it was in force at the time of the events giving rise to the dispute, in conformity with Article 70 VCLT again. This provision does not extend the effect in time of the substantive provisions of the previous treaty. This provision was discussed in the ICSID case *ABCI v. Tunisia*, and it was understood by the arbitral tribunal as referring only to disputes that may have arisen before the entry into force of the treaty.[13]

26. The 2005 BIT between the Belgium-Luxemburg Economic Union and China is also perfectly clear concerning its relationship with the previous BIT between the same parties. Its Article 10(2) excludes the application of the new treaty to "any dispute or any claim … which was already under judicial or arbitral process *before* its entry into force", and for the settlement of which the previous treaty applies.[14] This provision does not extend the effect in time of the previous treaty to future disputes; it only reiterates the consequences of the termination of the previous treaty on existing disputes. In *Ping An v. Belgium*, the arbitral tribunal discussed an objection *ratione temporis* to its jurisdiction based on the language of Article 10(2).[15] It also understood the provision as applying to disputes or claims based on events predating the termination of the former treaty.

27. All the examples cited show that the function of provisions of the same type as Annex 14-C is always to manage claims arising on the basis of the previous treaty and in no way to extend the effect in time of the substantive provisions of the previous treaty, which came to an end with the entry into force of the new one. They usually appear in an article concerning the

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[9] Article 11 of the 2006 BLEU-Korea BIT **(CL-113)**.
[10] *Ibid*. (emphasis added).
[11] Article 9 of the 2003 Netherlands-Korea BIT **(CL-114)**.
[12] Article 12(5) of the 1998 Netherlands-Tunisia BIT **(CL-115)** (emphasis added).
[13] *ABCI Investments N.V. c. La République Tunisienne*, ICSID Case No. ARB/04/12, décision sur la compétence, 18 February 2011, par. 162 ("L'article … ne vise que la situation des différends ayant pu naître avant l'entrée en vigueur du TBI") ("The article . . . covers only the situation of disputes that may have arisen before the entry into force of the BIT") (*free translation*) **(HA-0016)**.
[14] Article 10(2) of the 2005 BIT between the Belgium-Luxemburg Economic Union and China **(CL-116)**.
[15] *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, par. 231-232 **(HA-0017)**.

"scope" or "application" of the treaty, or must be read in conjunction with it, which corresponds closely to the wording of the USMCA and its Article 14(2). And they all deal with disputes or claims arising from events that occurred at a time the previous treaty was in force.

(c) Investment arbitration cases

28. Arbitral tribunals which have had to deal with problems of jurisdiction *ratione temporis* have always taken care to apply treaties during the exact period in which they are in force, in the absence an explicit provision to the contrary. For instance, in *Feldman v. Mexico*, a case concerning the application of NAFTA over time, the tribunal concluded that the obligations under NAFTA did not exist before its entry into force and could not apply to previous events, lacking an express provision on retroactivity.[16] The question at stake in the present case is not about the entry into force of NAFTA; it is about its termination. Yet, a symmetric reasoning applies: without an explicit provision to the contrary, obligations under NAFTA cannot apply to events arising after its termination.

29. Moreover, a number of arbitral tribunals have had occasion to consider jurisdiction *ratione temporis* in the context of two successive treaties. They have always paid attention to the date on which the new treaty came into force as a cut-off point in time, in the absence of an explicit provision to the contrary.

30. In the *Jan de Nul v. Egypt* case, the arbitral tribunal declared itself competent on the basis of the new treaty because it considered that the dispute had arisen as a result of the conduct of the Egyptian courts *after* its entry into force. Therefore, the clause in the new treaty excluding disputes arising from earlier events, which were covered by the previous treaty, did not apply.[17]

31. In other cases, the dispute arose from facts predating the entry into force of the new treaty, and the tribunal found it lacked jurisdiction on the basis of the new treaty for that reason. Illustrations include the following cases: *ABCI v. Tunisia*,[18] *Walter Bau v. Thailand*,[19] *Ping An v. Belgium*.[20]

32. The award in *Ping An v. Belgium* deserves special attention in the context of the present case, because the tribunal noted that the new treaty did not expressly "deal with the fate of disputes arising before December 1, 2009 which had been notified under the 1986 BIT but were not then the subject of judicial or arbitral process (in the sense of such proceedings having been formally initiated)".[21] If not specifically addressed in the new treaty, this category falls in a "black hole" or an "arbitration gap".[22] This demonstrates that the existence of a category of disputes based on past events but different from "pending claims" (referred to above as category (ii)) is a well-known question in investment arbitration, a reason for which it is addressed in USMCA under the expression "legacy investment claims". The function of Annex 14-C, paragraph 1, is thus to allow such claims, *ie* claims for breaches of NAFTA that occurred when

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[16] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, par. 62 **(RL-080)**.

[17] *Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, par. 116-122 **(CL-100)**.

[18] *ABCI Investments N.V. c. La République tunisienne*, ICSID Case No. ARB/04/12, décision sur la compétence, 18 February 2011, par. 163 **(HA-0016)**.

[19] *Walter Bau AG (in liquidation) v. The Kingdom of Thailand* (under UNCITRAL Rules 1976), Award, 1 July 2009, par. 9.67-9.69 **(HA-0018)**. In this case, however, the tribunal retained jurisdiction over part of the facts, those relating to a creeping expropriation that crystallised after the entry into force of the new treaty (par. 12.43-12.44).

[20] *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, par. 203-233 **(HA-0017)**.

[21] *Ibid*., at par. 205.

[22] *Ibid*., at par. 207.

it was in force but were not subject to arbitral process before its termination, to be arbitrated according to NAFTA's arbitral procedure. However, this does not correspond to the circumstances of the present case. In the present case, the event took place *after* the entry into force of USMCA and the termination of NAFTA, and is consequently governed by the proper USMCA's substantive and procedural provisions only. For claims arising from events posterior to NAFTA's termination (referred to above as (iii)), Annex 14-C does not apply.

II. THE REFERENCE TO NAFTA AS THE CAUSE OF ACTION FOR CLAIMS ARISING FROM EVENTS PREDATING THE ENTRY INTO FORCE OF USMCA

33. In its first paragraph, Annex 14-C mentions the substantive provisions of the NAFTA in a list that adds precision to the expression "breach of an obligation". This expression has the meaning of cause of action (*causa petendi*) in any litigation system. All of these terms appear in a clause whose object and purpose are to give consent for a category of claims, which it therefore defines in referring to the obligations that may have been breached.

34. The concept of cause of action is distinct from that of applicable law. Applicable law corresponds to the set of rules under which a dispute is to be decided, whereas the cause or causes of action circumscribe the dispute itself in terms of breaches of an obligation. This distinction is well-known in investment arbitration.[23] In Annex 14-C, paragraph 1 refers to NAFTA only to define the possible causes of action, and thus to specify categories of claims.

35. It may also be reminded that in the NAFTA, the applicable law clause is distinct from the clause containing the consent to arbitration (art. 1122) and from those defining the claims (art. 1116 and 1117), which avoid any risk of confusion. Nor is there any risk of confusion in reading Annex 14-C.

36. The reference to NAFTA in USMCA Annex 14-C simply refers back to the previous treaty for the cause of action, without changing any of its substantive provisions, and without extending their effect in time. Moreover, the idea of an implicit extension of the substantive provisions of NAFTA beyond 1 July 2020 on the basis of Annex 14-C would be in complete contradiction with all the references to the termination and replacement of NAFTA by the new treaty, including the references in Annex 14-C itself.

37. The discussion opened in the Claimants' submissions, including the Legal Opinion, on applicable law misses the decisive legal issue: that the category of claims for which the arbitral tribunal has jurisdiction is temporally restricted to claims arising from events occurring before NAFTA came to an end, as explained above in Section I.

38. Once the jurisdiction of an arbitral tribunal is established over a claim falling within the scope of Annex 14-C from a temporal point of view (*quid non* in the present case), there will be no doubt that both the procedure and the law applicable to the substance of the dispute would be governed by NAFTA. As for the procedure, it results from USMCA Annex 14-C itself, by reference to NAFTA Chapter 11, Section B. As for the applicable law, it is quite obvious that NAFTA substantive provisions will apply to disputes arising out of its breach at a time it was in force. This is why the substantive provisions of NAFTA concerned are mentioned in footnote 20 "for greater certainty" only. Since the cause of action is a breach of NAFTA in respect of

[23] See for instance, *Tidewater Inc. e.a. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, par. 139-140 **(HA-0019)**; *"President Allende" Foundation, Victor Pey Casado, Coral Pey Grebe v. The Republic of Chile*, PCA Case No. 2017-30, Award, 28 November 2019, par. 206 **(HA-0020)**.

events that occurred when this treaty was in force, NAFTA and the choice of law clause it contains will apply to the substance of the claim.

39. The question of applicable law has no connection to and no impact on the temporal restriction of the category of claims covered by the expression "legacy investment claims" in USMCA. The only thing to add is that reference to NAFTA Chapter 11, Section A, is perfectly consistent with the rules on intertemporal law in public international law: disputes must be resolved in accordance with the law in force at the time the alleged breach took place. The application of NAFTA to the merits stems from the fact that the claims concerned are those arising from breaches of this treaty at the time it was in force, and not subsequently.

40. For these reasons, the conclusion of this second expert opinion reiterates that Annex 14-C of USMCA, which contains the State's consent to arbitration, relates to violations of NAFTA that occurred when this treaty was in force. It does not cover an alleged breach of the NAFTA based on events that took place after it terminated, *i.e.*, after 1st July 2020, as in the present case.

Respectfully submitted,

[Signed]

Hervé Ascensio

Paris, France

LIST OF EXHIBITS

Exhibit No.	Description
Ascensio First Expert Report	
HA-0001	Hervé Ascensio, "Article 70 – Consequences of the termination of a treaty", *in* O. Corten and P. Klein (ed.), *The Vienna Conventions on the Law of Treaties*, Oxford University Press, Oxford, 2011, vol. II (2011)
HA-0002	Hervé Ascensio, "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", *ICSID Review – Foreign Investment Law Journal*, vol. 31, n°2, 2016
HA-0003	International Law Commission, Second Report of Sir Gerald Fitzmaurice, A/CN.4/107, *YILC*, 1957, vol. II
HA-0004	*Case between New Zealand and France, RIAA*, 30 April 1990, vol. XX
HA-0005	S. Wittich, "Article 70 – Consequences of the Termination of a Treaty", *in* O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer Verlag, Berlin Heidelberg, 2nd ed., 2018
HA-0006	Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 17 October 2019, OJEU, 12/11/2019, C 384 I/1
HA-0007	Stockholm Chamber of Commerce (SCC) No. 088/2004 Partial Award, *Eastern Sugar BV v Czech Republic*, of 27 March 2007
HA-0008	ICJ, *Ambatielos case (jurisdiction)*, judgment of 1st July 1952, *ICJ Reports 1952*
HA-0009	*The Ambatielos Claim (Greece v. United Kingdom)*, award of 6 March 1956, *RIAA*, vol. XII
HA-0010	Dissenting Opinion of Lord McNair *in* ICJ, *Ambatielos (Preliminary Objection)*, Judgment of 1 July 1952, *ICJ Reports 1952*
HA-0011	ICJ, *Northern Cameroons* case, Judgment of 2 December 1963, *ICJ Reports 1963*
HA-0012	*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, *ICJ Reports 2016*
HA-0013	*Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 13 February 2019, *ICJ Report 2019*
HA-0014	*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 3 February 2021, *ICJ Reports 2021*
HA-0015	Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, *OJEU*, 29/05/2020, L 169/1

Ascencio Second Expert Report	
HA-0016	*ABCI Investments N.V. c. La République Tunisienne*, ICSID Case No. ARB/04/12, Décision sur la compétence, 18 Feb. 2011 [French original and English translation of excerpt]
HA-0017	*Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium,* ICSID Case No. ARB/12/29, Award, 30 Apr. 2015
HA-0018	*Walter Bau AG (in liquidation) v. The Kingdom of Thailand* (under UNCITRAL Rules 1976), Award, 1 July 2009
HA-0019	*Tidewater Inc. e.a. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013
HA-0020	*"President Allende" Foundation, Victor Pey Casado, Coral Pey Grebe v. The Republic of Chile*, PCA Case No. 2017-30, Award, 28 November 2019
HA-0021	ICJ, *Ambatielos Case*, judgment of 19 May 1953, *ICJ Report 1953*, p. 10 ff., at 15