INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

CASE NO. ARB/23/5

RUBY RIVER CAPITAL LLC

Claimant

VS.

CANADA

Respondent

REJOINDER ON JURISDICTION

28 August 2025

Before:

Ms Carole Malinvaud (President)
Mr Barton Legum
Prof Zachary Douglas KC

LALIVE

TABLE OF CONTENTS

1 INTRODUCTION AND EXECUTIVE SUMMARY

1 In accordance with Procedural Order No. 12 dated 20 May 2025, the Claimant hereby submits its Rejoinder on Jurisdiction.[1]

2 In its Reply on Jurisdiction dated 28 June 2025 (the "**Reply on Jurisdiction**"), the Respondent maintains that this Tribunal lacks jurisdiction, mainly on the grounds that (i) the claims before it were not properly brought under Annex 14-C of the USMCA and that (ii) they do not arise out of a legacy investment under the NAFTA and the ICSID Convention. These objections are without merit and stand to be dismissed. The Tribunal has jurisdiction, under Annex 14-C of the USMCA, the NAFTA and the ICSID Convention.

3 Under Annex 14-C, the USMCA Parties consented to arbitrate claims arising from legacy investments, where the claims (i) allege a breach of an obligation under the NAFTA, Chapter 11, Section A, (ii) are made under the procedure set out in the NAFTA, Chapter 11, Section B, and (iii) are brought within three years of the termination of the NAFTA, *i.e.*, before 1 July 2023. All conditions are met in this case.

4 The Respondent recognises that Annex 14-C covers claims that arise out of legacy investments and measures that **pre-date** the termination of the NAFTA on 1 July 2020. This fact is undisputed and is important because the claims before the Tribunal in this arbitration indeed arise out of legacy investments and measures that pre-date the termination of the NAFTA. More specifically, the claims arise out of a series of actions and omissions starting in **2015**, some of which, on their own, amount to (instantaneous) NAFTA breaches. Those actions and omissions, however, also constitute a composite act which, in aggregate, that is including the actions and omissions which on their own would not necessarily amount to a NAFTA breach, were wrongful.

5 Unlike instantaneous treaty breaches, which occur on a specific date, a breach caused by a wrongful composite act extends over a period of time. Here, the wrongful composite act extended from December 2015 until

[1] The abbreviations in this Rejoinder have the same meaning as that set out in the Claimant's prior submissions, unless otherwise stated.

February 2022. It therefore straddled the termination of the NAFTA on 1 July 2020.

6 Because the breaches of the NAFTA relied upon by the Claimant (whether stand-alone or as part of a composite act) pre-date the termination of the NAFTA, the claims are permitted under Annex 14-C and the Tribunal has jurisdiction over them. Where, as here, the termination of the NAFTA falls during the composite act, the entire act must fall within the tribunal's jurisdiction. It would be wrong – under international law and Annex 14-C properly interpreted – and inequitable to find otherwise, to the extent equitable considerations should be applied, as the Respondent suggests.

7 Even if the Tribunal were to conclude that the Respondent's substantive obligations under the NAFTA did not continue to exist, as a matter of law, in the cases of continuing breach and wrongful composite acts that straddle the termination of the treaty (*quod non*), in any event, the claims in this case remain covered under Annex 14-C.

8 Indeed, as set out at length in the Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated 18 April 2025 (the "**Claimant's Reply**"), the application of the principles in the VCLT, first, as to the ordinary meaning of the terms of Annex 14-C, second as to their context, object, and purpose, commands the conclusion that Annex 14-C covers claims that arise out of State measures that **post-date** the termination of the NAFTA and occur during the three-year transition period between 1 July 2020 and 1 July 2023.

9 Based on the ordinary meaning of the terms of Annex 14-C, no other temporal restrictions apply. By contrast, what the Respondent seeks to do is add an additional temporal requirement where none exists.

10 The USMCA Parties could have easily excluded claims arising out of measures post-dating the termination of the NAFTA. They could also have excluded claims arising out of composite acts (or continuing breaches) that straddle the termination the NAFTA. They, however, did not do so, and thus no such exclusion can be read into Annex 14-C.

11 If the Respondent genuinely believed that Annex 14-C precluded claims arising out of legacy investments and measures post-dating the termination of the NAFTA, it would not have filed such claims itself, albeit indirectly.

12 It is undisputed that APMC, a provincial corporation in Alberta and a commercial arm of the Government of Alberta (and thus an organ of the Respondent State), gave notice in February 2022 of its intent to submit claims against the U.S. under Annex 14-C, in connection with measures post-dating the termination of the NAFTA and relating to the cancellation of the Keystone XL Pipeline. At the time, it valued its claims at not less than CAD 1.3 billion. Those proceedings are pending.

13 APMC's claims reflect an understanding on the part of the Alberta Government and, by extension, of the Respondent, that Annex 14-C does cover claims arising out of legacy investments and measures post-dating the termination of the NAFTA.

14 If the Respondent genuinely believed that Annex 14-C precluded such claims, it would *a fortiori* not have waited two years, until July 2024 (when it filed its Counter-Memorial) to express the opposite view in this arbitration. Indeed, it would and should have made its view known not only in other Annex 14-C cases – when given the opportunity to file Article 1128 NAFTA submissions, which it did not do until January 2025 – but also in these proceedings, at the latest when moving to bifurcate them. Its failure to promptly oppose the interpretation of Annex 14-C that it now opposes – in critical circumstances, where billions of dollars were at stake in multiple proceedings – speaks volumes.

15 For these reasons alone, the Respondent's position that the USMCA Parties have established a common and consistent practice, purportedly reflecting an agreement amongst themselves as to the proper interpretation of Annex 14-C, as envisaged under the VCLT, is not credible. This is all the more so where the USMCA Parties did have a tool at their disposal, precisely for the purpose of setting the record straight in cases of debate concerning the meaning of the USMCA, *i.e.*, issuing a joint interpretative note, but failed to use it.

16 Finally, although the Respondent maintains that the USMCA Parties intended to exclude claims arising out of measures post-dating the

termination of the NAFTA, it has not provided any evidence amounting to supplementary means of interpretation under the VCLT to confirm its interpretation. Had the USMCA Parties genuinely wished to exclude such claims, negotiation history documents would reflect that intention. The Respondent has, however, failed to provide USMCA preparatory works or to otherwise show that the circumstances of the conclusion of the treaty support its position. It has thus failed to discharge its burden of proof under Article 32 VCLT.

17 By contrast, the Claimant has referred to documents relating to the negotiation of Annex 14-C which support its interpretation of Annex 14-C insofar as they, again, do not reflect an intent to exclude such claims. The Respondent has provided no meaningful explanation or response to these documents.

18 As for the Respondent's argument, initially raised in its Request for Bifurcation in January 2024, that the dispute in this case does not arise from an investment under Article 25 of the ICSID Convention, it has no basis.

19 The Respondent has not disputed that the Claimant made an investment in accordance with Article 1139 NAFTA, which prevails over the notion of investment under Article 25 of the ICSID Convention, in which that term is not defined. In any case, contrary to the Respondent's assertion, the Claimant did make an investment within the meaning of Article 25 of the ICSID Convention.

20 As for the Respondent's new argument that the Claimant breached the Canada Investment Act, implying that this would be a ground for the Tribunal to decline jurisdiction, it is equally unavailing. The Respondent failed to establish such breach, but more importantly, how such a breach of domestic law would have any bearing on the Tribunal's jurisdiction.

21 In this Rejoinder on Jurisdiction, it is first recalled that the claims in this case arise out of measures by the Respondent that constitute a composite act that straddles the date of termination of the NAFTA, and that accordingly the date of termination only needs to fall within the period over which the composite act took place, which is the case here (**Section 2**). However, even if the measures out of which the claims arise

both pre-date and post-date the termination of the NAFTA, they fall within the scope of Annex 14-C of the USMCA since, properly interpreted, Annex 14-C covers measures that in their entirety fall during the three-year transition period (**Section 3**). Finally, contrary to the Respondent's latest arguments, the Tribunal has jurisdiction *ratione materiae* (**Section 4**).

2 THE CLAIMS ARISE OUT OF A COMPOSITE ACT THAT COMMENCED PRIOR TO THE DATE OF TERMINATION OF THE NAFTA

22 The Respondent's main jurisdictional argument is that Annex 14-C of the USMCA does not permit an investor to submit claims arising out of State measures that post-date the termination of the NAFTA, on 1 July 2020.[2] The Respondent, however, recognises that measures that pre-date 1 July 2020 can amount to a NAFTA breach and can give rise to claims under Annex 14-C.[3]

23 As explained in the Reply, the Claimant's claims arise out of a composite act that began well before the termination of the NAFTA. Specifically:

- The claims in this case arise out of State actions and omissions that started in December 2015 and extended until February 2022.[4]
- These actions and omissions, when taken together, *i.e.*, with the other actions and omissions of the Respondent (some of which, on their own, also amount to stand-alone breaches of the NAFTA) constitute a wrongful composite act under Article 15 of the ILC Articles.[5]
- It was only in July 2021, when the Québec Government refused to authorise the GNLQ Project that the composite act was revealed.[6]

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[2] As explained in the Claimant's Reply and in Section 3 below, this argument is wrong.

[3] See Claimant's Reply on Merits and Counter-Memorial on Jurisdiction dated 18 April 2025, p. 195 (para. 571). See also Respondent's Counter-Memorial on Merits and Memorial on Jurisdiction dated 15 July 2024, p. 76 (para. 206).

[4] See Cl. Reply, p. 195 *et seq.* (paras. 572 and 575).

[5] ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), at **Exhibit CL-283-ENG**, p. 5 (Art. 15) ("1. The breach of an international obligation by a State through a **series of actions or omissions defined in aggregate as wrongful** occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act. 2. In such a case, **the breach extends over the entire period** starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.") (emphasis added).

[6] See Cl. Reply, p. 198 *et seq.* (para. 576); see also ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" in Yearbook of the ILC, Vol. II dated 31 December 2001, at **Exhibit CL-111-ENG**, p. 63 (para. 7) ("**[o]nly after a series of actions or omissions takes place will the composite act be revealed**, not merely as a

- In accordance with the ILC Articles, the composite act must be regarded as having occurred over the whole period from the commission of the first action or omission, *i.e.*, from 2015 until 2022.[7] The date of termination of the NAFTA falls within this period and accordingly the Tribunal has jurisdiction over the entirety of the Claimant's claim, including over elements of the composite act that took place after the termination of the NAFTA.

24 In its Reply on Jurisdiction, the Respondent contends that the Claimant's claim based on a wrongful composite act in breach of the NAFTA is new and inadmissible. This is wrong and addressed first in **Section 2.1**.

25 The Respondent then attempts to deny the existence of a composite act in the present case. However, whether Canada's actions and omissions constitute a composite act is not a matter of jurisdiction. It involves a substantive inquiry closely related to the facts and thus relates to the merits of the case.

26 The details of the Respondent's actions and omissions amounting to a wrongful composite act in breach of the NAFTA are set out in the Reply and are not repeated here.[8] However, as shown in **Section 2.2** below, those actions and omissions constitute a composite act, as a matter of law and on the fact. As established in **Section 2.3**, the Tribunal has jurisdiction over all the components of the composite act. Finally, as demonstrated in **Section 2.4**, the Claimant's claims accord with the intertemporal principle.

succession of isolated acts, but as a composite act, *i.e.*, an act defined in aggregate as wrongful") (emphasis added).

[7] See Cl. Reply, p. 199 (para. 577); see also ILC Articles on State Responsibility with commentaries, at **Exhibit CL-111-ENG**, p. 63 (para. 10) ("Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, **the breach is dated to the first of the acts in the series**. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point **the act should be regarded as having occurred over the whole period from the commission of the first action or omission.**") (emphasis added).

[8] See Cl. Reply, p. 196 *et seq.* (paras. 574 and 579-596).

2.1 The Claimant's claim that the Respondent's actions constitute a wrongful composite act in breach of the NAFTA is admissible

27 In its Reply on Jurisdiction, the Respondent argues that the Claimant's presentation of Canada's actions as a composite act is inadmissible, because the Claimant failed to make this claim in its Notice of Dispute, its Request for Arbitration, or its Memorial.[9] This is incorrect.

28 **First**, as explained in detail in Section 2.3.1 below, the Respondent is taking an overly formalistic approach to Article 1119 NAFTA and Article 2(2) of the ICSID Institution Rules, which is not supported by the language of these provisions, or by the practice of investment treaty tribunals.

29 **Second**, the Respondent's argument is misleading. While the Claimant used the term "composite act" in its Reply to describe the nature of the Respondent's breaches of Articles 1102, 1103 and 1105 NAFTA, the claims have remained the same since the Memorial.[10] The Respondent indeed cannot point to any change or amendment to the Claimant's claims. It only complains about the Claimant's reference to additional wrongful acts, which, as established in Section 2.3.1 below, came directly in response to (i) the Respondent's Counter-Memorial and the evidence cited therein, and (ii) documents that the Respondent produced during the document production phase.

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[9] Respondent's Reply on Jurisdiction dated 30 June 2025, p. 60 (paras. 167-169).

[10] See Cl. Reply, p. 193 *et seq*. (citing to Claimant's Memorial on Jurisdiction and the Merits dated 21 November 2023, p. 123 (para. 382) ("The facts that form the basis of the claims set out in the present Memorial include breaches that were continuing in the first half of 2020 […]")); see also Claimant's Response to Respondent's Request for Bifurcation, p. 59 *et seq.* (paras. 168, 179 and 181) ("[…] These continuing NAFTA breaches of the Respondent began in 2015-2016, with the launch of the separate provincial and federal environmental assessments, and continued well into 2020 and up to 2022, with the conclusion of the separate provincial and federal environmental assessments."). While in these submissions the Claimant referred to "continuing" breaches rather than "composite acts", as in the Reply, its claim remained the same. As noted in the Commentaries to the ILC Articles, "**[c]omposite acts give rise to continuing breaches**, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct." ILC Articles on State Responsibility with commentaries, at **Exhibit CL-111-ENG**, p. 62 (commentary to Article 15, para. 1) (emphasis added).

30 Hence, the Claimant expressly stated in its Memorial that the "treatment" requirement under Articles 1102 and 1103 was to be understood as "the aggregate of measures undertaken by the State that bear upon the investor's business activity", or "the aggregate of all the regulatory measures applied to that business." [11] Likewise, the Claimant demonstrated that "the measures for which Canada is responsible under NAFTA were procedurally grossly unfair, they were manifestly arbitrary, and they amounted to unfair targeting of the Claimant" and "violated the Claimant's legitimate expectations", in breach of Article 1105 NAFTA. [12] The Claimant's claims under the NAFTA, therefore, arise from Canada's measures considered in aggregate, as a composite act.

31 This is the material difference between the present case and the claimant's case in *Agility Public Warehousing v. Iraq*, on which the Respondent relies to argue that the Claimant is now barred from relying on the notion of composite act, not having done so in its Memorial. [13] As mentioned in Section 2.2.3 below, in *Agility Public Warehousing*, the tribunal's decision to reject the claimant's composite act argument was based on the fact that these acts had already been presented individually by the claimant as forming the basis of individual breaches of international law. [14] In the present case, even though it did not use the term "composite act", the Claimant always presented Canada's actions and omissions in aggregate as breaches of the NAFTA.

32 In any case, if the Tribunal were minded to consider as new the Claimant's presentation of the Respondent's actions and omissions as constituting a

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[11] Memorial, p. 139 (para. 439) (referring to C. McLachlan and L. Shore *et al.* "Treatment of Investors", in C. McLachlan and L. Shore *et al.* (eds.), *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2017), at **Exhibit CL-020-ENG**, p. 38 *et seq.* (p. 338 and 344) and *Merrill and Ring Forestry L.P. v. Canada*, Award, 31 March 2010, at **Exhibit CL-028-ENG**, p. 34 *et seq.* (para. 79)).

[12] Memorial, p. 181 (para. 602).

[13] Resp. Reply on Jurisdiction, p. 61 (para. 170).

[14] See Resp. Reply on Jurisdiction, p. 70 (para. 193) (referring to *Agility Public Warehousing v. Iraq*, Decision on Jurisdiction, 9 July 2019, at **Exhibit RL-211-ENG**, p. 72 (para. 254)) (stating further: "For instance, the claims concerning the refusal to engage with the Claimant and the refusal to reinstate the KRG Guarantee are each independent claims of breach (and were pleaded as such in the Claimant's Memorial); neither of them is reliant upon other acts in order cumulatively to constitute a breach of international law.").

composite act in breach of the NAFTA, the Claimant requests that the Tribunal consider this claim as an amendment of its claims, or an ancillary claim pursuant to Article 46 of the ICSID Convention.

33 According to Article 46 of the ICSID Convention, parties to a dispute may raise incidental or ancillary claims, provided that they arise directly out of the subject-matter of the dispute and are within the scope of the consent of the parties and within the jurisdiction of the Centre. The same rule is repeated in Rule 48(1) of the ICSID Arbitration Rules. Rule 48(2) provides that an incidental or additional claim can be presented no later than in the reply.

34 The presentation of the Respondent's actions and omissions as a composite act arises directly out of the subject-matter of the present dispute and the Respondent does not deny that it falls within its scope of consent, as well as that of the Centre. Likewise, this claim was presented in a timely manner, in the Claimant's Reply, in line with Rule 48(2) of the ICSID Arbitration Rules.

2.2 The Respondent's actions and omissions constitute a wrongful composite act that breached the NAFTA

35 In its Reply on Jurisdiction, the Respondent advances three propositions in response to the Claimant's case that its actions and omissions amount to a wrongful composite act in breach of the NAFTA, namely, that evidence of intent is required, that the actions and omissions should be, but were not in this case, interconnected, and that they each amount to a stand-alone breach of the NAFTA. None of these arguments withstand scrutiny.

36 **First**, as a matter of law, evidence of intent is not required to show a composite act (**Section 2.2.1**). **Second**, on the facts, the actions and omissions comprising the composite act in this case were interconnected (**Section 2.2.2**). **Third**, some actions and omissions comprising the composite act in this case also amount to stand-alone breaches of the NAFTA; some only amount to breaches of the NAFTA when taken in aggregate with other actions and omissions, and as such give rise to NAFTA breaches different from the stand-alone breaches (**Section 2.2.3**).

2.2.1 Evidence of intent is not required to show a composite act

37 In its Reply on Jurisdiction, the Respondent argues that "*les actes et omissions dont elle se plaint forment des maillons dans la chaîne de causalité ayant mené au refus du Canada et du Québec d'accepter leur projet. Or, un lien plus substantiel est requis*."[15] The Respondent, however, goes further. Referring to the MELCC's and the Agency's failure in 2015-2016 to conduct a joint EA (or to have the Agency take the lead in conducting a federal assessment), the Respondent contends:

> "*Ces éléments ne peuvent servir à établir l'existence d'un fait illicite composite qui aurait culminé avec le rejet du projet Énergie Saguenay car il est impossible d'y voir l'amorce d'un* ***dessein délictueux*** *qui sous-tend les autres faits auxquels ils seraient prétendument reliés* [...] *la demanderesse n'allègue-t-elle pas que l'assujettissement de son projet à deux évaluations environnementales avait pour* ***but ultime de rejeter le projet*** […]."[16]

38 In connection with this argument, the Respondent refers to the case of *Gabriel Resources v. Romania*, where the tribunal concluded that "some sort of proof of motive or purpose is called for" to show a composite act.[17] It also relies on the Decision on Jurisdiction and Liability in *Cyprus Popular Bank v. Greece*, and specifically on the following statements from the tribunal in that case:

- "a series of isolated acts by the State that affect the investment are not in themselves sufficient to characterize the aggregate of those acts as a composite breach";
- "the acts must be interconnected, in the sense that they are adopted as part of a systematic policy of the State to target the investor;" and,

[15] Resp. Reply on Jurisdiction, p. 62 (para. 172).

[16] Resp. Reply on Jurisdiction, p. 64 *et seq.* (para. 179).

[17] See Resp. Reply on Jurisdiction, p. 63 *et seq.* (para. 175) (referring to *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v.* Romania, ICSID Case No. ARB/15/31, Award, 8 March 2024, at **Exhibit RL-204-ENG**, p. 173 *et seq.* (para. 828)).

- "a composite breach may only arise 'where the actions in question disclose some link of underlying pattern or purpose between them', or [sic] adopted 'under a common denominator.'"[18]

39 However, only the first of these statements flows directly from Article 15(1) of the ILC Articles, which provides as follows:

> "1. The breach of an international obligation by a State through a **series of actions or omissions defined in aggregate as wrongful** occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."[19]

40 Neither the second nor the third statement above appear in Article 15 or in the commentary to that article.

41 To start with, Article 15 does not set out any legal criteria or conditions other than that the actions and omissions constitute a breach in aggregate. Furthermore, the question of whether there is a composite act is a matter of fact, not law.

42 While composite acts may include "systematic" acts, they are not limited to such acts.[20] There is also no mention in Article 15 of a need to show (i) a State "policy" – let alone a "systematic policy" – "target[ing] the investor," (ii) a "pattern or purpose" or (iii) a "common denominator".[21]

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[18] The tribunal described these (factual) requirements in abstract terms and did not describe them as legal requirements. See Resp. Reply on Jurisdiction, p. 62 (para. 173) (referring to *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019, at **Exhibit RL-203-ENG**, p. 367 *et seq.* of the PDF (para. 1511)).

[19] ILC Articles on State Responsibility, at **Exhibit CL-283-ENG**, p. 5 (Art. 15) (emphasis added); see also Cl. Reply, p. 196 (para. 573).

[20] The commentary to Article 15 describes, as mere examples of composite acts, systematic acts of racial discrimination and genocide ("which implies that the State has adopted a systematic policy or practice"). ILC Articles on State Responsibility with commentaries, at **Exhibit CL-111-ENG**, p. 62 (commentary to Art. 15, paras. 2 and 3).

[21] Furthermore, the Decision on Jurisdiction and Liability in *Cyprus Popular Bank v. Greece* is heavily redacted (including the description of the claim of composite act and the Tribunal's discussion on the facts) and as such provides limited guidance. See, *e.g.*, *Cyprus Popular Bank*

43 Indeed, the *Gabriel v. Romania* tribunal also stated that "in investor-State arbitration there is **no requirement of systemic policy or practice** (and hence not in an organized and deliberate way), meaning that the first act could possibly not be wrongful independently."[22]

44 Article 15(1) also does not require intent on the part of the State in connection with a composite act.[23] Nor does the commentary to Article 15. On the contrary, the commentary makes clear that intent may only be relevant depending on the underlying State obligation at issue.[24] There is *a fortiori* no requirement that the actions and omissions comprising the composite act be taken with a goal or objective in mind ("*but ultime*") or by criminal design or intent (by "*dessein délictueux*").[25]

45 Evidence of intent is also not required to show any (one-off) breach of the NAFTA provisions at issue in this case.[26] In particular, intent is not

v. Greece, Decision on Jurisdiction and Liability, 8 January 2019, at **Exhibit RL-203-ENG**, p. 364 *et seq.* of the PDF (para. 1488); see also p. 368 to 371 of the PDF.

[22] *Gabriel v. Romania*, Award, 8 March 2024, at **Exhibit RL-204-ENG**, p. 172 *et seq.* (para. 826) (emphasis added).

[23] Articles 1105, 1102 and 1103 NAFTA are primary rules of international law, and one must show a breach to establish State responsibility. By contrast, the ILC Articles are secondary rules and set out the consequences of a breach of a primary rule. Article 15 of the ILC Articles describes how a composite act amounts to a breach, but it does not say what kind of obligation is being breached. Whether or not intent is required is not a matter of secondary rules, but a matter of primary rules. See ILC Articles on State Responsibility with commentaries, at **Exhibit CL-111-ENG**, p. 31 (General commentary, para. 1) (the ILC Articles "do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility" as this would be "the function of the primary rules").

[24] For instance, genocide requires a showing of an "intent to destroy [the] group as such […]". See ILC Articles on State Responsibility with commentaries, at **Exhibit CL-111-ENG**, p. 62 (commentary to Art. 15, para. 3); see also p. 63 (commentary to Art. 15, para. 10).

[25] More generally, state responsibility in international law is objective, not based on *culpa* (fault). See, *e.g.*, ILC Articles on State Responsibility, at **Exhibit CL-283-ENG**, p. 2 (Art. 2) (defining a wrongful act as conduct attributable to the State that violates an international obligation, without mentioning fault or intent); see also J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002) (excerpt) dated 31 December 2002, at **Exhibit CL-114-ENG**, p. 84 (No. 10) ("In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of the State that matters, independently of any intention.").

[26] See ILC Articles on State Responsibility with commentaries, at **Exhibit CL-111-ENG**, p. 36 (commentary to Art. 2, para. 10) ("A related question is whether fault constitutes a necessary

required to show (i) a failure to provide the minimum standard of treatment in breach of Article 1105 NAFTA;[27] (ii) a failure to provide NT or MFN treatment in breach of Articles 1102 and 1103 NAFTA;[28] or, (iii) an expropriation in breach of Article 1110 NAFTA.[29]

46 Certain investment treaty tribunals have found a creeping breach of FET and/or a creeping expropriation, without requiring a separate showing of intent (or motive or purpose).[30] Indeed, as the tribunal in *Blusun v. Italy*,

element of the internationally wrongful act of a State. This is certainly not the case if by 'fault' one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, **it is only the act of a State that matters** [to establish an internationally wrongful act], **independently of any intention**") (emphasis added).

[27] See Cl. Reply, p. 264 *et seq.* (paras. 787-791) (showing that evidence of the motive of discrimination is not required for the finding of a breach of Article 1105 NAFTA).

[28] See Cl. Reply, p. 333 *et seq.* (paras. 986-990) (showing that evidence of intent to discriminate foreign nationals is not required to establish a breach of Articles 1102/1103 NAFTA).

[29] See, *e.g.*, *Fireman's Fund v. U.S.*, Award, 17 July 2006, at **Exhibit CL-069-ENG**, p. 82 (para. 176(f)) ("The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation.").

[30] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, at **Exhibit CL-356-ENG**, p. 204 *et seq.* (para. 7.4.12) (in context of claims of creeping breach of FET (and creeping expropriation), the tribunal described the FET standard as being an objective standard and found it "unrelated to whether the Respondent has had any deliberate intention"); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, at **Exhibit CL-357-ENG**, p. 83 (para. 270) (the tribunal recognizes that no specific intent is required for finding creeping expropriation); *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, at **Exhibit CL-358-ENG**, p. 19 (para. 81) (the tribunal recognizes that motivations for actions and omissions of Ghanian governmental authorities are not relevant to establish creeping (constructive) expropriation); *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, at **Exhibit CL-359-ENG**, p. 137 (para. 464) (the tribunal recognizes that the interconnectedness of certain constitutive elements is of no relevance for the establishment of deprivation); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, at **Exhibit CL-360-ENG**, p. 188 (para. 515) (the tribunal recognizes that "reasonable measures to cope with a difficult economic situation, the measures" when viewed as cumulative steps can amount to an FET violation); *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009 dated 1 July 2009, at **Exhibit RL-209-ENG**, p. 118 (para. 10.6) ("A state's purpose in implementing measures alleged to amount to indirect expropriation is irrelevant to a finding of whether expropriation has occurred"); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15,

presided by the late Judge James Crawford,[31] confirmed, a wrongful composite act (in that case, a breach of the FET standard under the ECT) does not require "plan or coordination":

> "A breach of an obligation to 'encourage and create stable, equitable, favourable and transparent conditions for Investors' including 'to accord at all times […] fair and equitable treatment' could be breached by a single transformative act aimed at an investment, or **by a program of more minor measures, or by a series of measures taken without plan or coordination but having the prohibited effect**."[32]

47 The Respondent argues that "[*d*]*'autres tribunaux ont pareillement refusé de conclure à l'existence d'un fait illicite composite en l'absence d'une ligne de conduite systématique démontrant un objectif commun et coordonné entre les actes ou omissions allégués*."[33] However, the cases to which the Respondent refers do not fully support the proposition and/or are distinguishable on the facts.

48 **First,** in *Rompetrol v. Romania*, the claimant had described the State conduct at issue as amounting to a "State-orchestrated harassment."[34] It was against this background that the tribunal held that "whether the conduct in question is stigmatized as 'conspiracy' or as 'organized harassment,' some proof is required, even if all of the actors have the status of State agencies, that different actions pursued on different paths by different actors are linked together by a common and coordinated

Award, 31 October 2011, at **Exhibit CL-083-ENG**, p. 188 (para. 515) ("Although they may be seen in isolation as reasonable measures to cope with a difficult economic situation, the measures examined can be viewed as cumulative steps which individually do not qualify as violations of FET, as pointed out earlier by the Tribunal, but which amount to a violation if their cumulative effect is considered.").

[31] Judge Crawford had served as the Special Rapporteur on State Responsibility in the years leading up to the adoption of the ILC Articles in 2001.

[32] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, at **Exhibit CL-210-ENG**, p. 129 (para. 362) (emphasis added).

[33] Resp. Reply on Jurisdiction, p. 64 (para. 177, n. 175).

[34] See *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, at **Exhibit RL-137-ENG**, p. 15 (para. 45).

purpose."[35] The tribunal found on the facts of that case that the claimant had failed to show "a co-ordinated campaign of harassment by the Romanian State."[36] This finding relates to the question of whether there was a breach of a primary obligation, not a question of whether there was a composite act. As stated above, the ILC Articles are not concerned with the question of breach of a primary obligation.

49 **Second**, in *Victor Pey Casado v. Chile*, the tribunal could not find a wrongful composite act because it could not find, first, a series of acts constituting a separate wrongful act (separate from the alleged instantaneous breaches) ("*les faits litigieux allégués par les demanderesses ne correspondent ni à une série d'actes constitutive d'une infraction distincte des manquements invoqués* […]").[37] Second, it could not find a practice consisting of an accumulation of identical or analogous breaches which were sufficiently numerous and interconnected ("*une pratique de l'Etat chilien découlant de l'accumulation de manquements de nature identique ou analogue assez nombreux et liés entre eux*'").[38] The tribunal did not state that a composite act requires, in the Respondent's words, a

[35] *Rompetrol v. Romania*, Award, 6 May 2013, at **Exhibit RL-137-ENG**, p. 147 (para. 273).

[36] The tribunal more broadly stated that it "[could] join other recent tribunals in accepting that the cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord fair and equitable treatment even where the individual actions, taken on their own, would not surmount the threshold for a Treaty breach. But this would only be so where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough." *Rompetrol v. Romania*, Award, 6 May 2013, at **Exhibit RL-137-ENG**, p. 146 *et seq.* (paras. 271 and 276). Thus, the tribunal seemed to require for a composite act, as a matter of law, at most "some link of underlying pattern or purpose"; however, even "some link of underlying pattern or purpose" is not *strictu sensu* a requirement of the ILC Articles. See paragraph 44 above.

[37] See *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, at **Exhibit RL-205-FRA**, p. 200 (para. 619).

[38] In this regard, the tribunal quoted the language from the *Ireland v. United Kingdom* ICJ decision, reproduced in the ILC Articles commentary. See *Víctor Pey Casado v. Chile*, Award, 8 May 2008, at **Exhibit RL-205-FRA**, p. 200 (para. 619).

"*ligne de conduite systématique démontrant un objectif commun et coordonné entre les actes ou omissions allégués*".[39]

50 **Third**, the decision in *Fengzhen Min v. Korea* is one addressing an ICSID Rule 41(5) motion to dismiss the case at the outset, for manifest lack of merit. At that stage of the proceedings, it was, however, undisputed that certain impugned State acts were interconnected.[40] The tribunal thus did not "*refusé de conclure à l'existence d'un fait illicite composite en l'absence d'une ligne de conduite systématique démontrant un objectif commun et coordonné entre les actes ou omissions allégués*." It made no findings in this regard.

2.2.2 The actions and omissions comprising the composite act were interconnected

51 The Respondent denies the existence of a wrongful composite act in this case. Referring to the State measures at issue, it argues "*[o]utre le fait qu'ils s'inscrivent tous, à une exception près, dans le cadre des évaluations environnementales du projet de la demanderesse, ces faits et omissions n'ont aucun lien entre eux.*"[41] That conclusion is not correct.

52 As a matter of fact, the actions and omissions comprising the wrongful composite act in this case are interconnected. They are not isolated, disparate or unrelated events. As the Respondent acknowledges, they all related to the GNLQ Project and the EA Process, from its initiation to its conclusion. Furthermore, the State actors involved are limited to the Québec and federal environmental agencies (the MELCC and the Agency) as well as the Québec Government and the Federal Government. The

[39] The tribunal stated that "[i]*l n'y a pas dans la présente affaire de 'système' ou d''ensemble' d'actes illicites qui, pris de manière globale, apparaîtrait comme un fait illicite.*" It thus suggested that an "*ensemble d'actes*" might suffice to establish a composite act. See *Víctor Pey Casado v. Chile*, Award, 8 May 2008, at **Exhibit RL-205-FRA**, p. 200 (para. 619).

[40] *Fengzhen Min v. Republic of Korea*, ICSID Case No. ARB/20/26, Decision on the Respondent's Preliminary Objection pursuant to Rule 41(5) of the ICSID Arbitration Rules, 18 June 2021, at **Exhibit RL-206-ENG**, p. 27 (para. 94) ("In the present case, […] for the purposes of this Objection the interconnection between the facts alleged [to][sic] constitute composite acts is accepted.").

[41] Resp. Reply on Jurisdiction, p. 64 (para. 178).

Claimant's claim of wrongful composite act is thus very different from the cases on which the Respondent relies, including the following:

- *Gabriel Resources v. Romania*: In that case, the claims of wrongful composite act in breach of the relevant treaties involved statements and measures by numerous State actors (different Prime Ministers, ministers, ministries and other State agencies; the Government as a whole; the Parliament; and a technical advisory committee) and related to not only the environmental permitting process for a mining project, but also economic negotiations surrounding the underlying mining license, the submission of a law to Parliament, and an application for an exploitation license relating to a different project.[42]
- *Rompetrol v. Romania*: In that case, the claims of wrongful composite act in breach of the relevant treaty arose out of purported measures by the Government, the General Prosecutor's Office, the National Anti-Corruption Prosecutor's Office, tax authorities, the judiciary, and intelligence services.[43]

53 With regard to the measures that pre-date the termination of the NAFTA, the Respondent argues that "*il est impossible d'y voir des éléments étroitement interreliés qui participent* ***au même objectif*** *de refuser le projet Énergie Saguenay*."[44]

54 As explained above, however, the Claimant is not required to demonstrate, and the Tribunal is not required to find, that those measures were adopted with the ultimate goal of refusing to authorise the Project.[45] The Claimant is only required to show on the facts, and the Tribunal only needs to find as a matter of fact, that they are related insofar as they form part a "series of actions or omissions" which "in aggregate" are wrongful, as per Article 15 of the ILC Articles. In this case, the measures pre-dating the termination

[42] *Gabriel v. Romania*, Award, 8 March 2024, at **Exhibit RL-204-ENG**, p. 309 (para. 1165); see also, more generally, p. 306 *et seq.* (paras. 1149-1168).

[43] *Rompetrol v. Romania*, Award, 6 May 2013, at **Exhibit RL-137-ENG**, p. 15 *et seq.* (*e.g.*, paras. 46, 128 and 271).

[44] Resp. Reply on Jurisdiction, p. 64 (para. 178) (emphasis added).

[45] See Section 2.2.1 above.

of the NAFTA are, by their very nature, interrelated amongst each other and with the measures post-dating the termination of the NAFTA.

55 The question of whether the Claimant has established, on the facts, a composite act, and as a matter of law, that such composite act constitutes a breach under the NAFTA, is a matter for the merits and not jurisdiction. However, the Claimant addresses briefly the Respondent's specific allegations concerning the measures pre-dating the termination of the NAFTA.

56 In relation to the first measure, as explained above, the Claimant is not required to show, and the Tribunal need not find, that the **decisions of the MELCC and the Agency not to conduct a joint EA or single federal assessment led by the Agency** were taken with the ultimate aim of refusing to authorise the GNLQ Project.[46] In any event, the Respondent does not explain why, had the MELCC and/or the Agency as a matter of fact reserved their option to refuse to authorise the GNLQ Project, it would have been easier for them to do so by having a single assessment (not both a provincial EA and a federal EA).[47] The Respondent's contrary assertion that the existence of two EA processes instead of one made a rejection less likely is indeed illogical. By insisting on conducting a separate EA process, the MELCC chose, as a matter of fact, to reserve the unilateral option to authorise or to refuse to authorise the Project, without leaving this decision entirely to the federal level. This was, however, improper and unlawful.

57 With regard to the **MELCC's request in May 2019 that GNLQ provide a cost-benefit analysis**, the Respondent argues that it "*n'est pas de nature à favoriser la réalisation du dessein sous-jacent, à savoir le rejet du projet Énergie Saguenay*" and that "*ce n'est pas la demande d'un bilan en tant que telle qui est de nature à favoriser ou non le rejet d'un projet mais bien le contenu du bilan réalisé par l'initiateur*."[48] Again, the Claimant need not show, and the Tribunal need not find, that this request was made with the ultimate goal of refusing to authorise the GNLQ Project.

[46] See Cl. Reply, p. 196 *et seq.* (para. 574) and p. 42 *et seq.* (s. 2.3.1).

[47] See Resp. Reply on Jurisdiction, p. 64 *et seq.* (para. 179).

[48] Resp. Reply on Jurisdiction, p. 65 (para. 181).

58 In its Rejoinder on the Merits, the Respondent concedes that a cost-benefit analysis was not required at the time and does not deny that this type of methodology had never been applied before in an EA.[49] Indeed, the request was unusual and the MELCC was improperly imposing more stringent requirements on the Project.[50] It is also the case that it was improper and unlawful for the Québec Government to refer to GNLQ's cost-benefit analysis to refuse to authorise the Project in circumstances where such an analysis was (i) used for the early assessment of public projects to decide on their financing, (ii) outside the scope of the MELCC directive, (iii) had not been used in an EA of a project of this nature before, and (iv) was only added to standard MELCC directives much later, as one of several options available to proponents.[51] It is thus clear that, by improperly imposing a cost-benefit analysis, the MELCC provided the Québec Government with an option to refuse to authorise the Project.

59 As for the **Agency's attempt in August 2019 to extend the geographic scope of the federal EA**, the Claimant also need not show, and the Tribunal need not find, that it was part of a "*ligne de conduite poursuivant un dessein délictueux*."[52] For reasons explained in the Claimant's Reply and which the Respondent has failed to rebut in either its Reply on Jurisdiction, or in its Rejoinder on the Merits, the Agency's attempted extension of the geographic scope of the federal EA – several months after receipt of GNLQ's EIS – was unjustified and unlawful.[53]

60 Finally, in relation to the **leak of information** to the press about the withdrawal of a key investor in March 2020, the Respondent argues that "*il ne peut, à lui seul, établir l'existence d'un fait illicite composite*."[54] The Claimant, however, does not argue that the leak in and of itself amounts to

[49] Respondent's Rejoinder on the Merits dated 21 July 2025, p. 215 *et seq.* (para. 517).

[50] Cl. Reply, p. 297 *et seq.* (paras. 881-884); see also p. 72 *et seq.* (paras. 218-228).

[51] See Cl. Reply, p. 201 (paras. 587-588).

[52] See Section 2.2.1 above; see also Resp. Reply on Jurisdiction, p. 66 (para. 182).

[53] Cl. Reply, p. 203 (paras. 593-595); see also p. 133 *et seq.* (s. 2.6.2.1(ii)).

[54] Resp. Reply on Jurisdiction, p. 66 (para. 184).

a wrongful composite act; rather, the leak is part of a wrongful composite act.[55]

61 Even if the Tribunal were to find that a certain "motive or purpose" were required to find a wrongful composite act, which is denied, there was a motive or purpose behind the actions and omissions comprising the wrongful composite act in this case. The underlying pattern characterising Canada's conduct is twofold:

i) the Québec Government's intention to remain in a position to have a decisive weight in the decision on whether to authorise the GNLQ Project or not; and

ii) the Federal Government's decision to let the Québec Government have its way, at the expense of a lawful allocation of powers in accordance with Canadian constitutional law.[56]

62 This pattern appears in relation to each of Canada's actions and omissions.

- As noted above, the **MELCC's decision not to conduct a joint EA or allow for a single federal assessment led by the Agency** reflected the intent on the part of Québec authorities to exercise control and authority over the environmental review of the GNLQ Project, even on matters that were not within their jurisdiction. As the Claimant demonstrated in its Reply based on the documents produced by Canada, the MELCC knew at the time that, at the very least, the GNLQ

[55] See Cl. Reply, p. 196 *et seq.* (para. 574).

[56] In this respect, the Respondent argues in its Rejoinder on the Merits that the Claimant's position, based on the Canadian constitutional doctrines set out by its experts, that the Québec Government had no power to conduct its own EA and should have deferred to the Federal Government, is allegedly incompatible with the constitutional doctrine of "cooperative federalism" (Rejoinder on the Merits, p. 30 *et seq*. (paras. 64-66)). The Canadian Supreme Court's case law cited by the Respondent and its own experts contradicts this assertion. In *Opsis Services aéroportuaires inc. c. Québec*, the Supreme Court highlighted that "Though it is 'constrained by principle and precedent', the doctrine of interjurisdictional immunity continues to play an essential role in relation to federalism, because it makes it possible to "balanc[e] the need for intergovernmental flexibility with the need for predictable results'". See *Opsis Airport Services Inc. v Quebec (Attorney General),* 2025 SCC 1, at **Exhibit SP-0085-ENG**, and *Opsis Services aéroportuaires inc. c. Québec (Procureur général)*, 2025 CSC 17, at **Exhibit MY-174-FRA**, p. 31 *et seq*. (paras. 33-35). See also Renvoi relatif à la Loi sur l'évaluation d'impact, 2023 CSC 23, at **Exhibit MY-0004-FRA**, p. 94 *et seq*. (paras. 122 and 233).

Project was subject to the Canada-Québec Agreement.[57] This transpired not only from the correspondence between the MELCC and the Agency, but also from their representations at the time.[58] The MELCC and/or the Agency had even prepared a joint letter the purpose of which was to notify GNLQ of the initiation of a joint EA.[59] Put simply, the Québec Government wanted to have a say over the GNLQ Project – beyond the say that they would have had with a joint EA or a

[57] See Cl. Reply, p. 51 (para. 152). The Claimant notes in this regard that, contrary to the position expressed by the Respondent and its witnesses in the Counter-Memorial (Counter-Memorial, p. 36 (para. 100); Duquette I, at **Exhibit RWS-5**, p. 6 *et seq.* (para. 13); Bélanger I, at **Exhibit RWS-1**, p. 10 *et seq.* (para. 33)), the Respondent now contends in its Rejoinder on the Merits that the Canada-Québec Agreement expired in 2012 (Rejoinder on the Merits, p. 40 *et seq*. (paras. 86-88). This is not correct. To this day, the Canada-Québec Agreement remains mentioned as one of the "[k]ey environmental federal-provincial agreements" on the Canadian Government's website (Government of Canada, "Québec: Environment profile" (accessed 27 August 2025), at **Exhibit C-0632-ENG**; see also Government of Canada, "Agreements related to assessments" (accessed on 19 August 2025), at **Exhibit C-0633-ENG**). In 2019, *i.e.*, long after the Canada-Québec Agreement allegedly ceased to apply, the Québec Ministerof Environment, Mr Charette, in a memo setting out Québec's comments on the draft bill C-69, referred to the Canada-Québec Agreement as being in force (Letter from Minister Charette to the Senate of Canada dated 26 April 2019, at **Exhibit C-0634-FRA**, p. 5 and 9). Furthermore, contrary to its 2004 version which indicated that it would remain in force for a period of five years from its execution, paragraph 4 of the Canada-Québec Agreement provides that its termination requires a 45-day written notice. There is no evidence of such notice. On the contrary, in a press release issued in 2010 upon the renewal of the Canada-Québec Agreement, the Canadian Government indicated that "[t]he Agreement is renewed for an indeterminate period of time and will be evaluated every three years" (Government of Canada, "Renewal of the Canada-Québec Agreement on Environmental Assessment Cooperation" (accessed on 19 August 2025), at **Exhibit C-0631-ENG**). Finally, the Respondent's new position is contradicted by the MELCC's and the Agency's own practice in EA procedures initiated after 2012: see, *e.g.*, Canadian Environmental Assessment Agency, "Akasaba West Copper-Gold Mine Project Environmental Assessment Report" (May 2018), at **Exhibit RN-0093-ENG**, p. ii, 3 and 152 and Letter from the Agency and the MELCC to Mines Agnico Eagle Ltd. (Akasaba Project) dated 9 March 2016, at **Exhibit C-0635-FRA**.

[58] Letter from the Agency to the MELCC dated 20 November 2015, at **Exhibit GB-0016-FRA**; MEIE, GNLQ interministerial committee monitoring table dated 26 November 2015, at **Exhibit C-0463-FRA**, p. 4 *et seq*.; Agency, Information session on the GNLQ Project, 18 December 2016, at **Exhibit RN-0190-FRA**, p. 21 and 23.

[59] Draft letter from the Agency and the MELCC to GNLQ, at **Exhibit C-0471-FRA**. This letter and the documents cited above confirm that the Respondent's new position that the Canada-Québec Agreement had ceased to exist in 2015 is untenable (see Rejoinder on the Merits, p. 40 *et seq*. (paras. 86-88)), as both the MELCC and the Agency considered at the time that it was applicable.

single federal assessment – to be able in effect either to approve or veto the GNLQ Project.

- Equally, **the Agency's failure to advise the MELCC that the Agency should conduct a single federal assessment or that there should be a joint assessment** reflected that the Federal Government, despite knowing that these were the only two options, had resigned in the face of the Québec Government's decision to retain control over the process.
- The **MELCC's request in 2019 for a cost-benefit analysis** as well as **the Agency's attempt in 2019 to extend the geographic scope of the federal assessment** reflected those institutions' desire to effectively keep their options open, *i.e.*, to request a maximum amount of information – even if those requests were unlawful – to be able to refuse to authorise the GNLQ Project if that was the ultimate decision. This is not a lawful way to conduct an EA process. Furthermore, information obtained from an unlawful request cannot serve as a basis to refuse to authorise the project. That information, in those circumstances, effectively becomes fruit of the poisonous tree.
- The **leak by the Québec Government of the news that a major investor had pulled out of the GNLQ Project** was similarly intentional. [60] It reflected the Québec Government's intention to maintain control over the process by retaining the possibility of invoking GNLQ's imaginary financing issues, while impeding its ability to raise funds.
- The motive or purpose behind the **Québec Government's support in September 2020 of two researchers hostile to the Project**, for purposes of the BAPE hearings, was also to keep the authorities' options open, *i.e.*, to provide ammunition in case the Government decided to refuse to authorise the GNLQ Project.[61] Again, this is not a lawful way to conduct an EA process.
- The motive or purpose behind the **Québec Government's interference with the provincial EA process between March and June 2021** was again to request information – formulated in a

[60] Cl. Reply, p. 39 *et seq*. (para. 117).

[61] See Cl. Reply, p. 196 *et seq.* (para. 574).

deliberately vague way – to alter the course of the EA and set the ground for a rejection of the GNLQ Project. The motive or purpose was to have the option to refuse to authorise the Project and to have fodder for doing so, even if it meant improperly interfering in the EA Process.[62] This is confirmed notably by:

i) the highly unusual character of the Government's interference in this respect, as underlined by Me Duchaine and the Respondent's own witness;[63]

ii) the evidence stemming from the documents produced by Canada of the sudden and highly political character of the Québec Government's interference in the EA process,[64] and that these criteria were imposed on the MELCC team in charge of the EA, who considered they were outside the scope of the EA by the Québec Government.[65]

63 The decisions of the Québec Government in July 2021, the Federal Minister of Environment in December 2021 and the Federal Government in February 2022 were the culmination of the above prior actions and omissions. Those decisions in turn link the prior actions and omissions that form the composite act.

64 Indeed, but for the Agency's and the MELCC's failure to initiate a joint EA of the Project, there would not have been a separate, uncoordinated EA process at the Québec level in which the Québec Government would have interfered as it did, nor a formal decision by the Québec Government in July 2021, based on issues beyond its jurisdiction and/or outside the scope of the MELCC Directive. The very existence of the 2021 Decree was a consequence of the MELCC's and the Agency's failures in 2015 and 2016 and of the irregular and unlawful process that ensued. Equally, but for those failures, there would have been no decision of the Federal Government

[62] See Cl. Reply, p. 196 *et seq.* (para. 574).

[63] Cl. Reply, p. 81 *et seq.* (paras. 244-245); see also Duchaine I, at **Exhibit CER-1**, p. 82; Duchaine II, at **Exhibit CER-1 (Second)**, p. 109 *et seq.* (para. 308) and Duquette I, at **Exhibit RWS-5**, p. 24 (para. 52).

[64] Cl. Reply, p. 82 *et seq*. (paras. 247-256).

[65] Cl. Reply, p. 92 *et seq*. (paras. 275-288).

simply following suit, also based on matters outside the scope of the EIS Guidelines. Furthermore, the grounds that the Québec Government invoked in its July 2021 decision and that the Federal Government invoked in its February 2022 decision were the result of an irregular EA process.[66]

2.2.3 The breaches resulting from the wrongful composite act are different from the stand-alone breaches resulting from some of the actions and omissions comprising the composite act

65 As previously explained, the wrongful composite act in this case gave rise to breaches of Articles 1102, 1103 and 1105 NAFTA.[67] However, some of the actions and omissions comprising the wrongful composite act also constitute stand-alone breaches of Articles 1102, 1103, 1105 and 1110 NAFTA.[68]

66 In its Reply, the Respondent wrongly argues that "[a]*fin de constituer un fait illicite composite, les actes et omissions qui le composent ne doivent pas, de manière indépendante et autonome, constituer une violation de la même obligation*."[69] No such prohibition exists under international law.

67 On the contrary, the ILC Articles commentary confirm the opposite: "While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, **this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation**."[70] The commentary provides the following example: "In the case of crimes against humanity, the composite act is a violation

[66] See Cl. Reply, p. 199 *et seq.* (paras. 579, 581, and 592).

[67] See footnote 8 above. See Cl. Reply, p. 285 *et seq.* (paras. 848, 854, and 1010)

[68] See Cl. Reply, p. 199 *et seq.* (paras. 578 and 1161).

[69] Resp. Reply on Jurisdiction, p. 70 (para. 191).

[70] ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" in Yearbook of the ILC, Vol. II dated 31 December 2001, at **Exhibit CL-111-ENG**, p. 63 (para. 9) (emphasis added).

separate from the individual violations of human rights of which it is composed."[71]

68 Stated differently, an action or omission can both constitute a stand-alone breach of an international obligation and at the same time form part of a wrongful composite act amounting to a breach of a different obligation. For example, an act forming part of a creeping expropriation may also constitute a stand-alone breach of the fair and equitable treatment standard.

69 The two cases on which the Respondent relies on this point – *Pacific Rim Cayman v. El Salvador* and *Agility Public Warehouse v. Iraq* – do not support its proposition.[72]

70 On the contrary, in *Pacific Rim*, the tribunal confirmed what is stated in the ILC Articles as follows:

> "The fact that a composite act is composed of acts that are legally different from the composite act itself means that the composite act can comprise legal acts and still be unlawful or that it can comprise **unlawful acts violating certain norms which are different from the legal norm violated by the composite act**."[73]

71 In that case, the claimant argued that a mining ban amounted to a wrongful composite act in breach of the CAFTA. The claimant had, however, thereafter changed nationalities (in December 2007, from Cayman Islands to Canada), raising a question as to whether its reliance on the CAFTA amounted to an abuse of process.[74]

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[71] ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" in Yearbook of the ILC, Vol. II dated 31 December 2001, at **Exhibit CL-111-ENG**, p. 63 (para. 5); see also para. 4 ("apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.").

[72] Resp. Reply on Jurisdiction, p. 70 (paras. 192 and 193) (and evidence cited therein).

[73] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012, at **Exhibit RL-199-ENG**, p. 54 *et seq.* of the PDF (para. 2.71) (emphasis added).

[74] *Pac Rim v. El Salvador*, Decision on Respondent's Jurisdictional Objections, 1 June 2012, at **Exhibit RL-199-ENG**, p. 38 of the PDF (paras. 2.16-2.17).

72 The tribunal noted that the claimant described the ban as "the practice of the Government not to grant any metallic mining application" and that this "practice" derived from events occurring before December 2007. It concluded that "no relevant act was pleaded by the Claimant occurring after the change of nationality" and that as such it was "impossible […] to characterise the ban as a different legal animal from the several acts that comprise it."[75] The tribunal did, however, conclude that the ban amounted to a continuous act (under Article 14 of the ILC Articles).[76]

73 As for *Agility Public Warehousing*, as the Respondent notes, in that case the tribunal held that "the acts identified by the Claimant as constituting the composite breach already individually form the basis for claims of the breach of international law."[77] That is not the case here.

74 Contrary to the Respondent's suggestion, some – not all – of the acts constituting the composite act in this case also represent stand-alone breaches.[78] The composite act also comprises actions and omissions which are not stand-alone breaches and which amount to a breach when cumulated with other actions and omissions.[79]

2.3 The Tribunal has jurisdiction over all of the individual actions and omissions constituting the Respondent's composite act

75 In its Reply on Jurisdiction, the Respondent advances additional jurisdictional objections in relation to the Claimant's claim based on the Respondent's wrongful composite act. Some of these objections wrongly assume that all of the actions and omissions invoked by the Claimant as

[75] *Pac Rim v. El Salvador*, Decision on Respondent's Jurisdictional Objections, 1 June 2012, at **Exhibit RL-199-ENG**, p. 61 of the PDF (para. 2.88).

[76] *Pac Rim v. El Salvador*, Decision on Respondent's Jurisdictional Objections, 1 June 2012, at **Exhibit RL-199-ENG**, p. 68 of the PDF (para. 2.109).

[77] See Resp. Reply on Jurisdiction, p. 70 (para. 193) (referring to *Agility Public Warehousing v. Iraq*, Decision on Jurisdiction, 9 July 2019, at **Exhibit RL-211-ENG**, p. 72 (para. 254)) (stating further: "For instance, the claims concerning the refusal to engage with the Claimant and the refusal to reinstate the KRG Guarantee are each independent claims of breach (and were pleaded as such in the Claimant's Memorial); neither of them is reliant upon other acts in order cumulatively to constitute a breach of international law.").

[78] Resp. Reply on Jurisdiction, p. 70 *et seq.* (para. 194).

[79] See, *e.g.*, Cl. Reply, p. 285 (para. 847).

constituting the Respondent's composite act are stand-alone breaches of the NAFTA. Others are revived objections that the Respondent had raised in its Request for Bifurcation, but not pursued in its Counter-Memorial.

76 Specifically, contrary to the Respondent's allegations, the Claimant's claims based on the Respondent's composite act were properly notified under Article 1119 NAFTA (**Section 2.3.1**). The Claimant's claims based on the MELCC's and the Agency's decision to conduct two separate assessments instead of a single federal assessment, or a joint assessment, are not time-barred, the Claimant having only acquired knowledge of the resulting loss or damage from this breach on 21 July 2021, upon the Québec Government's decision not to authorise the GNLQ Project (**Section 2.3.2**). Finally, that the Claimant failed to establish a loss deriving from each of the Respondent's actions and omissions forming the composite act is irrelevant (**Section 2.3.3**).

2.3.1 The Claimant's claims were properly notified under Article 1119 NAFTA

77 In its Reply on Jurisdiction, the Respondent alleges that the Claimant submitted for the first time in its Reply that nine of the eleven actions constituting the Respondent's composite act constitute stand-alone breaches of the NAFTA.[80] The Respondent also argues that the Claimant, in its previous submissions, had not described any of these actions as stand-alone breaches of the NAFTA having caused it a loss.[81] It concludes that the Claimant is barred from alleging that these nine acts on which it relies as elements constituting a composite act constitute stand-alone breaches of the NAFTA.[82]

78 The argument misconstrues the Claimant's case and is flawed both procedurally and substantively.

79 **First**, the Claimant has not alleged that all of the acts forming the composite act in this case constituted stand-alone breaches of the NAFTA.

[80] Resp. Reply on Jurisdiction, p. 38 *et seq*. (paras. 105-107).

[81] Resp. Reply on Jurisdiction, p. 40 *et seq*. (paras. 107-114).

[82] Resp. Reply on Jurisdiction, p. 43 (para. 115).

On the contrary, it made clear in its Reply that its claims "arise out of actions and omissions that started in 2015, **some of which**, on their own, amount to a breach of the NAFTA",[83] and expressly identified them as (i) the December 2015 omissions of both the MELCC and the Agency to conduct a single federal assessment, or a joint assessment, and (ii) the Québec and Federal Government's decisions not to authorise the Project.[84] The Claimant also explained in relation to the other nine measures that, although they do not necessarily constitute on their own breaches of the NAFTA, they constitute, in aggregate and together with both the MELCC's and the Agency's actions and omissions that led to two separate EA processes and the Québec and Federal Governments' decisions not to authorise the GNLQ Project, a composite act constituting a breach of the NAFTA.[85]

80 The Respondent's complaint that there was no reference to those in the Notice of Intent or the Request for Arbitration is thus misguided.

81 Interestingly, in its Request for Bifurcation, the Respondent failed to argue that the Tribunal had no jurisdiction over the Claimant's claim that the lack of a single federal or joint assessment was a breach of the NAFTA because it had not been mentioned in the Notice of Intent, when that claim had already been raised in the Memorial. The Respondent's argument is thus as late as it is opportunistic.

82 **Second**, the Respondent adopts an overly formalistic approach to Article 1119 NAFTA and Article 2(2) of the ICSID Institution Rules governing the content requirements of the notice of intent and the request for arbitration.[86]

83 It is common ground that Article 1119 NAFTA requires, in connection with the notice of intent that it "specify […] (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions; (c) the

[83] Cl. Reply, p. 195 *et seq*. (para. 572) (emphasis added).

[84] Cl. Reply, p. 199 *et seq*. (paras. 578-596).

[85] Cl. Reply, p. 196 *et seq.* (paras. 574 and 578-596).

[86] Resp. Reply on Jurisdiction, p. 43 *set seq*. (paras. 118-121).

issues and the factual basis for the claim".[87] The Claimant did set out in Sections IV and V of its Notice of Intent the "provisions alleged to have been breached", namely Articles 1102, 1103, 1105 and 1110 NAFTA, as well as the "issues and factual basis for the claim", and thus complied with Article 1119 NAFTA.

84 It is similarly common ground that the ICSID Institution Rules, applicable pursuant to Article 1120 NAFTA require that a request for arbitration include "a summary of the relevant facts and claims". The Claimant did provide that summary as part of Sections IV and V of its Request for Arbitration.

85 Contrary to the Respondent's suggestion, these provisions do not require that the notice of intent and the request for arbitration include the entirety of the factual and legal basis of the Claimant's case and every single claim that the Claimant will make.[88] This would indeed run contrary to their stated purpose.

86 According to the FTC's Statement on notices of intent to submit a claim to arbitration, the notice of intent "naturally serves as the basis for consultations or negotiations between the disputing investor and the competent authorities of a Party."[89] This was also recognised by the tribunal in *B-Mex and others v. Mexico*, who stated that "the purpose of a notice of intent is to provide a NAFTA Party with the information it needs to assess amicable settlement opportunities as contemplated in Article 1118."[90]

87 In relation to the request for arbitration, as the Respondent itself points out, the purpose of Article 2(2) of the ICSID Institution Rules is to demonstrate the existence of a legal dispute arising in connection with an investment, within the meaning of Article 25 of the ICSID Convention.[91] It is not

[87] Resp. Reply on Jurisdiction, p. 43 *et seq*. (paras. 118-119).

[88] Resp. Reply on Jurisdiction, p. 45 (paras. 121-122).

[89] FTC Statement of Notices of Intent to Submit a Claim to Arbitration, 7 October 2003, at **Exhibit CL-361-ENG**, p. 1 (No. 2).

[90] *B-Mex et al. v. Mexico*, Final Award, 21 June 2024, at **Exhibit CL-362-ENG**, p. 181 (para. 130).

[91] Resp. Reply on Jurisdiction, p. 44 (para. 120).

disputed that the Claimant's Request for Arbitration met this requirement. Note D to Rule 2 of Institutional Rules 1968 further confirms that "[p]rovided the requesting party is confident that the information it furnishes shows that the dispute is not manifestly outside the Centre's jurisdiction, it may choose to develop such information at a later stage".[92]

88 It is well established that the request for arbitration need not contain all of the legal arguments or specific causes of action upon which the claimant intends to rely.[93] Nor does the information contained (or omitted) in the request for arbitration affect the claimant's right to submit incidental or additional claims under Article 46 of the ICSID Convention at a later stage of the proceedings.[94] As confirmed by the tribunal in *E Energija v. Latvia*, "Article 36(2) of the ICSID Convention (and Institution Rule 2) deal with the registration procedure, not with the jurisdiction of a tribunal constituted under the ICSID Convention", such that a jurisdictional objection cannot be based on alleged defects of the request for arbitration.[95]

89 Likewise, in *Cambodia Power v. Cambodia*, the tribunal refused to decline jurisdiction over a claim based on a deed of guarantee that had not been mentioned at all in the claimant's request for arbitration, holding that "[a]t no point do the Rules require the request for arbitration to articulate all legal arguments or specific causes of action that the claimant relies upon."[96]

90 In other words, the NAFTA parties did not intend for the notice of intent, or the request for arbitration, to constitute the ultimate statement of a claimant's factual and legal case, defining the jurisdictional ambit of the Tribunal's analysis.

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[92] ICSID Regulations and Rules (1968), at **Exhibit CL-363-ENG**, p. 30 *et seq.* (notes D, K).

[93] L. Malintoppi, "Article 36" in S. Schill *et al.* (eds), *Schreuer's Commentary on the ICSID Convention* (Cambridge University Press, 2022), 3rd edition, at **Exhibit CL-364-ENG**, p. 4 (para. 23).

[94] L. Malintoppi, "Article 36", at **Exhibit CL-364-ENG**, p. 5 (para. 27). See also *Hela Schwarz v. China,* Procedural Order No. 4, 15 May 2019, at **Exhibit CL-365-ENG**, p. 13 *et seq.* (paras. 42-44).

[95] *E energija v. Latvia*, Award, 22 December 2017, at **Exhibit CL-366-ENG**, p. 135 (para. 506).

[96] *Cambodia Power Company v. Cambodia*, Decision on Jurisdiction, 22 March 2011, at **Exhibit CL-251-ENG**, p. 75 *et seq.* (paras. 298-301).

91 **Third**, according to Rule 30 of the ICSID Arbitration Rules, the claimant's submission that must "contain a statement of the relevant facts, law and arguments, and the request for relief" is the memorial, not the request for arbitration.[97]

92 In its Memorial, the Claimant did argue that the Respondent had treated the GNLQ Project less favourably than other projects in like circumstances when subjecting it to two separate environmental assessments, in breach of Article 1111 and 1112 NAFTA.[98] The Claimant also established that the lack of joint assessment violated due process,[99] and constituted an unfair targeting of the Claimant,[100] in breach of Article 1105(1) NAFTA. In other words, as part of its Memorial, and in line with the ICSID Arbitration Rules, the Claimant did notify the Respondent that (i) the MELCC's decision to conduct an environmental assessment and omission to conduct a joint assessment and (ii) the Agency's omission to notify the MELCC that it would conduct a single federal assessment or that there would be a joint assessment, were actions and omissions of the Respondent part of the Claimant's claim for breach of the NAFTA .

93 In its Memorial, the Claimant also properly notified the Respondent that the Québec Government's leak of the withdrawal of a major investor combined with subsequent false press statements, was a relevant fact for its claim of breach of Article 1105 NAFTA. [101] Contrary to the Respondent's allegation, in the Reply the Claimant did not present this leak as a stand-alone breach of the NAFTA.[102]

94 In the same vein, the Claimant did refer in its Memorial to the following actions and omissions as wrongful and supporting its claims that the Respondent breached the NAFTA:

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[97] ICSID Convention, Regulations and Rules (2022) (English version), at **Exhibit CL-367-ENG**, p. 105 (Arbitration Rules, Rule 30).

[98] Memorial, p. 176 *et seq.* (paras. 587-594).

[99] Memorial, p. 182 *et seq*. (paras. 608-609).

[100] Memorial, p. 195 *et seq*. (paras. 652-657).

[101] See Memorial, p. 77 (para. 219).

[102] Resp. Reply on Jurisdiction, p. 47 *et seq.* (para. 132).

- the participation in the BAPE hearings on behalf of the Québec Government of researchers known to be hostile to the GNLQ Project;[103]
- the late announcement of three new and unprecedented core criteria to be met by the GNLQ Project to be authorised;[104]
- the tweet of a journalist referring to the position of a Liberal party's spokesperson that the GNLQ Project would not be authorised, thereby prejudging the outcome of the federal environmental assessment;[105]
- the decision of the federal Minister of Environment that the GNLQ Project would have adverse environmental effects;[106] and
- contrary to the Respondent's assertion, the Agency's attempt to expand the geographical scope of the federal environmental impact assessment.[107]

95 The only action to which the Claimant did not refer in its Memorial is the MELCC's requirement that GNLQ conduct a cost-benefit analysis. Rule 30 of the ICSID Arbitration Rules provides that the reply "shall be limited to responding to the previous written submission and addressing any relevant facts that are new or could not have been known prior to filing the reply". As explained in the Reply, the Claimant addressed the requirement for a cost-benefit analysis in response to the Respondent's own representations in its Counter-Memorial.[108] There was thus nothing improper with the Claimant's decision to address those arguments in the Reply.

96 **Finally**, the Respondent was not prejudiced by the Claimant's presentation of its claims allegedly for the first time in its Reply.[109] In particular, the

[103] See Memorial, p. 78 *et seq.* (paras. 225-232) and p. 182 *et seq.* (para. 608).

[104] See Memorial, p. 83 *et seq.* (paras. 244-249); p. 184 *et seq.* (paras. 610-618) and p. 189 (para. 628).

[105] See Memorial, p. 103 *et seq.* (paras. 316-319); p. 187 (para. 623); p. 193 (paras. 645-646).

[106] See Memorial, p. 105 (paras. 321-322) and p. 188 (para. 625).

[107] First Expert Report of Rodney Northey dated 20 November 2023, at **Exhibit CER-2**, p. 31 *et seq*. (para. 89).

[108] See Cl. Reply, p. 297 *et seq.* (para. 881).

[109] Resp. Reply on Jurisdiction, p. 45 (paras. 121-123).

Respondent's allegation that the Claimant would have deprived the Respondent of the opportunity to "*soulever des demandes de production documentaires se rapportant à ses allégations*" is unsubstantiated.[110] The Respondent is unable to provide any example of documents or categories of documents that it would have requested, but for the Claimant's alleged untimely presentation of its case.

97 As for the Respondent's allegation that "*la manière dont la demanderesse a présenté les allégations faisant l'objet du différent dans son mémoire a très probablement guidé les déterminations du Tribunal quant à la résolution des objections aux demandes de production documentaire*",[111] it is speculative and it is in any event wrong, as demonstrated by the example chosen by the Respondent.

98 The Respondent indeed argues that "*il est possible que le Tribunal n'ait pas rejeté la demande no 3 du Canada au motif de manque de pertinence des documents demandés pour la résolution du litige*" if the Claimant had included in its Request for Arbitration a reference to the MELCC's and the Agency's decisions not to conduct a single federal assessment or a joint assessment.[112] This is absurd given that, as shown above, the Claimant in its Memorial had referred to the MELCC's and the Agency's decision as constituting a breach of the NAFTA. The Tribunal thus rejected the Respondent's Request No. 3 knowing of the Claimant's claim that the lack of a single federal assessment or a joint assessment was wrongful.

99 In other words, the Respondent is unable to point to any prejudice resulting from the Claimant's alleged failure to set out its full factual and legal case in its Notice of Intent and Request for Arbitration.

2.3.2 The Claimant's claims are not time-barred under Article 1117(2) NAFTA

100 In its Reply on Jurisdiction, the Respondent finally addresses the Claimant's demonstration that the three-year limitation period of

[110] Resp. Reply on Jurisdiction, p. 45 (para. 123).

[111] Resp. Reply on Jurisdiction, p. 45 (para. 123).

[112] Resp. Reply on Jurisdiction, p. 45 (para. 123).

Article 1117(2) NAFTA is not a bar to the Claimant's claim deriving from the absence of a joint assessment, or of a single assessment by the Agency.[113]

101 Indeed, the Respondent first raised this argument in its Request for Bifurcation dated 5 January 2024[114] and repeated it in its Reply on Bifurcation dated 26 February 2024.[115] It was addressed in full in the Claimant's Rejoinder on Bifurcation, in which the Claimant recalled that the three-year limitation period of Article 1117(2) NAFTA applies as of the date on which a party first acquires knowledge of the loss it had incurred as a result of a breach.[116] The Claimant showed that it could only have acquired constructive knowledge of such loss when the Québec and Federal Governments decided not to authorise the Project on 21 July 2021 and 7 February 2022[117] respectively.[118] In its Counter-Memorial, the Respondent merely reiterated its earlier position, but did not comment on or respond to the Claimant's demonstration,[119] as the Claimant explained in its Reply.[120] The belatedness of the Respondent's arguments, in its Reply on Jurisdiction, speaks for itself.

102 The Respondent now acknowledges that the three-year limitation period of Article 1117(2) NAFTA is not as rigid as its own timeline submitted as Appendix II suggests. In particular, it acknowledges that the limitation period only begins when the Claimant first acquired, or should have first acquired, knowledge that it had incurred loss or damage as a result of the alleged breach.[121] The Respondent's case is that the Claimant had or should

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[113] See Resp. Reply on Jurisdiction, p. 52 *et seq.* (paras. 145-161).

[114] Respondent's Request for Bifurcation dated 5 January 2024, p. 20 *et seq.* (paras. 49-64).

[115] Respondent's Reply to the Claimant's Response to Canada's Request for Bifurcation dated 26 February 2024, p. 23 *et seq.* (paras. 47-61).

[116] Claimant's Rejoinder on Respondent's Request for Bifurcation, p. 25 (para. 82).

[117] On 3 February 2022 the Federal Government issued its decision (that the Project was likely to cause significant adverse environmental effects that were not justified in the circumstances). On 7 February 2022, the Minister of Environment issued the "Decision Statement" confirming this decision. See Cl. Reply, p. 194 (n. 843 and references included therein).

[118] Rejoinder on Bifurcation, p. 26 *et seq.* (paras. 89-92).

[119] Counter-Memorial, p. 97 *et seq.* (para. 271); see also p. 69 *et seq*. (para. 188).

[120] See Cl. Reply, p. 193 *et seq.* (paras. 563-568).

[121] Resp. Reply on Jurisdiction, p. 52 *et seq*. (paras. 147-149).

have acquired such knowledge at the time of the Respondent's breach of the NAFTA. This is disingenuous.

103 In support of its position, the Respondent relies on Me Duchaine's statement in her first report that the MELCC's and the Agency's actions and omissions in 2015 and 2016 caused the Claimant a loss as a result of the increased complexity and costs resulting from the initiation of two separate environmental assessment processes, instead of a single federal assessment, or a joint assessment.[122] The Respondent argues that the Claimant thus had or should have acquired knowledge of this at the time.[123] This argument is flawed.

104 **First**, the Claimant's claim is not for loss incurred on the basis that undergoing two environmental assessments instead of one increased its costs.[124]

105 This is what sets this case apart from *Bilcon v. Canada*, on which the Respondent erroneously relies.[125] In *Bilcon*, the "loss or damage" alleged by the claimants as part of their claims was indeed for "the expense and delay associated with participating in a JRP process".[126] In deciding that the claimants' claim for breach of the NAFTA was time-barred, the tribunal considered that the claimants must have known about these expenses and delays at the time, notably because they had submitted evidence of the filing of a "massive EIS".[127] In this case, the "loss or damage" suffered by the Claimant – for which it claims compensation - only materialised upon the decisions by the Québec and Federal Governments not to authorise the

[122] Resp. Reply on Jurisdiction, p. 54 (para. 151), referring to Duchaine II, at **Exhibit CER-1 (Second)**, p. 4 (para. 17); p. 33 *et seq.* (paras. 117, 139) and p. 156 (para. 424).

[123] Resp. Reply on Jurisdiction, p. 54 (para. 151).

[124] See Rejoinder on Bifurcation, p. 26 *et seq*. (paras. 88-90).

[125] Resp. Reply on Jurisdiction, p. 55 (paras. 152-153).

[126] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 78 (para. 280). See also *Bilcon of Delaware et al. v. Government of Canada*, PCA Case No. 2009-04, Statement of Claim, 30 January 2009 (amended 3 December 2009), at **Exhibit C-0636-ENG**, p. 10 (para. 39(a)).

[127] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 78 (para. 280).

Project on 21 July 2021 and 7 February 2022. The Claimant could not have acquired constructive knowledge of that loss until 21 July 2021.

106 Contrary to the Respondent's assertion, that distinction is not irrelevant.[128] The Respondent's argument that what matters is the Claimant's actual or constructive knowledge of any "loss or damage", not that the Claimant submitted a claim for compensation for such "loss or damage",[129] is wrong. It contradicts the clear language of the NAFTA.

107 Indeed, Article 1117(2) NAFTA reads:

> "An investor may not make **a claim** on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, **knowledge** of the **alleged breach** and **knowledge that** the enterprise has incurred **loss or damage**." (emphasis added)

108 The "knowledge that the [claimant] has incurred loss or damage" in that provision (and Article 1116(2) NAFTA) can only refer to the loss or damage the compensation of which is sought through "a claim" made by the claimant. The wording does not support a dissociation of "a claim" on the one hand, and the "loss or damage" on the other hand, as the Respondent argues. This would indeed be non-sensical. It would suggest that the slightest inconvenience that could qualify as a loss and that may have been caused by an act or omission of the State would automatically trigger the three-year limitation period, regardless of whether any related claim could arise from it. That is not what this article provides or indeed can have been intended to provide.

109 **Second**, the Respondent's position ignores that the MELCC's and the Agency's decisions not to conduct a single federal assessment or a joint assessment are both continuing breaches and the first actions and omissions in a chain of actions and omissions constituting a composite act. In such circumstances, investment treaty arbitration tribunals have determined that the wrongful conduct constituting the breach must have

[128] Resp. Reply on Jurisdiction, p. 55 *et seq*. (para. 154).

[129] Resp. Reply on Jurisdiction, p. 55 *et seq*. (para. 154).

come to an end for the investor to acquire actual or constructive knowledge that it has incurred loss or damage.[130]

110 **Third**, the Respondent's argument is factually incorrect. That the MELCC's and the Agency's decisions to conduct separate environmental assessments instead of one was more onerous to the Claimant is something Me Duchaine was able to determine *ex post facto*. However, the Claimant was not aware of such decisions at the time. As Mr Le Verger explains in his Second Witness Statement, the Claimant did not learn with certainty until this arbitration (i) whether and when the MELCC and the Agency made these decisions and (ii) the extent of the collaboration between the MELCC and the Agency throughout the EA processes.[131]

111 Furthermore, the evidence produced by the Respondent with its Counter-Memorial and in document production revealed that the MELCC and the Agency acted as if they would conduct a joint assessment.[132] The MELCC even indicated to GNLQ during a meeting of the interministerial committee set up to monitor the Project that the EA would be conducted jointly with the Agency.[133] This statement was reiterated in subsequent meetings of the interministerial committee, including as late as May 2018.[134] In other words, the Claimant was left in the dark and misled by

[130] See *United Parcel Service of America Inc. v. Government of Canada,* ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, at **Exhibit CL-023-ENG**, p. 13 (para. 28) ("continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here."); *Energía y Renovación v. Guatemala*, Award 31 March 2025, at **Exhibit CL-282-ENG-SPA**, p. 240 *et seq.* of the PDF (para. 240) ("the limitation period only starts to run when the damage is known") and p. 242 of the PDF (para. 244) ("above that the continuing illegality extends over time for the entire period during which the state persists in violating its obligations") (loose translations); *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 72 *et seq.* (para. 261).

[131] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 29 (paras. 82-85). See also Énergie Saguenay - Quarterly Status Report for the Port Authority from LNG Québec Inc. dated 1 September 2014, at **Exhibit C-0637-ENG**, p. 1 *et seq.* (s. B) (showing that the Claimant remained optimistic at the time that it would benefit from a joint environmental assessment).

[132] Cl. Reply, p. 51 *et seq*. (para. 152).

[133] MEIE, GNLQ interministerial committee monitoring table dated 26 November 2015, at **Exhibit C-0463-FRA**, p. 4 *et seq*.

[134] GNLQ, Monitoring Table for Interministerial Committee Meeting, at **Exhibit TLV-0107-FRA**, p. 4.

the Québec Government as to the nature of the EA process the Project would undergo for several years.

112 **Lastly**, the Respondent argues that the Claimant's claims that the Respondent breached the NAFTA as a result of (i) the MELCC's decision to request a cost-benefit analysis and (ii) the Agency's decision to extend the geographical scope of the federal assessment are similarly time-barred.[135] This contention is misplaced.

113 As mentioned in Section 2.2 above, the Claimant does not contend that these wrongful acts constitute stand-alone breaches of the NAFTA. They form part of a composite act and only amount to a breach of the NAFTA when examined in aggregate with other actions and omissions of the Respondent. The Respondent in fact recognises that the Claimant is not seeking any compensation for these individual actions and omissions.[136] The argument is thus moot.

2.3.3 That no autonomous loss derived from each specific act or omission by the Respondent is irrelevant

114 In its Reply on Jurisdiction, the Respondent argues that the Tribunal should decline jurisdiction over the actions and omissions for which the Claimant is not seeking compensation for an autonomous loss.[137] The argument does not hold water.

115 **First**, it is based on the erroneous assumption that the Claimant alleges that each of the actions and omissions constituting the composite act that destroyed the Claimant's investment also constitute stand-alone breaches of the NAFTA. As explained in Sections 2.2.2 and 2.2.3 above, this is not the case.

116 **Second**, the Respondent's argument ignores that the Claimant's claims are based on a series of actions and omissions by the Respondent, which, **in aggregate**, constitute a composite act. This composite act culminated in the Québec and Federal Government's decisions not to authorise the

[135] Resp. Reply on Jurisdiction, p. 56 *et seq*. (paras. 156-161).

[136] Resp. Reply on Jurisdiction, p. 57 (para. 160).

[137] Resp. Reply on Jurisdiction, p. 58 *et seq.* (paras. 162-165).

GNLQ Project. These decisions are the source of the Claimant's loss. However, the other actions and omissions relied upon by the Claimant, even though they did not directly cause such loss, were wrongful acts that led to these ultimate decisions. Declining jurisdiction over actions and omissions that did not cause a specific loss to the Claimant, but allowed the event causing that loss to occur, would be absurd.

117 The only case cited by the Respondent in support of its argument, *Tennant Energy v. Canada*, is inapposite.[138] As the Respondent admits, in *Tennant Energy*, the tribunal declined jurisdiction because the claimant had acquired an interest in a company only **after** it had incurred a loss as a result of the Respondent's actions and for a price reflecting such loss.[139] The Respondent does not explain how these circumstances are in any way similar to the present case where the Claimant maintained its interest in GNLQ and Gazoduq at all times.

2.4 The Claimant's claims accord with the intertemporal principle

118 The Respondent continues to argue that, in accordance with Article 13 of the ILC Articles[140] and Article 70 of the VCLT,[141] it cannot have breached an obligation if it was not bound by that obligation, "*car le Canada n'était plus lié par les obligations de l'ALÉNA après l'extinction du traité*."[142] It also refers to the following commentary to Article 15 of the ILC Articles:[143]

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[138] Resp. Reply on Jurisdiction, p. 58 (para. 163).

[139] *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Award, 25 October 2022, at **Exhibit RL-202-ENG**, p. 128 *et seq.* (paras. 443-444). See Resp. Reply on Jurisdiction, p. 58 (para. 163).

[140] ILC Articles on State Responsibility, at **Exhibit CL-283-ENG**, p. 4 (Art. 13) ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

[141] See paragraph 129 below.

[142] Resp. Reply on Jurisdiction, p. 5 (para. 8); see also p. 4 *et seq.* (paras. 7 and 9).

[143] ILC Articles on State Responsibility, at **Exhibit CL-283-ENG**, p. 5 (Art. 15) ("1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act. 2. In such a case, the breach

> "The word 'remain' in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the 'first' of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent)."[144]

119 The Claimant does not dispute the intertemporal principle as described above and as expressed in Article 13 of the ILC Articles and Article 70 of the VCLT.[145]

120 **First**, however, as the Respondent recognises, the commentary to Article 15 quoted above addresses the situation where an obligation under the treaty did not exist "at the beginning of the course of conduct but came into existence thereafter".[146] Understandably, in that situation, the breach can only begin when the treaty enters into force. The situation is different here: the composite act commenced when the NAFTA was in effect (2015) and extended during a period of time which was largely prior to the termination of the NAFTA (in July 2020) and then culminated in events that occurred after the termination of the NAFTA (in 2021 and early 2022).[147]

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extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.").

[144] ILC Articles on State Responsibility, at **Exhibit CL-283-ENG**, p. 63 *et seq.*; see also Resp. Reply on Jurisdiction, p. 67 (para. 186) (referring to **Exhibit RL-064-FRA**).

[145] See also Resp. Reply on Jurisdiction, p. 4 *et seq.* (paras. 7-11) and paragraph 130 below.

[146] See Resp. Reply on Jurisdiction, p. 67 *et seq.* (para. 187); see also paragraph 118 above.

[147] See paragraph 23 above; see also Cl. Reply, p. 196 *et seq.* (para. 574); see also, generally, p. 195 *et seq.* (s. 3.2).

121 The commentary does not address this situation, where a treaty is terminated during a series of actions and omissions comprising a composite act and where an obligation exists **at the beginning** of the course of conduct but no longer exists at the end of the course of conduct.[148] In such cases, simply put, when the treaty terminates, the breach is already there.[149] One is thus able to take into account later actions and omissions – post-dating the termination – when defining the composite act, even if the breach only crystallises and only reveals itself after the termination.

122 Were this position not taken, a respondent State would be able to avoid liability for an unlawful act that it begins to commit before the termination of a treaty but only completes after that date. This cannot be right.

123 Furthermore, if the Tribunal were minded to take into account considerations of equity as the Respondent elsewhere argues,[150] these

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[148] As explained elsewhere, it is, however, in any event, the Claimant's case that the substantive obligations at issue here also existed at the end of the course of conduct.

[149] The cases to which the Respondent refers at paragraph 188 only address the situation where an obligation did not exist at the beginning of the course of conduct but came into being thereafter. These situations thus differ from the one at hand, as they all concerned the application of the principle of non-retroactivity of treaties. Moreover, nearly all the cases cited by the Respondent in paragraph 188 acknowledge that facts formally outside the tribunal's temporal jurisdiction may nonetheless be relied upon to establish a breach of a treaty obligation. See *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic,* LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, at **Exhibit RL-207-ENG**, p. 42 *et seq.* (para. 92); *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador,* PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, at **Exhibit RL-208-ENG**, p. 137 *et seq.* (para. 301); *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, at **Exhibit RL-070-ENG**, p. 160 *et seq.* (para. 558); *Walter Bau v. Thailand*, Award, 1 July 2009, at **Exhibit RL-209-ENG**, p. 116 *et seq.* (paras. 9.91, 12.22-12.23); *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011 dated 18 February 2011, at **Exhibit RL-210-FRA**, p. 63 *et seq.* (para. 178); *Mondev v. U.S.*, Award, 11 October 2002, at **Exhibit CL-037-ENG**, p. 22 *et seq.* (paras. 69-70); *Pac Rim v. El Salvador*, Decision on Respondent's Jurisdictional Objections, 1 June 2012, at **Exhibit RL-199-ENG**, p. 67 of the PDF (para. 2.105).

[150] See Resp. Reply on Jurisdiction, p. 9 *et seq.* (para. 22) ("*même dans les rares cas d'expropriation directe,* ***des principes d'équité procédurale pourraient être invoqués pour empêcher le rejet d'une plainte*** *au motif que l'expropriation d'un investissement aurait privé un investisseur d'un 'investissement antérieur'. Comme le faisait remarquer le tribunal dans*

would militate in the Claimant's favour. It would indeed be manifestly inequitable for the Tribunal to deny jurisdiction over the claims in this case where the actions and omissions at issue commenced well before the termination of the NAFTA but where the wrongful composite act was not revealed until after the termination of the NAFTA.

124 **Second**, Annex 14-C does not exclude claims arising out of composite acts (or continuing breaches) that straddle the termination the NAFTA. The USMCA Parties could have easily done so but did not; accordingly, no such exclusion can be read into Annex 14-C.

125 As discussed in the Claimant's Reply and Section 3.1.4 below, at least one tribunal has upheld jurisdiction under Annex 14-C over claims arising out of a legacy investment and State measures that both pre-dated and post-dated the termination of the NAFTA: *Finley v. Mexico*.[151]

126 Conversely, the *TC Energy* tribunal was not faced with claims arising out of a continuing or composite act. The Respondent's assertion that the *TC Energy* majority decision "*a aussi confirmé l'application du principe d'intertemporalité dans le cas d'une allégation de manquement composite dans le passage de la décision* […] *traitant de la note de bas de page 21 du Chapitre 14 de l'ACEUM*"[152] is therefore misleading.[153] The *TC Energy* majority simply questioned (effectively, in *obiter dicta*) whether footnote

l'affaire Westmoreland III: 'given the wording of Paragraph 1 of Annex 14-C, in which the USMCA Parties consented to arbitrate claims of breach of an obligation under Chapter 11, including expropriation under Article 1110, a good faith interpretation of the 'in existence' requirement would imply disregarding that requirement in cases where the 'non-existence' is caused by the respondent State.'") (emphasis added).

[151] See Cl. Reply, p. 220 *et seq.* (paras. 657-658); see Section 3.1.4 below.

[152] Resp. Reply on Jurisdiction, p. 69 (para. 189).

[153] The *TC Energy* majority stated that "a NAFTA tribunal would in case of a continuous or composite breach have no jurisdiction to assess the parts of that breach occurring after the NAFTA termination; equally, a USMCA tribunal would not have jurisdiction to assess facts occurring before USMCA's entry into force." at *TC Energy v. U.S.*, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p. 41 (para. 167). However, the issue was not argued before the *TC Energy* tribunal and the majority wrongly assumed that these two scenarios were the same (see above paragraphs 120-123).

21 in Annex 14-C might have anticipated such claims.[154] The substantive point was addressed in the Reply and is further addressed below in Section 3.1.4,[155] but the Respondent's speculation as to why TC Energy did or did not formulate its claims in a certain manner is of no moment .[156]

127 **Third**, as detailed in Section 3 below, it remains the Claimant's case that, in any event, Annex 14-C extended the substantive obligations of the NAFTA Chapter 11, Section A for a transition period of three years.

[154] See *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p. 41 (para. 167) ("In the case of a composite breach, **there may** also be uncertainty as to when the action or omission occurred which, taken with the other actions or omissions, constitutes the wrongful act. The parties **may** have wanted to eliminate this by including footnote 21.") (emphasis added).

[155] See Cl. Reply, p. 210 *et seq.* (s. 3.3.2.2).

[156] The *TC Energy* majority decision suggests elsewhere that the outcome might have been different if TC Energy had presented a claim of breach arising out of a composite act. *TC Energy v. U.S.*, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p. 51 *et seq.* (para. 209) ("**The difficulty is however** that the Claimants are not asking the Tribunal to find that the U.S. breached its obligations under NAFTA in 2016 (which claim would in any event be time-barred), **nor do they submit that the alleged breach supporting their claim would be a continuous or composite breach having started in 2016**.") (emphasis added); see also Resp. Reply on Jurisdiction, p. 69 (para. 189).

3 CLAIMS ARISING OUT OF MEASURES THAT OCCURED DURING THE THREE-YEAR TRANSITION PERIOD FALL WITHIN THE SCOPE OF ANNEX 14-C OF THE USMCA

128 As explained in Section 2 above, it is the Claimant's case that the Respondent's substantive obligations under the NAFTA continued to exist in the cases of continuing breach and composite acts, which straddle the termination of the treaty. In any event though, under Annex 14-C properly interpreted, those obligations exist during the transition period that followed the termination of the NAFTA.

129 In its Reply on Jurisdiction, the Respondent, however, wrongly maintains that the Respondent's consent to arbitration in Annex 14-C of the USMCA does not cover claims that arise out of measures that post-date the termination of the NAFTA.

130 As the Claimant previously noted, Article 70(1) VCLT confirms that it is possible to provide for the continued application of a treaty after its termination:

> "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."[157]

131 The Respondent does not dispute that a treaty can thus continue to apply in two scenarios: (i) when the treaty being terminated so provides (*i.e.*, through a so-called sunset clause); or (ii) when the parties so provide in a separate agreement ("or the parties otherwise agree").[158]

132 For the reasons set out in this Section, the latter scenario is the one that materialised here: in the USMCA, the Parties agreed that certain provisions of the NAFTA would continue to apply. Even if the NAFTA expired on 1 July 2020, certain provisions remained in effect for a transition period of three years, thereby allowing claims in connection with actions and omissions that occurred after 1 July 2020.[159]

133 In its Reply on Jurisdiction, the Respondent continues to argue that Annex 14-C is procedural in nature and that "*l'objet de l'accord des Parties à l'ACEUM contenu à l'annexe 14-C est l'extension de leur consentement à l'arbitrage, et non l'extension des obligations de fond du chapitre 11 de l'ALÉNA*."[160]

134 However, there is no reason to conclude that Annex 14-C extended the NAFTA Chapter 11, Section B, but not Section A. Although Annex 14-C does not expressly extend the substantive obligations of Chapter 11, Section A, for three years, Annex 14-C also does not expressly state that those substantive obligations are not extended.[161] The Respondent provides no support for its interpretation of Annex 14-C, other than the *TC*

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[157] Vienna Convention on the Law of Treaties, at **Exhibit CL-284-ENG**, p. 24 (Art. 70) (emphasis added); see also Cl. Reply, p. 212 (paras. 627-628).

[158] Cl. Reply, p. 212 (para. 628). The Respondent refers to the finding of the majority of the TC Energy tribunal that "According to Article 70, unless the treaty provides otherwise (which is not the case, as indicated above) […]"). However, as previously noted, the decision of the majority of the tribunal in *TC Energy v. U.S.* is of limited relevance. See Cl. Reply, p. 205 *et seq.* (s. 3.3.1).

[159] Cl. Reply, p. 212 (para. 629); Memorial, p. 116 *et seq.* (para. 365).

[160] Resp. Reply on Jurisdiction, p. 7 (paras. 14-15).

[161] Cl. Reply, p. 210 *et seq.* (para. 623).

Energy v. U.S. majority decision, through an improper circular reasoning. Furthermore, that decision provides limited guidance.[162]

135 The application of the principles in the VCLT, first, as to the ordinary meaning of the terms of Annex 14-C, second as to their context, confirm the Claimant's interpretation of Annex 14-C, namely that it covers claims that arise out of measures that post-date the termination of the NAFTA and, more specifically, that occur during the three-year transition period between 1 July 2020 to 1 July 2023 (**Sections 3.1 and 3.2**).

136 In this regard, there was and is no agreement of the USMCA Parties on a contrary interpretation of Annex 14-C, nor any established practice reflecting such an agreement (**Section 3.3**).

137 Lastly, relevant supplementary means of interpretation (within the meaning of the VCLT), support the Claimant's interpretation of Annex 14-C; none on record support the Respondent interpretation (**Section 3.4**).

138 In any event, for the reasons explained in Section 2, even if the Tribunal concluded that Annex 14-C did not extend the substantive obligations of the NAFTA Chapter 11, Section A (*quod non*), it would still have jurisdiction over (i) the Claimant's claims of breach arising out of the Respondent's composite act,[163] which consisted of measures both pre-dating and post-dating the termination of the NAFTA, and (ii) the Claimant's claims of breach that pre-date the termination of the NAFTA).[164]

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[162] The decision is of limited relevance mainly because, in the present case, all of the Respondent's wrongful acts, including those that took place after the termination of the NAFTA, are part of a composite act and are thus dated to the first act (in 2015). Cl. Reply, p. 205 *et seq.* (s. 3.3.1). Furthermore, the *TC Energy* majority decision and dissent are heavily redacted.

[163] It would thus have jurisdiction over the claims that the Respondent's composite act breached Articles 1102, 1103 and 1105 NAFTA. See Cl. Reply, p. 196 *et seq.* (para. 574); p. 285 (para. 847) and p. 341 (para. 1009).

[164] The Tribunal would have jurisdiction over the claims of standalone breaches that pre-dated the termination of the NAFTA, namely: (i) the failure to carry out a single federal EA or a joint EA in breach of Article 1105 and Article 1102 NAFTA (Cl. Reply, p. 287 *et seq.* (paras. 850-874) and p. 342 (paras. 1013-1028)); and (ii) Québec Government's leak of confidential

3.1 Article 31(1) VCLT: The ordinary meaning of Annex 14-C of the USMCA

139 Article 31 VCLT set outs the general rule of treaty interpretation: the starting point is 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."[165]

140 Contrary to the Respondent's arguments,[166] the ordinary meaning of Annex 14-C of the USMCA is that both the NAFTA, Chapter 11, Section A provisions (relating to the substantive protections of foreign investments) and the Section B provisions (relating to the settlement of disputes arising out of those investments) were extended beyond the termination of the NAFTA, for three years, until 1 July 2023.[167]

141 In the Reply on Jurisdiction, the Respondent no longer argues that the Claimant bears the burden of proving that the Respondent consented to the present claims being submitted to arbitration. As demonstrated in the Reply and not disputed by the Respondent, (i) burden of proof is only relevant for purposes of establishing the facts underlying a party's jurisdictional case and there are no such factual issues here on the interpretation of Annex 14-C,[168] and (ii) investment treaty arbitration tribunals have held that the notion of burden of proof does not apply when determining a tribunal's jurisdiction to hear a dispute arising under an investment treaty.[169]

142 It is thus incumbent on the Tribunal, through the application of the VCLT, to satisfy itself of the meaning of Annex 14-C. For the reasons recalled below, the ordinary meaning of the terms of Annex 14-C is that the annex covers claims arising out of measures post-dating the termination of the

information about an investor's decision not to invest in the GNLQ Project in breach of Article 1105 NAFTA (Cl. Reply, p. 294 *et seq.* (paras. 874-877)).

[165] VCLT, at **Exhibit CL-284-ENG** p. 12 (Art. 31).

[166] Resp. Reply on Jurisdiction, p. 6 *et seq.* (paras. 12 *et seq.*).

[167] See Cl. Reply, p. 206 *et seq.* (s. 3.3.2).

[168] See Cl. Reply, p. 206 (para. 610) (also noting that the issue here is not whether there is consent in Annex 14-C; the issue is the scope of that consent).

[169] See Cl. Reply, p. 206 *et seq.* (para. 611) (and evidence cited therein).

USMCA and falling within the three-year transition period (**Sections 3.1.2 to 3.1.4**).

3.1.1 Paragraphs 1 to 3 of Annex 14-C support the Claimant's interpretation

143 Paragraphs 1 to 3 of Annex 14-C concern legacy investments, not legacy investment claims and there is no basis to add words to paragraph 3 to give it a different meaning, as the Respondent has done.

(i) Overview of Paragraphs 1 to 3 of Annex 14-C

144 The first paragraph of Annex 14-C, entitled "Legacy Investment Claims and Pending Claims," provides as follows:

> "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**. [references to footnotes 20 and 21]"[170]

145 A "legacy investment" is defined at paragraph 6(a) 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."[171]

[170] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 1 (Art. 1) (emphasis added). Footnotes 20 and 21 to paragraph 1 are discussed below.

[171] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 2 (Art. 6(a)).

146 Paragraph 1(a) thus provides an explicit consent of the USMCA Parties to the submission of a claim arising out of a legacy investment and alleging breach of a NAFTA substantive obligation (a breach of the NAFTA, Chapter 11, Section A).

147 Paragraphs 2 and 3 of Annex 14-C provide:

> "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."[172]

148 Paragraph 3 thus establishes the transition period of three years, from 1 July 2020 until 1 July 2023.

149 The ordinary meaning of these provisions is that the USMCA Parties consent to arbitrate claims arising from legacy investments, subject to four conditions:

- the claim must concern a legacy investment,
- the claim must allege a breach of an obligation under the NAFTA, Chapter 11, Section A;
- the claim must be made under the procedure set out in the NAFTA, Chapter 11, Section B; and

[172] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 1 (emphasis added).

- the claim must be brought within three years of the termination of the NAFTA, *i.e.*, before 1 July 2023.[173]

150 It remains the Claimant's position that, in this case, the conditions are met, because the claims:

- concern a legacy investment;
- allege breaches of obligations under the NAFTA, Chapter 11, Section A (specifically Articles 1102, 1103, 1105 and 1110);
- were made in accordance with the procedures set out in Section B; and
- were brought within three years of the termination of the NAFTA.[174]

151 Accordingly, the Respondent has consented to arbitrate the Claimant's claims before the Tribunal.

(ii) Annex 14-C is concerned with legacy investments, not legacy investment claims

152 The Respondent does not, and indeed cannot, dispute that, while Annex 14-C defines a "legacy investment", it does not define a "legacy investment claim", which is a term only used in the heading of Annex 14-C, but not in the body of the annex. The Respondent furthermore does not dispute that, if Annex 14-C were concerned with legacy investment "**claims**" rather than legacy investments, such claims would have been defined (*e.g.*, as "claims that arose prior to the date of entry into force of the USMCA"). They were not. Nor can it dispute that the heading of Annex 14-C must therefore be read simply as referring to claims concerning or arising out of "legacy investments" as defined in the annex.[175]

153 If the USMCA Parties had intended to exclude claims that arose after the entry into force of the USMCA, they could have limited the scope of Annex 14-C to pending claims (as described at Annex 14-C, paragraph 5) and to claims that were "outstanding" when the USMCA entered into force

[173] See Cl. Reply, p. 208 *et seq.* (para. 616) (and evidence cited therein).

[174] See Cl. Reply, p. 209 (para. 618) (and evidence cited therein).

[175] See Cl. Reply, p. 209 *et seq.* (para. 620) (and references cited therein).

and then simply extended the claim period for a further period of three years.[176]

154 This is precisely what the Parties to the Claims Settlement Declaration, including the U.S., did when establishing the Iran-United States Claims Tribunal in January 1981. The Declaration provided:

> "An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding **claims** of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, **if such claims and counterclaims are outstanding on the date of this Agreement**, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights […]"[177]

155 The U.S. State Department officials who negotiated Annex 14-C would have been familiar with the Claims Settlement Declaration, as it relates to an international tribunal still in place and operational, and thus of the possibility of limiting the scope of Annex 14-C to claims that were "outstanding" as at the entry into force of the USMCA. They, however, did not espouse that formulation.

156 The same goes for Canada, as shown by the language of the Comprehensive Economic and Trade Agreement between Canada and the

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[176] Email correspondence between L. Mandell and K. Gharbieh dated 2 March 2021, at **Exhibit C-0638-ENG**, p. 3 *et seq*. ("Regarding your question, we intended the annex to cover measures in existence before AND after USMCA entry into force. That could probably be clearer. I'd have to think about the best textual argument, but the one that immediately comes to mind rests on paragraph 3. If we were just intending to allow claims for pre-existing measures, we likely wouldn't have framed a three-year consent period -- we would have just defaulted to the statute of limitations in NAFTA Section B that would apply to claims for those measures. In other words, we would have omitted paragraph 3 altogether. The contrary argument - the purpose of paragraph 3 was intended to alter the SOL [statute of limitation] for claims with respect to pre-existing measures, that's it, doesn't make a lot of sense.").

[177] Claims Settlement Declaration, at **Exhibit CL-368-ENG**, p. 1 (Art. II(1)) (emphasis added).

E.U. (the "**CETA**"), signed in 2016. CETA Article 30.8 provides, at paragraph 1, that certain agreements listed in annex (*i.e.*, certain treaties between individual EU Member States and Canada) would be "replaced and superseded" by its entry into force, and:

> "Notwithstanding paragraph 1, **a claim may be submitted** under an agreement listed in Annex 30-A in accordance with the rules and procedures established in the agreement if:
>
> (a) **the treatment that is object of the claim was accorded when the agreement was not terminated**; and
>
> (b) no more than three years have elapsed since the date of termination of the agreement."[178]

157 The CETA Parties thus made clear that a claim could be submitted under one of the superseded agreements based only on measures pre-dating the termination of the agreement in question. This demonstrates that when Canada wishes to preclude or preserve claims, in cases where one treaty is replacing another, it knows how to do so. Annex 14-C does not, however, include such language.

158 The language of the Canada-Peru Free Trade Agreement (the "**Canada-Peru FTA**"), which replaced an investment treaty between the two countries signed in 2006, is equally revealing. It provides:

> "1. The Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments done in Hanoi on 14 November 2006 (the 'FIPA') shall be suspended from the date of entry into force of this Agreement and until such time as this Agreement is no longer in force.
>
> 2. Notwithstanding paragraph 1, the FIPA 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 FIPA that occurred before the entry into force of this Agreement**. During this period the right of an investor of a Party to submit a claim to arbitration

[178] Canada-European Union Comprehensive Economic and Trade Agreement (2017), at **Exhibit CL-369-ENG**, p. 194 (Art. 30.8(1) and (2)) (emphasis added).

concerning such a breach shall be governed by the relevant provisions of the FIPA."[179]

159 There too, Canada was able to make clear, upon the termination and replacement of a treaty, that claims would be allowed under that treaty only in connection with measures pre-dating the termination. By contrast, Annex 14-C does not limit claims arising out of legacy investments to claims arising out of "[a] breach of the obligations of the [NAFTA] that occurred before the entry into force of the [USMCA]."

(iii) The Respondent improperly adds words to paragraph 3 of Annex 14-C

160 In the Reply on Jurisdiction, the Respondent makes a new argument with regard to paragraph 3 of Annex 14-C.

161 It had previously argued that the transition period under that paragraph corresponded to the three-year limitation period under Articles 1116 and 1117 NAFTA and therefore suggested that Annex 14-C only envisaged claims based on events that pre-date the termination of the NAFTA.[180]

162 In its Reply, the Claimant explained that, if the USMCA Parties had intended to only allow claims based on measures that pre-date the termination of the NAFTA, they would not have needed to include paragraph 3 of Annex 14-C.[181]

163 Faced with this argument, the Respondent has adjusted its position and now argues the following:

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[179] Canada-Peru Free Trade Agreement (2009), Chapter 8, at **Exhibit CL-370-ENG**, p. 16 (Art. 845) (emphasis added).

[180] Resp. Reply on Jurisdiction, p. 7 *et seq.* (paras. 16-18); see also Counter-Memorial, p. 6 (para. 10); Cl. Reply, p. 213 (para. 630).

[181] An investor with a legacy investment harmed before the termination of the NAFTA, would in any case have been able to file a claim for three years by virtue of, and in accordance with, paragraphs 1 and 2 of Annex 14-C, as combined with Articles 1116 and 1117 NAFTA. By including the third paragraph in Article 1, the USMCA Parties thus allowed for new claims that might arise out of legacy investments in the three years following the termination of the NAFTA. See Cl. Reply, p. 213 (para. 632) (and evidence cited therein). Furthermore, paragraph 3 does not preclude claims arising out of continuing breaches or wrongful composite acts that straddle the termination of the NAFTA.

> "***La limite temporelle du paragraphe 3 de l'annexe 14-C se distingue de celles prévues aux articles 1116(2) et 1117(2)*** *de l'ALÉNA, qui dépendent du moment où l'investisseur ou l'entreprise a acquis pour la première fois la connaissance réelle ou présumée du manquement allégué et de la perte ou du dommage subi. Alors que les limites prévues aux articles 1116(2) et 1117(2) sont théoriquement infinies, le paragraphe 3 impose une limite fixe offrant plus de certitude aux Parties quant à la fenêtre temporelle durant laquelle de nouvelles plaintes peuvent être déposées contre elles*."[182]

164 The Respondent thus seeks to explain the inclusion of paragraph 3 in Annex 14-C by ascribing to it a new *effet utile*, *i.e.*, purportedly to provide a cut-off date for the submission of claims based on events that pre-dated the termination of the NAFTA.[183]

165 However, **first**, paragraph 3 does not state that it is imposing "*une limite fixe offrant plus de certitude aux Parties quant à la fenêtre temporelle durant laquelle de nouvelles plaintes peuvent être déposées contre elles*." Paragraph 3 does not refer to "*plaintes*" (claims). It *a fortiori* does not state that:

- claims filed under Annex 14-C must arise out of events pre-dating the termination of the NAFTA; or that
- the conditions for establishing a claim (including knowledge of the damage caused by an alleged breach) must have occurred before the termination of the NAFTA.

166 Paragraph 3 simply refers to the notion of "consent under paragraph 1". The Respondent is again adding language to Annex 14-C where none exists.[184]

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[182] Resp. Reply on Jurisdiction, p. 8 (para. 17) (emphasis added); see also p. 24 (para. 67) ("*L'annexe 14-C introduit aussi une limite temporelle fixe de trois ans au consentement des Parties, qui ne dépend pas de la connaissance réelle ou présumée des investisseurs ou de leurs entreprises*.").

[183] Resp. Reply on Jurisdiction, p. 8 (para. 17).

[184] See more generally Cl. Reply, p. 222 *et seq.* (s. 3.3.2.2(iv)) (explaining how the Respondent improperly seeks to add a temporal requirement to Annex 14-C, where none exists).

167 **Second**, in the same way as the Respondent provided no support for its position that the three-year transition period was intended to mirror the three-year statute of limitations under Articles 1116 and 1117 (as the Respondent previously argued), it has provided no support for its (new, alternative) position, other than the findings of the majority of the tribunal in *TC Energy v. US*, again through improper circular reasoning.[185]

168 Indeed, had the USMCA Parties wished to align the duration of the transition period with that of the NAFTA statute of limitations, this intent would be reflected in the *travaux prépatoires* or other documents relating to the negotiation of Annex 14-C. The Respondent does not refer to any such documents.

169 **Third**, the Claimant's interpretation of paragraph 3, namely that, by including the third paragraph, the USMCA Parties allowed for new claims that might arise out of legacy investments in the three years following the termination of the NAFTA, stands unrebutted. It reflects the ordinary meaning of the terms of that paragraph and, unlike the Respondent's interpretation, does not require the addition of words.

3.1.2 Paragraph 6(a) envisages claims arising out of NAFTA breaches that occur during the three-year transition period

170 As recalled above, paragraph 1 of Annex 14-C provides for the USMCA Parties' consent to the submission of a claim arising out of a legacy investment alleging a breach of Chapter 11, Section A of the NAFTA. Paragraph 6(a) in turn defines a "legacy investment" as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and **in existence on the date of entry into force of this Agreement**."[186]

[185] Cl. Reply, p. 213 (para. 631) ("[T]he Respondent has submitted no evidence in support of that argument, and specifically no evidence of an intention to ensure that the length of the Annex 14-C transition period would coincide with that of the NAFTA limitation period.").

[186] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 2 (Art. 6) (emphasis added); See also Cl. Reply, p. 210 *et seq.* (para. 621) and p. 214 (para. 634).

171 In its Reply, the Claimant explained why the Respondent's reading of Annex 14-C would result in absurd consequences, namely, by excluding expropriation claims even if they arose prior to 1 July 2020.[187] Indeed, the Respondent's interpretation of Annex 14-C would disregard the phrase "in existence" and deny it of any *effet utile* since it would mean that an investor that made an investment before the termination of the NAFTA and whose investment was expropriated before the termination of the NAFTA would not be able to file a claim under Annex 14-C (since the investment would no longer be "in existence").[188] By contrast, the Claimant's interpretation of Annex 14-C gives *effet utile* to the phrase "in existence" in paragraph 6(a), consistent with the terms and object of Annex 14-C as it permits claims based on measures that post-dated the termination of the NAFTA.[189]

172 In its Reply on Jurisdiction, the Respondent proffers no explanation for this conundrum – a conundrum resulting from its own interpretation of Annex 14-C.[190] Rather, it seeks to dismiss the Claimant's arguments on the grounds that, in any event, most expropriations are indirect (not direct) and that in such situations, investors retain some control over at least a portion of their investment. Effectively, the Respondent dismisses the Claimant's hypothetical scenario on the grounds that it is in practice unlikely.[191]

173 There is, however, nothing unlikely or unusual about the Claimant's hypothetical scenario. Expropriation claims – both direct and indirect – are common in investor-State arbitration, and it remains the case that the Respondent's interpretation of Annex 14-C would preclude expropriation claims in circumstances where the investor lost the investment in its entirety prior to the termination of the NAFTA.

174 To avoid this difficulty, the Respondent argues that "*même dans les rares cas d'expropriation directe, des principes d'équité procédurale pourraient*

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[187] See also Cl. Reply, p. 214 (para. 634).

[188] The Respondent in fact now recognizes that Annex 14-C "*exclut toute plainte relative à un investissement qui aurait cessé d'exister avant l'extinction de l'ALÉNA*." Resp. Reply on Jurisdiction, p. 24 (para. 67); see Cl. Reply, p. 215 (paras. 637-638).

[189] Cl. Reply, p. 215 *et seq.* (paras. 639-640); see also p. see also p. 214 *et seq.* (paras. 634-640).

[190] Resp. Reply on Jurisdiction, p. 8 *et seq.* (paras. 19-23).

[191] Resp. Reply on Jurisdiction, p. 9 (para. 21).

être invoqués pour empêcher le rejet d'une plainte au motif que l'expropriation d'un investissement aurait privé un investisseur d'un 'investissement antérieur'".[192]

175 In support of this argument, the Respondent relies on the tribunal's observations regarding the definition of a legacy investment in *Westmoreland Coal Company v. Canada* ("***Westmoreland III***"),[193] which are cited in full below:

> "Fifth, while ownership or control at the time of the USMCA's entry into force would present a difficulty in disputes involving expropriation, the Tribunal does not see such difficulty as an obstacle to its reading of Paragraph 6(a). Assuming that an investment was expropriated prior to NAFTA's termination, the investor would have lost ownership or control by the time when the USMCA entered into force. It would thus arguably lack an investment 'in existence' and thus a 'legacy investment'.
>
> The Respondent conceded at the Hearing that 'there may be limited circumstances where a State would not be able to rely on the 'in existence' requirement', but submitted they were hypothetical. In the Tribunal's view, given the wording of Paragraph 1 of Annex 14-C, in which the USMCA Parties consented to arbitrate claims of breach of an obligation under Chapter 11, including expropriation under Article 1110, a good faith interpretation of the 'in existence'

[192] Resp. Reply on Jurisdiction, p. 9 (para. 22).

[193] The Respondent also refers to the tribunal's observation in *Westmoreland III* that Annex 14-C "offers investment protection for breaches preceding the USMCA that occurred while NAFTA was still in force, a proposition that is **common ground between the Parties**." Resp. Reply on Jurisdiction, p. 1 *et seq.* (para. 2, n. 3; n. 14) (referring to *Westmoreland Coal Company v. Government of Canada (III)*, ICSID Case No. UNCT/23/2, Award, 17 December 2024, at **Exhibit RL-184-ENG**, p. 37 *et seq.* (para. 143) (emphasis added)). However, as the quoted passage states, this proposition was undisputed in that case. Indeed, the alleged breaches took place before the termination of the NAFTA. There was no argument and thus no discussion as to whether Annex 14-C extended the substantive protections under the NAFTA for three years. The case is therefore inapposite.

> requirement would imply disregarding that requirement in cases where the 'non-existence' is caused by the respondent State."[194]

176 **First**, the *Westmoreland III* case is different from the case at hand mainly in that the State measures at issue all preceded the termination of the NAFTA (all occurring in 2015-2016), and there had been a change in ownership and control of the investment (in 2019) prior to the filing of the claims. The respondent challenged the tribunal's jurisdiction on grounds that (i) the claims were time-barred and that (ii) they did not comply with Annex 14-C. The tribunal denied jurisdiction on the first ground, namely, that the claims were time-barred. Its comments on Annex 14-C were thus effectively made *in obiter*.

177 **Second**, as the *Westmoreland III* tribunal confirmed, the claimant did not hold an investment at the time of the termination of the NAFTA.[195] The claimant in that case had sought to minimize the language of Annex 14-C requiring a legacy investment "in existence" when the USMCA entered into force; the respondent, on the contrary, had insisted on the requirement that, under Annex 14-C, there must be a legacy investment "in existence" when the USMCA entered into force and that that phrase must be given *effet utile.* The tribunal's findings must therefore be read against that background.

178 Indeed, the *Westmoreland III* tribunal found, on the facts, that there was no legacy investment "in existence" when the USMCA entered into force. On that basis, it concluded that the claims were not brought with respect to a legacy investment, as required under paragraph 6(a) of Annex 14-C.[196] Again, the above remarks were made in that specific context.

179 In reaching its conclusions, the tribunal noted that the claimant was wrongly trying to substitute the notion of "legacy investment" (defined in paragraph 6(a)) with that of "legacy investment claim" (not defined in

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[194] Resp. Reply on Jurisdiction, p. 9 *et seq.* (para. 22); *Westmoreland v. Canada (III)*, Award, 17 December 2024, at **Exhibit RL-184-ENG**, p. 44 (paras. 168-169).

[195] *Westmoreland v. Canada (III)*, Award, 17 December 2024, at **Exhibit RL-184-ENG**, p. 44 (para. 171).

[196] *Westmoreland v. Canada (III)*, Award, 17 December 2024, at **Exhibit RL-184-ENG**, p. 45 (para. 175).

paragraph 6(a)) and that the "term 'claim' appears nowhere in that provision".[197] The tribunal further held that "[t]he language in Paragraph 6(a) requiring an investment 'in existence' upon the entry into force of the USMCA was a distinct element of the 'legacy investment' definition that must be given *effet utile*."[198] The Claimant agrees.

180 The Claimant further agrees that there might be circumstances – where a respondent State expropriated the investment prior to the entry into force of the USMCA – when the phrase "in existence" might not be given *effet utile.* However, this is not inconsistent with the default/primary position that Annex 14-C does require a legacy investment "in existence" when the USMCA entered into force and that the phrase "in existence" must be given *effet utile*, as the *Westmoreland III* tribunal itself also emphasized.

181 Accordingly, Annex 14-C can only be read to extend the substantive obligations of the NAFTA for a period of three years. There would otherwise be no need – under any circumstance – to require an investment "in existence" when the USMCA entered into force.

182 The Respondent also relies on the *Westmoreland III* award to deny that its interpretation of Annex 14-C would give rise to absurd results : "*[l]e choix des Parties à l'ACEUM de conditionner leur consentement à l'arbitrage de plaintes en instance et de plaintes relatives à des investissements antérieurs à des exigences additionnelles* ***n'a rien d'absurde*** *et n'est en aucun cas contraire à l'objet et au but de l'ACEUM, comme l'a reconnu le tribunal dans l'affaire Westmoreland III*".[199] It quotes the following passage from the *Westmoreland III* award:

> "[…] there is nothing 'absurd' about investors, whose claims arise from acts taken while NAFTA was in force but who filed their claims after NAFTA was terminated, having to meet new requirements under the USMCA framework to receive NAFTA protection. […] Beyond that, the Contracting States were entitled

[197] *Westmoreland v. Canada (III)*, Award, 17 December 2024, at **Exhibit RL-184-ENG**, p. 41 (para. 160).
[198] *Westmoreland v. Canada (III)*, Award, 17 December 2024, at **Exhibit RL-184-ENG**, p. 41 (para. 161).
[199] Resp. Reply on Jurisdiction, p. 24 (para. 68) (emphasis added).

> to tailor their consent to ISDS as they saw fit. While this included the option to withhold ISDS protection entirely for NAFTA-era claims, the USMCA Parties instead chose to offer limited protection by prolonging the effects of NAFTA subject to additional conditions, such as the 'in existence' language embedded in Paragraph 6(a)."[200]

183 The Claimant agrees with these findings. The USMCA Parties could have agreed to terminate the NAFTA without any transition period, but this is not what they did. As noted in *Westmoreland III*, they established a transition period and a requirement that claimants hold a legacy investment "in existence" at the time of the entry into force of the USMCA.

184 In any event, again, in *Westmoreland III*, all of the State acts at issue preceded the termination of the NAFTA. The tribunal thus did not need to decide whether Annex 14-C extended the substantive obligations of the NAFTA.

3.1.3 Footnote 20 supports the Claimant's interpretation of Annex 14-C

185 Footnote 20 to paragraph 1 of Annex 14-C provides as follows:

> "**For greater certainty**, the relevant provisions in Chapter 2 (General Definitions), **Chapter 11 (Section A) (Investment)**, Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 **apply with respect to such a claim**."[201]

186 The ordinary meaning of these terms is that the provisions of Chapter 11, Section A, which comprise the NAFTA substantive obligations vis-à-vis foreign investors, "apply with respect to" the claims described in

[200] *Westmoreland v. Canada (III)*, Award, 17 December 2024, at **Exhibit RL-184-ENG**, p. 43 (para. 166)

[201] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 1 (n. 20) (emphasis added).

paragraph 1 of Annex 14-C. In other words, the claims described in paragraph 1 may arise out of, and thus allege violations of the obligations contained in, Chapter 11, Section A.[202] This implies that those obligations are extended for the duration of the three-year transition period.

187 In the Reply on Jurisdiction, the Respondent creatively argues that "*l'effet utile de la note de bas de page 20 est de confirmer ce que stipule le principe d'intertemporalité, et non de prolonger l'application des obligations de fond du chapitre 11 de l'ALÉNA*."[203] This is a tortuous explanation for a simple phrase. Footnote 20 does not refer to the intertemporal principle. Nor does it say that Section A does not apply (rather, it does the opposite). The Respondent thus again reads into footnote 20 language that is not there.

188 Referring to observations of the majority of the *TC Energy* tribunal, the Respondent argues that the phrase "for greater certainty" is to "confirm the existence of a given rule," not "to introduce new obligations."[204] The Claimant disagrees.

189 The phrase "for greater certainty" can be used not only to "confirm," but also to "clarify" a proposition. It means to make something clearer, more definite, or to remove any doubt or ambiguity.[205] Whether it means one or the other, or both, depends on the context.

190 The plain meaning of footnote 20 is that it seeks to confirm and clarify the meaning of paragraph 1 of Annex 14-C. The Respondent has no credible answer to the Claimant's position that footnote 20 only has *effet utile* if it confirms that Section A **continues to apply**, *i.e.*, it is extended for the three-year transition period. Otherwise, the reference to Section A offers

[202] Cl. Reply, p. 216 (para. 642).

[203] Resp. Reply on Jurisdiction, p. 10 (para. 26).

[204] Resp. Reply on Jurisdiction, p. 10 *et seq.* (para. 26).

[205] B. Garner (ed), *Black's Law Dictionary* (2019) (excerpt of definition 'Certainty'), at **Exhibit CL-371-ENG**, p. 279; L. Brown (ed), *The New Shorter Oxford English Dictionary*, Volume 1 (excerpt of definition 'Certainty' and 'Certain'), at **Exhibit CL-372-ENG**, p. 364.

no greater certainty as compared to paragraph 1 and would be meaningless.[206]

191 Grasping at straws, the Respondent seeks to contrast the reference in footnote 20 to a "claim" with references in Chapter 14 of the USMCA to "measures."[207]

192 It is however not clear what conclusion the Respondent seeks to draw from the use of the word "claim" (versus "measure") in footnote 20. Annex 14-C indeed does not refer to "measures". *A fortiori*, it does not require that the State "measures" underlying Annex 14-C claims have occurred at a particular point in time.

193 The reference in footnote 20 to a "claim" does not support the Respondent's argument that the purpose of footnote 20 is to specify that a claim brought under paragraph 1 concerning a breach pre-dating the expiration of the NAFTA should be considered in the light of the provisions applicable at the time. That is not what footnote 20 says. It does not refer to a breach (or measure) pre-dating the termination of the NAFTA and, more broadly, it does not contain any temporal limitation or requirement.[208]

194 For all of these reasons, Footnote 20 must mean, based on paragraph 3 of Annex 14-C, that a "claim" may include a claim arising out of measures taken during the three-year period following the termination of the NAFTA. Thus, the relevant provisions of NAFTA, Chapter 11, Section A continue to apply to claims brought during the three-year transition period.[209] Footnote 20 can also be understood to mean that, at a minimum,

[206] Cl. Reply, p. 217 (para. 645).

[207] The Respondent's similar reference to a footnote in Annex 14-E to the USMCA is of even less avail. Resp. Reply on Jurisdiction, p. 11 *et seq.* (paras. 27-30).

[208] See also Cl. Reply, p. 217 (para. 644).

[209] See Cl. Reply, p. 217 (para. 646); see also *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 4 (para. 10) ("Annex 14-C 1 plainly refers to both sections of Chapter 11 and provides for the application of each in the case of a claim with respect to a legacy investment. The application of Section A is confirmed by footnote 20.").

Annex 14-C covers continuing breaches and composite acts that started before the termination of the NAFTA.

3.1.4 Footnote 21 supports the Claimant's interpretation of Annex 14-C

195 The Respondent remains unable to convincingly explain footnote 21 to paragraph 1 of Annex 14-C, which provides as follows:

> "Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)."[210]

196 As demonstrated below, the Claimant's interpretation of Annex 14-C accords with the ordinary meaning of the terms of footnote 21. Furthermore, although the majority in *TC Energy* considered whether footnote 21 may have been intended to address situations of continuous breaches, its observations are of limited guidance, not least because it was not addressing such claims. By contrast, the *Finley v. Mexico* tribunal, faced with claims of continuous or composite breach arising out of measures pre-dating and post-dating the termination of the NAFTA concluded, in part based on footnote 21, that those claims were properly brought under Annex 14-C.

(i) The ordinary meaning of Footnote 21

197 As the Claimant demonstrated in its Reply, on a plain reading, footnote 21 carves out an exception to paragraph 1 for claims arising out of covered government contracts and arising between Mexican and U.S. parties, which should be submitted to arbitration in accordance with Annex 14-E. Footnote 21 is thus aimed at avoiding a possible overlap between Annex 14-C arbitrations and Annex 14-E arbitrations and requires Mexican and U.S. investors who meet the requirements of both Annex 14-C and 14-E to

[210] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 1 (n. 21).

follow the arbitration procedures set out in Annex 14-E.[211] Annex 14-C and Annex 14-E can overlap **only if** they **both** apply to measures that **post-date** the termination of the NAFTA. This is the only interpretation of footnote 21 that gives it *effet utile*.[212]

198 Conversely, footnote 21 does not contain an agreement not to extend the NAFTA, Chapter 11, Section A obligations.[213] Referring to Article 70.1(a) of the VCLT, the Respondent argues that footnote 21 did not need to do so: "*il n'était pas nécessaire pour les Parties à l'ACEUM de spécifier – ni dans la note de bas de page 21 ni ailleurs dans l'ACEUM – que les obligations de la section A du chapitre 11 de l'ALÉNA cesseraient de s'appliquer à l'extinction du traité, puisque la conséquence de l'extinction est déjà déterminée par le droit international.*"[214] This reasoning is circular and flawed.

199 The only interpretation of footnote 21 that gives it *effet utile* assumes that the Chapter 11, Section A obligations **were** extended. Annex 14-C is an agreement of the USMCA Parties by which they effectively created an exception to the rule, under Article 70(1)(a) of the VCLT, that the termination of a treaty releases the parties from any obligation further to perform the treaty.[215]

200 Ultimately – and the Respondent does not dispute this point –footnote 21 is silent on the timing of the NAFTA breach. It does not require the NAFTA breach to have occurred before 1 July 2020. The Respondent thus reads into footnote 21 a requirement that is not there.[216]

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[211] See Cl. Reply, p. 218 (para. 648); see also *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 4 *et seq.* (para. 12, n. 3) ("in footnote 21 the Parties addressed the potential overlap between Annex 14-C 1 and Annex 14-E 2 and Mexico and the United States expressly excluded their consent to arbitrate in such a case.").

[212] See Cl. Reply, p. 218 (para. 649); see also p. 219 (para. 653) ("the **only** interpretation of footnote 21 that gives it an *effet utile* assumes that the Chapter 11 Section A obligations **are extended** for the transition period of three years.") (emphasis in original).

[213] Cl. Reply, p. 219 (para. 653).

[214] Resp. Reply on Jurisdiction, p. 14 (para. 35).

[215] See Cl. Reply, p. 219 *et seq.* (paras. 653 and 666); see paragraph 130 above.

[216] See Cl. Reply, p. 219 *et seq.* (para. 654).

201 The Claimant's interpretation of footnote 21 is supported by the conclusions of Mr Henri Alvarez in his dissenting opinion in *TC Energy v. U.S.*, which referenced an internal USTR email. That email stated that footnote 21 would not have been necessary if Annex 14-C only envisaged claims based on measures pre-dating the termination of the NAFTA.[217] As far as one is able to ascertain from the redacted decision, the majority in *TC Energy* did not comment on the substance of that particular email exchange and its impact on the interpretation of footnote 21. In its Reply on Jurisdiction, the Respondent also failed to comment on this point and provided no documentary or witness evidence contradicting the Claimant's interpretation of footnote 21.

(ii) The TC Energy majority's observations on footnote 21 and continuous breaches are of limited relevance

202 The Respondent puts forward the following alternative interpretation of footnote 21, of which it in fact appears unconvinced: "[…] *le Canada a expliqué que l'effet de la note de bas de page 21* ***pourrait se manifester*** *dans une situation d'acte continu chevauchant la date à laquelle l'ACEUM a remplacé l'ALENA* […]".[218]

203 In support of that interpretation of footnote 21, the Respondent relies solely on certain statements by the majority of the tribunal in *TC Energy v. U.S.*[219] However, the remarks of the *TC Energy* majority should be taken with caution, for reasons already explained and because TC Energy did not argue that there had been a wrongful composite act in breach of the

[217] See Cl. Reply, p. 218 *et seq.* (paras. 650-651); *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 9 *et seq.* (para. 29); Email correspondence between L. Mandell and K. Gharbieh dated 2 March 2021, at **Exhibit C-0638-ENG**, p. 3 *et seq.* ("Finally, I think footnote 21 probably helps as well. The whole point of the footnote was to require keyhole investors to arbitrate under the 'new and improved' USMCA rules and procedures (there was no reason to give them the option of arbitrating under NAFTA rules and procedures under 14-C instead). **If 14-C only applied to preexisting measures, there'd be no reason to say that**. We'd just be punishing keyhole investors, which is contrary to the clear intentions of the whole keyhole framework.") (emphasis added).

[218] Resp. Reply on Jurisdiction, p. 12 *et seq.* (para. 33) (emphasis added).

[219] See Resp. Reply on Jurisdiction, p. 12 *et seq.* (para. 33).

NAFTA, nor did it argue a continuous breach.[220] The facts of the case are indeed different from those at issue in this case.[221]

204 As it was not faced with such claims, the *TC Energy* majority did not conclude that Annex 14-C would preclude a tribunal from hearing claims arising out of measures both pre-dating and post-dating the termination of the NAFTA and representing either a continuous breach or a composite breach. The majority recognised that "[i]n the case of a composite breach, there may also be uncertainty as to when the action or omission occurred which, taken with the other actions or omissions, constitutes the wrongful act."[222]

205 In any event, footnote 21 does not refer to continuous or composite breaches. The plain reading of footnote 21 is simply that an investor may meet the conditions of **both** Annex 14-C and Annex 14-E and, in that regard, that there may be an overlap between the two regimes.[223]

(iii) The Finley v. Mexico tribunal upheld jurisdiction over claims that straddled the NAFTA termination, in part by reference to footnote 21

206 Furthermore, as explained in the Claimant's Reply, at least one other tribunal, in *Finley v. Mexico*, has upheld jurisdiction under Annex 14-C of the USMCA over claims arising out of measures both pre-dating and post-dating the termination of the NAFTA and in part by reference to footnote

[220] See Cl. Reply, p. 205 (s. 3.3.1).

[221] See Cl. Reply, p. 205 (para. 604).

[222] As the Respondent notes, the *TC Energy* majority also stated, "**Footnote 21 does therefore not necessarily presuppose** that Chapter 11 remains in force after 30 June 2020: the parties **may have wanted** to avoid the uncertainties described above and the potential parallel arbitrations." *TC Energy v. U.S.*, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p. 41 (para. 167). See Resp. Reply on Jurisdiction, p. 12 *et seq.* (para. 33) (internal quotations omitted) (emphasis added). The majority thus did not exclude the possibility that footnote 21 presupposed that Chapter 11 (*i.e.*, Sections A and B) would remain in force after 30 June 2020.

[223] See Cl. Reply, p. 220 (para. 656).

21.[224] In that case, the tribunal in its January 2025 decision, concluded as follows:

> "The Tribunal is cognizant of the temporal peculiarities of the claims in this arbitration, **to the extent that the facts underlying the claims straddle separate periods in which the NAFTA and the USMCA were in force,** respectively. Consequently, this has forced the Claimants to interpret the temporal procedural rules contained in the USMCA (**including footnote 21**) and, in the Tribunal's view, they have interpreted those rules in a consistent and reasonable manner.
>
> As the Claimants have argued, the facts related to [*sic*] 821 Contract pose a particular legal conundrum, **to the extent that some of them took place before the entry into force of the USMCA** (e.g., the ruling of the TFJA in 2018), **which led them to present that claim under Annex 14-C ('legacy investments'), while other facts took place after that date, some even after this arbitration had already commenced** (e.g., the unilateral signature of the *finiquito* on November 10, 2021 and the subsequent calling upon of the Dorama Bond). **In the Tribunal's view, the Claimants were right in presenting their claim(s) related to the 821 Contract under Annex 14-C of the USMCA and, hence, under the legacy provisions of the NAFTA**."[225]

207 The *Finley* tribunal thus found that a claim could be made under Annex 14-C in circumstances where the measures invoked both pre-dated and post-dated the termination of the NAFTA.

208 In its Reply on Jurisdiction, the Respondent seeks to distinguish *Finley v. Mexico* on four grounds, none of which is convincing. [226]

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[224] See Cl. Reply, p. 220 *et seq.* (paras. 657-658) (describing the relevant facts of the case).

[225] *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 62 (paras. 213-214) (emphasis added); see also p. 58 (para. 196) (regarding the 803 and 804 Contracts, the claimants also noted that "[t]he underlying acts **commenced prior to and continued after** the USMCA's effective date.") (emphasis added).

[226] Resp. Reply on Jurisdiction, p. 14 *et seq.* (paras. 36-43).

209 **First**, the Respondent argues that the *Finley* tribunal made its decision for reasons of procedural economy that would not apply in this case.[227] The *Finley* tribunal specifically held that:

> "**it would neither have been reasonable or appropriate nor procedurally economical** to require the Claimants to argue their case concerning the *finiquito* or the calling of the Dorama Bond [the disputed measures that post-dated the termination of the NAFTA] separately, as a new Annex 14-E claim, let alone start a new arbitration to deal with that alleged breach instead."[228]

210 It is undisputed that in that case – which involved a U.S. claimant and Mexico – the question was in part whether the claims were properly brought under Annex 14-C and/or Annex 14-E.[229] This in turn led to a question as to whether there should be two arbitrations: one for measures pre-dating the termination of the NAFTA and one for measures post-dating the termination of the NAFTA.[230] It is in that specific context that the tribunal considered the question of procedural economy. That question indeed does not arise in the present case.[231]

211 In *Finley*, the tribunal did conclude that it had jurisdiction under Annex 14-C of the USMCA over claims based on measures that straddled the NAFTA termination date, and procedural economy did not, and indeed cannot in and of itself, provide a basis for such jurisdiction.

212 To the extent that the Tribunal would want to consider what is "reasonable or appropriate", when assessing the Respondent's jurisdictional objection based on Annex 14-C, as in *Finley*, then the Tribunal should uphold jurisdiction. It would indeed be reasonable and appropriate to uphold

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[227] Resp. Reply on Jurisdiction, p. 14 *et seq.* (paras. 36-37, 39); *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 62 (para. 214).

[228] *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 62 (para. 214) (emphasis added).

[229] *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 122 (para. 460).

[230] *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 62 (para. 214) and p. 122 *et seq.* (para. 460).

[231] Resp. Reply on Jurisdiction, p. 16 (para. 40).

jurisdiction over claims arising out of measures that started years before the termination of the NAFTA but where the breach only crystallized and the harm only revealed itself after the termination of the NAFTA. The contrary would be manifestly unreasonable and inappropriate.

213 **Second**, the Respondent seeks to distinguish *Finley v. Mexico* on the basis that Mexico purportedly did not oppose the tribunal's jurisdiction under Annex 14-C.[232] In reality, the *Finley* tribunal found that Mexico had made only a "belated, oblique reference […] to the non-applicability of […] NAFTA".[233]

214 In any case, even if Mexico had made no objection at all on this issue (*quod non*), such an omission would not diminish the relevance of the *Finley* tribunal's findings. If anything, the paucity and tardiness of Mexico's objections on this issue – as well as the failure of Canada and the U.S. to file Article 1128 submissions on that issue in that case[234] – supports the Claimant's position: the USMCA Parties considered that where a claim arises out of disputed State measures that straddle the NAFTA termination date, it can validly be brought under Annex 14-C.

215 **Third**, the Respondent argues that, in *Finley*, "*la seule mesure qui est postérieure à l'entrée en vigueur de l'ACEUM est une décision qui avait, dans les faits, déjà été prise trois ans auparavant alors que l'ALÉNA était toujours en vigueur*".[235] It is true that the tribunal found that the "substantive decision to claim the entire USD 41.8 million amount of the

[232] However, in this case, the Respondent also did not promptly oppose the tribunal's jurisdiction under Annex 14-C. See below Section 3.3; see also Resp. Reply on Jurisdiction, p. 15 (para. 38).

[233] *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 123 (paras. 463-464) ("[…] in its PHB the Respondent argued in passing that 'Pemex filed its formal claim for the Dorama Bond after the NAFTA terminated, as the Claimants confirm, and thus, Article 1105 does not apply.'").

[234] The Respondent could have made an Article 1128 submission in this case in August 2023 but failed to do so. *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 8 (para. 50). While the U.S. made an Article 1128 submission in that case, its submission did not address this issue as such. See *Finley Resources v. Mexico*, Submission of the United States of America, 31 August 2023, at **Exhibit C-0639-ENG**.

[235] Resp. Reply on Jurisdiction, p. 15 (para. 38).

Dorama Bond was taken by PEP's [*Petróleos Exploración y Producción*, a subsidiary of Pemex] management during its meeting […] on May 16, 2018, well before the USMCA entered into force in July 2020."[236]

216 However, two further key events occurred after the termination of the NAFTA in connection with the 821 Contract: (i) on 10 November 2021, following the initiation of arbitration, Pemex issued a unilateral "*finiquito*" (termination) of the 821 Contract; and (ii) on 2 December 2021, Pemex sought to claim the USD 41.8 million Dorama performance bond associated with it.[237] The claimants were effectively arguing that Mexico had committed – vis à vis three contracts (the 803/804 contracts[238] and the 821 contract[239]) – continuous[240] breaches of the NAFTA, based on measures that pre-dated and post-dated the termination of the NAFTA.[241]

217 In any case, even though the *Finley* tribunal observed that the decision to call the bond had been made before the termination of the NAFTA, it also concluded that the disputed State measures that post-dated the termination of the NAFTA (the termination of the 821 contract and the calling of the

[236] *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 123 (para. 465).

[237] See *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 50 (para. 170) and p. 123 (para. 465); see also p. 122 (para. 459).

[238] With regard to the 803 and 804 Contracts, the claimants argued that Mexico breached Art. 1105 NAFTA and Art. 14.6(1) USMCA by denying justice through undue delay as the local litigation started in 2015 and continued through 2021 without deciding the claims on the merits. The tribunal dismissed this claim on the merits.

[239] With regard to the 821 Contract, the claimants argued that Mexico breached Arts. 1105 on MST and FET of the NAFTA and 1102 on National Treatment of the NAFTA by a cumulative act consisting of at least the following acts: (i) adopting the decision to on 16 May 2018 to call the Dorama Bond; (ii) issuing on 10 November 2021 the unilateral *finiquito* of the 821 Contract; (iii) continuation, after 9 April 2018, of the legal defence against the claimant in the nullity proceedings. This claim was accepted by the tribunal.

[240] The claimants described the breaches as "continuous" or "continuing" and as in part continuing into the period where the USMCA came into existence. See *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 58 (para. 196), p. 102 *et seq.* (paras. 368, 447).

[241] The claimants furthermore rejected the respondent's arguments relating to continuous breaches. *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 119 (para. 447); see also p. 118 (para. 443) (describing respondent's position).

bond) were "**directly linked** to the administrative rescission of the 821 Contract [on 28 August 2017] and **to all of the facts of this case**."[242]

218 The Respondent argues that, by contrast to the *Finley* case, the decisions of the Québec and federal governments to reject the GNLQ Project were not made when the NAFTA was in effect and only formalised after the after the termination of the NAFTA.[243]

219 However, as in *Finley* and as discussed above in Section 2.2.2, the events in this case that pre-dated and post-dated the termination of the NAFTA are directly linked and indissociable from one another. They do not represent disjointed actions and omissions. They are all linked to the EA permitting process; in the same vein, the actions and omissions in *Finley v. Mexico* all related to certain contracts.

220 **Fourth**, the Respondent relies on an observation by the *Finley* tribunal that the substantive protections afforded by the NAFTA and the USMCA concerning the minimum standard of treatment and national treatment are similar.[244] That observation again does not lessen the relevance of the tribunal's conclusion that it had jurisdiction under Annex 14-C of the USMCA over claims based on measures that straddled the NAFTA termination date. Like the *Finley* tribunal, this Tribunal is also faced with claims based on measures pre-dating and post-dating the termination of the NAFTA.

221 To conclude, the Respondent's attempts to distinguish the *Finley* award are all misguided. As in *Finley*, the wrongful measures in the present case occurred before and after the entry of force of the USMCA. The Tribunal therefore has jurisdiction over the claims, as they arise out of legacy investments and are properly brought under Annex 14-C.[245]

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[242] *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 122 (para. 461) (emphasis added).

[243] Resp. Reply on Jurisdiction, p. 16 (para. 42).

[244] Resp. Reply on Jurisdiction, p. 15 (para. 38); *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 124 (para. 466).

[245] See also Cl. Reply, p. 222 (para. 661).

3.2 Article 31(1) and (2) VCLT: The context of Annex 14-C and the relevant object and purpose of the USMCA

222 Under Article 31(1) VCLT, the terms of a treaty should be considered "in their context and in the light of [the treaty's] object and purpose." Article 31(2) VCLT specifies that the "context" refers to the text of the treaty, including the preamble and annexes.[246]

223 None of the Respondent's arguments in the Reply on Jurisdiction rebut the Claimant's demonstration that the Protocol, the Preamble, and Article 34.1 of the USMCA lend support to the Claimant's interpretation of Annex 14-C (**Section 3.2.1 to Section 3.2.3**). Furthermore, Article 14.2 of the USMCA also provides useful context to the interpretation of Annex 14-C (**Section 3.2.4**).[247]

3.2.1 The USMCA Protocol supports the Claimant's interpretation of Annex 14-C

224 Under Article 31(2) VCLT, the "context" for purposes of interpreting a treaty includes "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty."[248] The Respondent does not dispute that the Protocol is such an agreement and that it may therefore provide context with regard to the USMCA, including Annex 14-C.

225 Article 1 of the Protocol provides:

> "Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, **without**

[246] See Cl. Reply, p. 225 (para. 667).

[247] The Respondent has not pursued its argument that paragraphs 1 and 2 of Annex 14-C are similar to Articles 1116, 1117 and 1122 NAFTA and that, accordingly, those paragraphs aim provide only dispute resolution mechanisms. In its Reply, the Claimant demonstrated why that argument was misguided. See Cl. Reply, p. 225 *et seq.* (s. 3.3.3.1).

[248] VCLT, at **Exhibit CL-284-ENG**, p. 12 (Art. 31(2)); see also Cl. Reply, p. 226 *et seq.* (para. 675).

> **prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA**."[249]

226 On its ordinary meaning, Article 1 of the Protocol thus provides that the USMCA supersedes the NAFTA without, however, affecting the USMCA provisions that refer to the NAFTA provisions.[250] Stated differently, the USMCA did not supersede the NAFTA in its entirety and without exception. Instead, Article 1 of the Protocol confirms that the USMCA Parties sought to extend certain provisions of the NAFTA.[251]

227 In its Reply on Jurisdiction, the Respondent has provided no basis, evidentiary or otherwise, to counter this straightforward interpretation.

228 When referring to Article 1 of the Protocol, the Respondent emphasises the term "supersede" and minimises the phrase "without prejudice" and wrongly denies not only the ordinary meaning of these terms as set out above, but also its *effet utile*.[252]

229 The phrase "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA" is not an anodyne phrase; it must be given *effet utile*. "Without prejudice" means "without detriment to any existing **right**."[253] In Article 1 of the Protocol, the USMCA Parties thus expressed their intention to maintain certain rights established by the NAFTA. Had the USMCA Parties intended the USMCA to replace the NAFTA entirely and without exception, they would not have included that phrase. Conversely, by doing so, they recognised that some provisions of the NAFTA were extended in time.

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[249] Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada (2018) dated 30 November 2018, at **Exhibit CL-002-ENG**, p. 1 (Art. 1) (emphasis added).

[250] See Cl. Reply, p. 227 (para. 677); see also *Alberta Petroleum Marketing Commission v. The Government of the United States of America*, ICSID Case No. UNCT/23/4, Claimant's Counter-Memorial on Preliminary Objections, 16 December 2024, at **Exhibit CL-300-ENG**, p. 21 (para. 50) ("the whole purpose of the Protocol […] states that [the USMCA] would in certain respects maintain the NAFTA provisions for certain purposes").

[251] Cl. Reply, p. 227 *et seq.* (paras. 678-679).

[252] Resp. Reply on Jurisdiction, p. 17 *et seq.* (paras. 45-48).

[253] Government of Canada, "Without Prejudice" (accessed 8 August 2025), at **Exhibit C-0640-FRA**, p. 1 (emphasis added).

230 The Respondent contends that the USMCA extends obligations under the NAFTA in only three instances, at Articles 34.1.4 to 34.1.6 of the USMCA, which refer to the NAFTA Chapters 5 and 19.[254] That contention is not correct on the Respondent's own case that, through Annex 14-C, the USMCA extended the obligations under the NAFTA, Chapter 11, Section B.[255]

231 In support of its argument, the Respondent refers to the *Crystalline Silicon Photovoltaic Cells Safeguard Measure* final report dated 1 February 2022.[256] However, its reference to that dispute (the "**Crystalline Silicon dispute**") is misleading.

232 The Crystalline Silicon dispute arose out of the U.S.'s imposition in 2018 of safeguard measures in the form of tariffs on imports from Canada of crystalline silicon photovoltaic cells.[257] This led to a State-to-State dispute between Canada and the U.S. In December 2020, further to Article 31.4 of the USMCA, Canada requested consultations with the U.S.; when those consultations failed, in accordance with Article 31.6 (and following) of the USMCA, a panel heard the dispute and rendered a report in February 2022.[258] After first considering whether it had jurisdiction over the dispute (and concluding that it did), the panel found that the U.S. had violated its obligations under Article 2.4.2 of the USMCA (relating to the treatment of customs duties).[259]

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[254] Resp. Reply on Jurisdiction, p. 19 *et seq.* (paras. 51-52).

[255] See also *Alberta Petroleum Marketing Comission v. United States of America*, ICSID Case No. UNCT/23/4, Claimant's Rejoinder on Preliminary Objections, 7 July 2025, at **Exhibit C-0641-ENG**, p. 42 *et seq.* (para. 91) ("A further circulated version of the Protocol from the United States delegation then included an approving comment from Canada and one apparently from the United States stating: 'I think it is clearer, and transitional provisions can appear anywhere in the text, not just necessarily in the Final Provisions.'").

[256] Resp. Reply on Jurisdiction, p. 20 (para. 53) (referring to *Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USA-CDA-2021-31-01, Final Report, 1 February 2022, at **Exhibit RL-188-ENG**).

[257] *Crystalline Silicon dispute*, Final Report, 1 February 2022, at **Exhibit RL-188-ENG**, p. 4 (para. 1).

[258] *Crystalline Silicon dispute*, Final Report, 1 February 2022, at **Exhibit RL-188-ENG**, p. 4 *et seq.* (paras. 1-13).

[259] *Crystalline Silicon dispute*, Final Report, 1 February 2022, at **Exhibit RL-188-ENG**, p. 41 *et seq.* (paras. 142 and 147).

233 That dispute was therefore a trade dispute brought under Chapter 31 of the USMCA (not an investor-State dispute brought under Chapter 14 as in the present case).[260] The report did not consider or mention Annex 14-C, nor did it have any reason to do so.

234 In the report, the panel observed that "[w]here the Parties wanted to carry over specific the [sic] NAFTA obligations, such as NAFTA Chapter Nineteen [concerning Review and Dispute Settlement in Antidumping and Countervailing Duty Matters], they did so explicitly in Article 34."[261] That is however not to the exclusion of other provisions of the USMCA that "carry over" the NAFTA provisions. As noted above, on the Respondent's own case, Annex 14-C carried over Chapter 11, Section B of the NAFTA – even though Article 34 makes no mention of the NAFTA Chapter 11 (or Annex 14-C).[262]

235 In its Rejoinder on Jurisdiction, the Respondent does not pursue its prior argument that, had the USMCA Parties wished to extend the obligations of the NAFTA Chapter 11, Section A, they could have done so by including language equivalent to that of a sunset clause, and rightly so.[263] As the Claimant explained in its Reply, the USMCA Parties stated at Annex 14-C that they wished to maintain in effect the NAFTA, Chapter 11, Section A

[260] The Crystalline Silicon dispute involved State measures that pre-dated and post-dated the termination of the NAFTA. Canada argued that "the safeguard measure was in place when the USMCA came into force" and that the "continuation of the safeguard measure under the USMCA was a 'continuing breach.'" The panel ultimately side-stepped the question of whether there was a continuing breach. *Crystalline Silicon dispute*, Final Report, 1 February 2022, at **Exhibit RL-188-ENG**, p. 6 *et seq.* (paras. 15, 31, 32, 39, 44, and 66).

[261] Resp. Reply on Jurisdiction, p. 20 (para. 53, n. 53); *Crystalline Silicon dispute*, Final Report, 1 February 2022, at **Exhibit RL-188-ENG**, p. 14 (para. 41).

[262] See also *Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USA-CDA-2021-31-01, Canada's Written Responses to Panel Questions, 22 November 2021, at **Exhibit C-0642-ENG**, p. 2 (para. 4) ("The provisions dealing with the continuity of ongoing disputes under Chapter 19 of NAFTA, Articles 34.1.4 and 34.1.5, were included in Chapter 34 of CUSMA for the reason that there were ongoing disputes under Chapter 19 of NAFTA. In particular, these disputes involve private litigants, and so these transitional rules were designed to ensure that ongoing litigation could continue without disruption and without altering the applicable rules. As Canada indicated in its rebuttal submission, there was no need for CUSMA to contain similar rules with respect to Chapter 20 of NAFTA because there were no ongoing State-to-State disputes under Chapter 20 during the time that CUSMA was being negotiated.").

[263] See Cl. Reply, p. 228 (para. 680); Counter-Memorial, p. 89 *et seq.* (paras. 247-249).

for three years following the termination of the treaty. The USMCA Parties therefore did not need to include an additional clause.[264]

236 Finally, the Respondent does not dispute that the sunset clauses to which it had previously referred are not relevant in that they relate to the entry into force, duration and termination of a treaty.[265] Nor does it dispute that, by contrast, here, the issue is that of the replacement of a treaty.

3.2.2 The USMCA Preamble supports the Claimant's interpretation of Annex 14-C

237 In its Reply, the Claimant demonstrated that the USMCA Preamble supports the Claimant's interpretation of Annex 14-C. The key provisions of the Preamble are as follows:

> "The Government of the United States of America, the Government of the United Mexican States, and the Government of Canada (collectively "the Parties"), resolving to:
>
> STRENGTHEN ANEW the longstanding friendship between them and their peoples, and **the strong economic cooperation that has developed through trade and investment**;
>
> […]
>
> 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;
>
> […]
>
> ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment;

[264] See Cl. Reply, p. 228 (para. 681).

[265] See Cl. Reply, p. 228 (para. 682).

> […]
>
> **PROMOTE transparency, good governance and the rule of law**, and eliminate bribery and corruption in trade and investment;"[266]

238 The Claimant maintains that the Respondent's interpretation of Annex 14-C would diminish the USMCA in the eyes of U.S. or Mexican legacy investors in Canada (as a "high standard new agreement") and would abruptly leave those investors without the benefit of certain NAFTA protections after 1 July 2020.[267]

239 Contrary to the Respondent's argument, the opinion of foreign investors, to whom part of the USMCA is addressed (Chapter 14), as was part of the NAFTA (Chapter 11), is not "*hors de propos dans ce contexte*",[268] whether or not, as the Respondent contends, the U.S., Mexico and Canada allegedly all agree that the USMCA is a high standard new agreement. A foreign investor's understanding of those treaties does, in practice, matter.

240 Under the Respondent's interpretation of Annex 14-C, the loss of protection after 1 July 2020 would, objectively, be abrupt for legacy investors with major, pending investment projects,[269] not least when the

[266] USMCA Preamble, at **Exhibit CL-301-ENG** (emphasis added).

[267] Cl. Reply, p. 230 (para. 686).

[268] Resp. Reply on Jurisdiction, p. 21 (para. 57).

[269] The Ruby River project had commenced years earlier, in 2013. See Memorial, p. 11 (para. 24).

USMCA was negotiated over a comparatively short period of time[270] and entered into effect during the Covid pandemic.[271]

241 There is no evidence that the USMCA Parties informed the public of what Canada now claims is the meaning and drastic consequence of Annex 14-C. Canada itself did not put forward that interpretation of Annex 14-C until July 2024, *i.e.*, nearly **six years after the signature of the USMCA** (on 30 November 2018), four years after the USMCA entered into force (on 1 July 2020) and one year after the end of the transition period (on 1 July 2023).

242 It is undisputed that the absence of Annex 14-C altogether would have meant an even more abrupt end to the NAFTA and that Annex 14-C permitted a softer landing.[272] However, the Claimant's interpretation of Annex 14-C allows for a smoother, and thus commercially more realistic, transition to the USMCA for legacy investors than the Respondent's interpretation.

243 The Respondent's reliance on the *Westmoreland III* tribunal's view in this respect is inapposite. In that case, the tribunal observed that "the USMCA did not terminate NAFTA 'abruptly'" given that "[t]he draft text of the USMCA, including for all material purposes the final version of Chapter 14 and Annex 14-C, was published on 1 October 2018, well in advance of the USMCA superseding NAFTA."[273] However, the tribunal did so in a

[270] With the NAFTA, the process lasted some 3.5 years, with the negotiations commencing in June 1990 and the treaty being signed in December 1992 and entering into effect on 1 January 1994. See, *e.g.*, K. Amadeo, "The History of NAFTA and Its Purpose", The Balance (accessed on 19 August 2025), at **Exhibit C-0643-ENG**. With the USMCA, the negotiations lasted roughly 1.5 years (versus 2.5 years, with the NAFTA), with the first round of negotiations starting on 16 August 2017, and the USMCA being signed on 30 November 2018 and entering into force on 1 July 2020. See M. Altieri, "New historical chapter for North American trade: United States–México–Canada Agreement - USMCA" (2021) *2 Sociology and Social Work Review 29*, at **Exhibit C-0644-ENG**, p. 29, 31-32. Other major trade deals like the Trans-Pacific Partnership (the "**TPP**") took nearly a decade of negotiations (2008–2016). See, *e.g.*, Popular Timelines, "Full History of Trans-Pacific Partnership in Timeline From 1974" (accessed on 19 August 2025), at **Exhibit C-0645-ENG**.

[271] See Resp. Reply on Jurisdiction, p. 22 (para. 59).

[272] Resp. Reply on Jurisdiction, p. 22 (para. 60).

[273] Resp. Reply on Jurisdiction, p. 22 (para. 61); *Westmoreland v. Canada (III)*, Award, 17 December 2024, at **Exhibit RL-184-ENG**, p. 44 (para. 167).

different context from that of the present case. In *Westmoreland*, all of the State measures at issue pre-dated the termination of the NAFTA by several years and an initial notice of arbitration had been filed in November 2018 (nearly two years before the termination of the NAFTA). As the tribunal noted, in a passage omitted by the Respondent, the claimant had "ample time […] to pursue the Claims before NAFTA's termination to avoid having to comply with the 'in existence' requirement."[274]

244 In the present case, the disputed measures occurred before and after the termination of the NAFTA and the Claimant did not become aware of the harm they caused until after the termination of the NAFTA. Unlike the Westmoreland Coal Company, the Claimant thus could not have pursued the claims before the termination of the NAFTA.

245 Finally, the Respondent wrongly maintains that its interpretation of Annex 14-C is in line with the goal set out in the Preamble of "establish[ing] a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment."[275] If the Respondent believed that Annex 14-C established a "clear framework", it would have said so at the outset of these proceedings, when seeking bifurcation.[276]

3.2.3 Article 34.1(1) of the USMCA supports the Claimant's interpretation of Annex 14-C

246 Article 34.1(1) USMCA provides that "[t]he Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement."[277]

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[274] *Westmoreland v. Canada (III)*, Award, 17 December 2024, at **Exhibit RL-184-ENG**, p. 44 (para. 167).

[275] Resp. Reply on Jurisdiction, p. 21 (para. 58).

[276] See also Cl. Reply, p. 230 *et seq.* (paras. 687-689).

[277] The majority in *TC Energy v. U.S.* stated that "the rest of Chapter 34 indicates that this language refers to matters other than investment." There is, however, no support for the conclusion that the USMCA Parties only desired a "smooth transition" with respect to those portions of the NAFTA and USMCA that were not related to foreign investors or investment. *TC Energy v. U.S.*, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p.

247 For the reasons explained in Section 3.2.2 above and in the Claimant's Reply, the Claimant's interpretation of Annex 14-C is the one that would allow a smoother transition[278] from the NAFTA to the USMCA, with regard to foreign investors and investment, as compared to the Respondent's interpretation of Annex 14-C.[279]

248 Contrary to the Respondent's argument, there was no need for the USMCA Parties to mention the extension of the substantive obligations of the NAFTA Chapter 11, Section A, in Article 34.1. As also noted above, they did not do so for the NAFTA Chapter 11, Section B provisions, and the extension of those provisions is undisputed. Article 34.1 does not mention Chapter 11 at all and it is non-sensical to argue, as the Respondent does, that Article 34.1 nonetheless confirms that (i) Section B was extended but that (ii) Section A was not extended.[280]

249 Although the USMCA Parties arguably could have referred in Article 34.1 to the NAFTA Chapter 11 (as they referred to the NAFTA Chapters 5 and 19), there was no need to do so given that they concluded a separate annex addressing the subject-matter of Chapter 11 (Annex 14-C).[281] By contrast, it was arguably necessary to refer to the NAFTA Chapters 5 and 19, as

37 (para. 153); United States-Mexico-Canada Agreement (USMCA), Chapter 34, at **Exhibit CL-299-ENG**.

[278] See also *Crystalline Silicon Photovoltaic Cells Safeguard Measure*, Rebuttal Submission of Canada, 6 October 2021, at **Exhibit C-0646-ENG**, p. 11 (para. 36) ("that '[t]he Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement' suggests that the 'smooth transition' should be of consequence or significance to the Parties, or that it should have a significant effect") and p. 12 (para. 38) ("[…] the ordinary meaning of Article 34.1.1 is that the Parties recognize that there should be a passage from NAFTA 1994 to CUSMA without obstruction, interruption, impediment, or difficulty, and that this should be of consequence or significance to the Parties.").

[279] Cl. Reply, p. 231 *et seq.* (s. 3.3.3.4).

[280] For this reason, the observations of the majority in TC Energy in this regard are thus also unavailing. Resp. Reply on Jurisdiction, p. 23 (para. 64) (internal citations omitted).

[281] The Respondent relies on the following statement by the majority in *TC Energy*: "In the Arbitral Tribunal's view, any agreement to extend Section A would either have been mentioned in Chapter 34 or, in view of its significance, be the subject of a specific provision elsewhere". The extension of Section A was, however, the "subject of a specific provision elsewhere": in Annex 14-C. See Resp. Reply on Jurisdiction, p. 24 *et seq.* (para. 65, n. 64) (internal citations omitted).

there was no separate annex or provision addressing the extension of those chapters.

250 In sum, the Claimant's interpretation of Annex 14-C allows for a more predictable, and thus smoother, transition out of the NAFTA and a more predictable legal framework for legacy investors sustaining a loss out of wrongful measures taken during the three-year transition period – as compared to the outcome for such investors if the Respondent's interpretation were applied. The Respondent has failed to demonstrate otherwise.

3.2.4 Article 14.2 of the USMCA supports the Claimant's interpretation of Annex 14-C

251 Article 14.2 of the USMCA, entitled "Scope" addresses the scope of Chapter 14 of the USMCA, which is dedicated to investments.

252 Article 14.2(3) refers to Annex 14-C in the following terms:

> "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."[282]

253 Thus, Article 14.2(3) establishes first the principle that the investment chapter of the USMCA does not bind a party with regard to (i) acts or facts that took place before the USMCA came into effect or (ii) a situation that ceased to exist before the date of entry into force. In so doing, it mirrors the language of Article 28 VCLT.[283]

254 Article 14.2(3) also establishes an exception to the principle of non-retroactivity of Chapter 14 of the USMCA: "as provided for in Annex 14-

[282] USMCA, Chapter 14, at **Exhibit CL-262-ENG** (emphasis added).

[283] Vienna Convention on the Law of Treaties, at **Exhibit CL-284-ENG**, p. 11 (Art. 28) ("**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.") (emphasis added).

C." Thus, a USMCA Party may be "bound" by Chapter 14 in relation to an "act or fact that took place" before the USMCA came into effect "as provided for in Annex 14-C."[284]

255 Article 14.2(3) furthermore implies, *a contrario*, that continuing and composite breaches that did **not** cease to exist before the entry into force of the USMCA are covered. In other words, the USMCA is binding in relation to composite and continuing breaches that straddle the date of entry into force of the USMCA (and thus do not cease to exist on that date).

256 If the USMCA Parties had wished to preclude claims arising out of legacy investments and measures post-dating the termination of the NAFTA, they could have done so, including at Article 14.2 of the USMCA.

3.3 Article 31(3) VCLT: The USMCA Parties have not expressed an agreement as to the meaning of Annex 14-C, nor is there a common practice as to its application

257 In its Reply on Jurisdiction, the Respondent maintains but fails to demonstrate that, for the purposes of Article 31(3) VCLT, there exists either an agreement amongst the USMCA Parties or a practice reflecting an agreement as to the meaning of Annex 14-C.

3.3.1 The USMCA Parties have not expressed an agreement, within the meaning of Article 31(3)(a) of the VCLT, regarding Annex 14-C

258 Contrary to the Respondent's case in its Reply on Jurisdiction, there has been no agreement amongst the USMCA Parties, within the meaning of Article 31(3)(a) VCLT, that Annex 14-C does not extend the substantive obligations of the NAFTA Chapter 11, Section A beyond the termination of the NAFTA.[285]

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[284] USMCA, Chapter 14, at **Exhibit CL-262-ENG**, p. 3 (Art. 14.2(3)).

[285] See Cl. Reply, p. 233 (para. 700); Resp. Reply on Jurisdiction, p. 25 *et seq.* (paras. 70 *et seq.*); VCLT, at **Exhibit CL-284-ENG**, p. 12 *et seq.* (Art. 31(3)(a)) ("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 […]").

259 If the USMCA Parties had wished to express an agreement regarding the interpretation of Annex 14-C, they could and should have done so by way of an interpretative note of the USMCA Free Trade Commission.[286] They did not.

260 Even if such interpretative note were now issued at this late stage, the Tribunal would have to assess its weight (if any), given its timing, namely years after the commencement and during the pendency of several cases in which the meaning of Annex 14-C is at issue.[287]

261 As previously noted, in recent years, albeit in a different context, an investment treaty tribunal rejected Italy's attempt to introduce as representing a subsequent agreement regarding the interpretation of the ECT under Article 31(3)(a) VCLT, a 2019 joint declaration regarding intra-EU disputes, signed by 21 EU Member States. [288]

3.3.2 The USMCA Parties have not established a practice, within the meaning of Article 31.3(b) VCLT, reflecting agreement of the Parties regarding the interpretation of Annex 14-C

262 Equally flawed is the Respondent's contention that the USMCA Parties have demonstrated a practice in the application of Annex 14-C which establishes an agreement regarding its interpretation under Article 31(3)(b)

[286] See USMCA, Chapter 30, at **Exhibit CL-373-ENG**, p. 1 (Art. 30.2(2)(f)); see also *Mobil Investments Canada Inc. v. Canada,* ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018 dated 13 July 2018, at **Exhibit RL-053-ENG**, p. 41 (para. 160) (noting "that the three States have not elected to move to a decision of the Free Trade Commission").

[287] In *Pope & Talbot v. Canada*, the tribunal – during the damages phase of those NAFTA proceedings – questioned whether the FTC's interpretation note regarding Article 1105 NAFTA was a true interpretation within the FTC's mandate or an impermissible attempt to amend the NAFTA. The tribunal considered that, were it required to make such a determination, it would characterise the FTC interpretation as an improper amendment. See *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, at **Exhibit CL-135-ENG**, p. 23 (para. 47).

[288] See *Eskosol v Italy,* Decision on Termination Request and Intra-EU Objection, 7 May 2019, at **Exhibit CL-305-ENG**, p. 102 (para. 226) ("it would be inconsistent with general notions of acquired rights under international law to permit States effectively to non-suit an investor part-way through a pending case, simply by issuing a joint document purporting to interpret longstanding treaty text so as to undermine the tribunal's jurisdiction to proceed.").

VCLT,[289] for at least two reasons: positions espoused by States in contentious proceedings should not be relied upon to establish a practice under Article 31(3)(b) VCLT (**Section 3.3.2.1**), and the Respondent has in any event not been consistent in its application of Annex 14-C (**Section 3.3.2.2**).

3.3.2.1 Positions espoused by States in contentious proceedings should not be relied upon to establish a practice under Article 31(3)(b) VCLT

263 As explained in the Reply, positions taken by the USMCA Parties in different arbitration proceedings cannot amount to a practice within the meaning of Article 31.3(b) of the VCLT insofar as respondent States take these positions in the context of and for the purposes of defending themselves against specific claims.[290]

264 In its Reply on Jurisdiction, the Respondent seeks to discredit the Claimant's authorities cited in the Reply, and to rely on authorities that are of no or limited relevance.

265 **First**, the Respondent relies on an ILC report from 2018 addressing subsequent agreements and practice in relation to the interpretation of treaties (the "**2018 ILC Report**"), which states, in passing, that "statements […] in the course of a legal dispute" may amount to "conduct in the application of a treaty" for purposes of Article 31(3)(b).[291]

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[289] Resp. Reply on Jurisdiction, p. 25 *et seq.* (paras. 70 *et seq.*).

[290] See Cl. Reply, p. 234 (para. 704).

[291] Resp. Reply on Jurisdiction, p. 27 (para. 73); Report of the International Law Commission (2018) (French version), at **Exhibit RL-189-FRA**, p. 33; see also Report of the International Law Commission (English version) (2018), at **Exhibit CL-374-ENG**, p. 32 ("Subsequent practice under article 31, paragraph 3 (b), […] includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.").

266 However, the report does not expand on, or explain, this comment in any detail. It is a report focused on State-to-State (ICJ) disputes, not investor-State disputes. It is thus at least possible that the ILC had in mind the situation where two State parties to a treaty would be in dispute and express a position regarding the meaning of that treaty in the context of that dispute, *i.e.*, a context that is fundamentally different to the current investor-State NAFTA disputes. In any event, the report did not create any new law in this regard.

267 **Second**, a number of investment treaty tribunals and scholars have taken a different view on this issue.[292] In addition to the cases and commentary cited in the Claimant's Reply (discussed further below),[293] the tribunal's rulings in *Infinito Gold v. Costa Rica* are particularly instructive.

268 In that case, the respondent, Costa Rica, had argued that both it and Canada[294] had confirmed in the arbitration that Article II(2)(a) of the Canada-Costa Rica BIT was limited to the minimum standard of treatment, and that this constituted a "subsequent agreement between the parties" under Article 31(3) VCLT (and that, in any event, no formal agreement was required).[295]

269 The tribunal, however, found that "Costa Rica's and Canada's concurrent positions in this arbitration do not amount to an agreement within the meaning of Article 31(3) of the VCLT."[296] It held:

> "[…] the Contracting Parties must have agreed to a particular interpretation. This requires a joint manifestation of consent from

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[292] The principle "no one can be judge in their own cause" – also known as *nemo judex in causa sua* – is a fundamental tenet of international law. See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953, reprinted CUP 2006) (excerpt), at **Exhibit CL-375-ENG**.

[293] See Cl. Reply, p. 234 (para. 705) (and authorities cited therein).

[294] Canada had made a non-disputing party submission. See *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, at **Exhibit RL-299-ENG**, p. 19 (para. 39).

[295] See *Infinito Gold v. Costa Rica*, Award, 3 June 2021, at **Exhibit RL-299-ENG**, p. 103 (para. 337).

[296] *Infinito Gold v. Costa Rica*, Award, 3 June 2021, at **Exhibit RL-299-ENG**, p. 103 (para. 338).

> the Contracting Parties, or at least an offer and acceptance, evidencing their common intention that Article II(2)(a) of the BIT reflects the MST under customary international law.
>
> No such consent is found here. The submissions made by Costa Rica and Canada in this arbitration reflect legal arguments put forward in the context of this dispute to advance their respective interests. Although they happen to coincide, they do not reflect an agreement as just described over the interpretation of the BIT. Even if the Tribunal could infer an 'agreement' from the Contracting States' submissions, *quod non*, this agreement would postdate the commencement of this arbitration and the Tribunal could not take it into consideration in favour of one litigant to the detriment of the other without incurring the risk of breaching the latter's due process rights."[297]

270 As put by Judge Charles Brower his dissenting opinion in *HICEE v The Slovak Republic*, accepting unilateral interpretations of treaty parties – made in the context of contentious proceedings – as the "real intent" behind a specific treaty provision would go against the principle of good faith.[298]

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[297] *Infinito Gold v. Costa Rica*, Award, 3 June 2021, at **Exhibit RL-299-ENG**, p. 103 *et seq.* (paras. 338-339).

[298] *HICEE v Slovakia*, Dissenting Opinion of Judge Charles N. Brower, 23 May 2011, at **Exhibit CL-376-ENG**, p. 21 *et seq.* (para. 36); see also *Telefonica v. Argentina*, Decision on Objections to Jurisdiction, 25 May 2006, at **Exhibit CL-377-ENG**, p. 57 (para. 112) ("[T]he Tribunal is not convinced that positions on interpretation of a treaty provision, expressed by a Contracting State in its defensive brief filed in an international direct arbitration initiated against it by an investor of the other Contracting State, amounts to 'practice' of that State, as this requirement is understood in public international law, nor does it appear relevant in order to ascertain 'how the treaty has been interpreted in practice' by the parties thereto."); *Empresas Lucchetti v. Peru*, Decision on Annulment: Dissenting Opinion of Sir Frankin Berman, 13 August 2007, at **Exhibit CL-378-ENG**, p. 3 (para. 9) ("[A tribunal] can clearly not discount assertions put forward in argument by the Respondent as to the intentions behind the BIT and its negotiation (since that is authentic information which may be of importance), but it must at the same time treat them with all due caution, in the interests of its overriding duty to treat the parties to the arbitration on a basis of complete equality (since it is also possible that assertions by the Respondent may be incomplete, misleading or even self-serving). In other words, it must be very rarely indeed that an ICSID Tribunal, confronted with a disputed issue of interpretation of a BIT, will accept at its face value the assertions of the Respondent as to its meaning without some sufficient objective evidence to back them up."); J. Romesh Weeramantry, *Treaty*

271 Conversely, in the Reply on Jurisdiction, the Respondent seeks to minimise the relevance of cases that the Claimant previously cited in its Reply.

272 In relation to *Eskosol v. Italy*, referred to above, the Respondent argues that Italy sought to prove an agreement within the meaning of Article 31(3)(a) VCLT regarding the interpretation of the treaty at issue (the ECT), through a joint declaration of the EU Member States,[299] whereas the Respondent here seeks to show a "subsequent practice in the application of the treaty which establishes the agreement of the parties" (under Article 31(3)(b) VCLT). This distinction is however irrelevant. The Respondent can show neither an agreement via an interpretative note (under Article 31(3)(a) VCLT), nor an agreement evidenced through practice (under Article 31(3)(b) VCLT).[300]

273 As for the Respondent's criticism of *Gas Natural v. Argentina* of 2005 on the grounds that it predates the 2018 ILC Report, it is misguided.[301] Indeed, for the reasons explained above, that report is of limited relevance in the present context and cannot meaningfully by relied upon.[302]

274 **Third**, the other authorities relied upon by the Respondent are equally inapposite.

275 The Respondent relies on the statement of the majority of the tribunal in *Kappes v. Guatemala* that "a demonstration that all the State Parties to a particular treaty had expressed a common understanding, albeit through

Interpretation in Investment Arbitration (Oxford University Press, 2012), 1st edition, at **Exhibit CL-379-ENG**, p. 84 *et seq.* (para. 3.116) ("after a claimant institutes a treaty claim, a subsequent agreement by the State parties to that treaty, which purports to modify the jurisdictional mandate of the tribunal, would not be determinative of a FIAT's [arbitral tribunal's] jurisdiction over the presented claim."); *Aguas del Tunari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, at **Exhibit CL-380-ENG**, p. 62 (para. 263); *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, at **Exhibit RL-122-ENG**, p. 106 (para. 337).

[299] See Cl. Reply, p. 234 (para. 705); see also Resp. Reply on Jurisdiction, p. 30 *et seq.* (para. 83).

[300] And, as stated above, even if the USMCA Parties did now issue an interpretative note, the Tribunal would need to assess any such note with caution, as did the *Eskosol v. Italy* tribunal with the joint declaration of the EU Member States. See also paragraph 260 above.

[301] Resp. Reply on Jurisdiction, p. 31 (para. 84).

[302] Cl. Reply, p. 234 (para. 705).

separate submissions in separate cases, could be compelling evidence of subsequent practice."[303] However, that statement was effectively made in *obiter dicta* since in that case the majority of the tribunal also found that it had been shown no evidence of an agreement or of a practice reflecting an agreement (under either Article 31(3)(a) or Article 31(3)(b) VCLT, respectively) regarding the relevant provision of the treaty at issue (the CAFTA).[304]

276 The Respondent then contends that the tribunals in three NAFTA cases have recognised that NAFTA Party statements could give rise to a "practice" under Article 31(3)(b) VCLT.[305] However, in each of the mentioned cases – *Alicia Grace v. Mexico*,[306] *Bilcon v. Canada*,[307] and *Mobil v. Canada*[308] – the question of treaty interpretation at issue had been settled for some time. This is not the case here.

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[303] See Resp. Reply on Jurisdiction, p. 28 (para. 76).

[304] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala,* ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, at **Exhibit RL-190-ENG**, p. 57 *et seq.* (para. 156).

[305] Resp. Reply on Jurisdiction, p. 30 (para. 81) (and evidence cited therein).

[306] The question before the tribunal (dual nationality and applicability of dominant and effective nationality test) was one on which two NAFTA parties had held consistent views for a long time. The U.S. had voiced its position, more than 20 years earlier, in 2000, when submitting its Art. 1128 NDP Submission in *Marvin Roy Feldman Karpa v. United Mexican States* and Mexico had confirmed the applicability of the effective/dominant nationality test in the same case. *Alicia Grace et al. v. United Mexican States*, ICSID Case No. UNCT/18/4, Final Award, 19 August 2024, at **Exhibit RL-191-ENG**. See *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, at **Exhibit RL-101-ENG**, p. 79 *et seq.* (para. 369, n. 102).

[307] In its Article 1128 NDP Submission in *Bilcon*, the U.S. pointed out that its position on the differences between Articles 1116 and 1117 NAFTA had been long-standing (since 2001), and that the positions of Canada and Mexico had also been known since 2001 (all three States had expressed views regarding these provisions in *S.D. Myers, Inc. v. Government of Canada*). *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Submission of the United States of America, 19 April 2025, at **Exhibit C-0647-ENG**, p. 2 *et seq.* (para. 5).

[308] The three NAFTA states had expressed similar views (on the interpretation of Articles 1116(2) and 1117(2) NAFTA in cases of continuous breach) already in 2009 (in *Merrill & Ring v. Canada*). See *Merril and Ring Forestry v. Canada,* Government of Canada's Rejoinder Memorial, 27 March 2009, at **Exhibit C-0648-ENG**, p. 20 (para. 36); *Merril and Ring Forestry v. Canada*, Submission of the United States of America, 14 July 2008, at **Exhibit**

277 **Finally,** the Respondent argues that "*[s]'agissant des dispositions de consentement à l'arbitrage, le seul moyen dont dispose un Etat pour les mettre en application est dans le cadre d'un arbitrage, en soulevant une objection à la compétence du tribunal fondée sur l'absence de consentement.*"[309] This argument is wrong.

278 Had the USMCA Parties genuinely agreed on the meaning of Annex 14-C, they did not need to wait until the moment when they could each object to a particular tribunal's jurisdiction to voice their views regarding the meaning of Annex 14-C. They could have set the record straight by issuing an interpretative note through the FTC Commission when the first notice of dispute was filed by a legacy investor relying on Annex 14-C to bring claims arising out of measures post-dating the termination of the NAFTA.

279 The Respondent could also have issued an official statement regarding the interpretation of Annex 14-C at that point in time – when first becoming aware of claims being filed under Annex 14-C in connection with measures post-dating the termination of the NAFTA.[310]

280 The Respondent's contention that the Claimant's position would flout the purpose of Article 1128 NAFTA submissions is disingenuous.[311] Article 1128 submissions serve a purpose, but State Parties cannot use them inconsistently, as the Respondent has done (as explained in Section 3.3.2.2 below), and then claim that they have taken a consistent approach regarding a debated question of treaty interpretation for which they had a specific mechanism at their disposal in the treaty.

C-0649-ENG, p. 1 (para. 2); *Merril and Ring Forestry v. Canada*, Submission of Mexico pursuant to Article 1128 of NAFTA, 2 April 2009, at **Exhibit C-0650-SPA-ENG**, p. 4 of the PDF; see also *Merril & Ring v. Canada*, Award, 26 May 2010, at **Exhibit CL-320-ENG**, p. 105 (para. 267).

[309] Resp. Reply on Jurisdiction, p. 31 *et seq.* (para. 85) (original emphasis omitted).

[310] See also Report of the International Law Commission (English version) (2018), at **Exhibit CL-374-ENG**, p. 32 (describing as conduct potentially amounting to a "practice" under Article 31(3)(b) VCLT "official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference […]").

[311] Resp. Reply on Jurisdiction, p. 32 (para. 87).

3.3.2.2 The Respondent has not been consistent in its position regarding Annex 14-C

281 Even if positions taken in contentious proceedings could be relied upon to evidence a practice under Article 31(3)(b) VCLT (*quod non*), there was no practice establishing an agreement of the USMCA Parties with regard to Annex 14-C.

(i) The Respondent failed to raise an objection or express a position regarding Annex 14-C in this case until July 2024

282 It remains undisputed that it was only in July 2024 – just after the majority rendered its decision in *TC Energy v. U.S.*– that the Respondent for the first time publicly expressed the view that Annex 14-C did not cover claims arising out of measures post-dating the termination of the NAFTA (when it submitted its Counter-Memorial in this case).[312] The Respondent could and should have taken a position regarding Annex 14-C when moving to bifurcate these proceedings (on other jurisdictional grounds), but failed to do so.[313] Even in the lead-up to its request to bifurcate, in its December 2023 request to suspend these proceedings, the Respondent was careful not to object to the Tribunal's jurisdiction on this basis or to say that it would raise such an objection.[314] The Respondent thus did not take a position regarding Annex 14-C, preferring instead to wait for and then to hide behind the *TC Energy* majority decision.

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[312] See Resp. Reply on Jurisdiction, p. 25 *et seq.* (para. 71) ("***Depuis le dépôt du mémoire sur la compétence du Canada le 15 juillet 2024**, les trois Parties à l'ACÉUM ont continué d'appliquer l'annexe 14-C de manière cohérente.*") (emphasis added).

[313] Procedural Order No. 3 dated 9 May 2024, p. 8 (para. 32) ("If the Annex 14-C temporal application was, as the Respondent contends, of such paramount importance and relevance to the present proceeding, the Respondent ought to have raised it, and the pending NAFTA cases dealing with it, in a timely manner."); see also Request for Bifurcation.

[314] Respondent's Motion for Stay of Proceedings dated 22 December 2023, p. 3 *et seq.* (para. 8) (noting that the U.S. and Mexico were raising a jurisdictional objection in certain cases involving Annex 14-C and measures post-dating the termination of the NAFTA); para.17 (indicating that TC Energy award might shed light on the meaning of Annex 14-C); para. 23 ("*La défenderesse considère qu'elle dispose de bons motifs pour s'objecter à la compétence du Tribunal **qui ne sont pas liés à la portée de l'annexe 14-C***.") (emphasis added); Claimant's Observations on Request for Suspension of the Proceedings dated 28 December 2023, p. 20 *et seq.* (paras. 57-68).

(ii) The Respondent's position regarding Annex 14-C prior to July 2024 could only be understood to be that of APMC, as expressed in APMC's arbitration against the U.S.

283 Until the Respondent objected to the Tribunal's jurisdiction on the basis of Annex 14-C in July 2024, its position regarding Annex 14-C could only be taken as that of APMC, as consistently expressed by APMC since it notified its dispute with the U.S. in February 2022.[315]

284 The Respondent's efforts to downplay the relevance of the submissions filed by APMC on Annex 14-C in its arbitration against the U.S. are painfully unconvincing.

285 In its Reply on Jurisdiction, the Respondent does not deny that (i) APMC is a "Provincial Corporation in Alberta and a commercial arm of the Government of Alberta" and (ii) it is opposing a jurisdictional objection raised by the U.S. relating to Annex 14-C.

286 The Respondent's only response is that APMC is not a party to the USMCA and not a party to this arbitration.[316] In doing so it refers to the Claimant's objection to Québec's attempt to file an *amicus curiae* submission in this case, in which the Claimant itself stated that Québec was not a party to the NAFTA or the USMCA.[317]

287 It should be uncontroversial that both Alberta and Québec are Canadian provinces and as such part of the Respondent. Québec could not act as an *amicus curiae* to the Tribunal at least in part because Québec is not a sovereign State and therefore not separate from the Respondent under international law.[318]

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[315] *Alberta Petroleum Marketing Commission (APMC) v. United States of America*, Case No. UNCT/23/4, Notice of Intent to Submit a Claim to Arbitration, 9 February 2022, at **Exhibit C-0651-ENG**, p. 1; see also *APMC v. U.S.*, Claimant's Counter-Memorial on Preliminary Objections, 16 December 2024, at **Exhibit CL-300-ENG**, p. 7 *et seq.* (s. II).

[316] Resp. Reply on Jurisdiction, p. 28 *et seq.* (para. 78).

[317] Resp. Reply on Jurisdiction, p. 28 *et seq.* (paras. 78 and 80).

[318] See Claimant's observations on the application for leave to submit a written memorial as *amicus curiae* by the Government of Québec dated 19 January 2024, p. 20 (paras. 67-68); Letter from Claimant to Tribunal dated 6 November 2024, at **Exhibit** , p. 6 *et seq.* (para. 17(e)); PO6, p. 12 *et seq.* (paras. 41-44).

288 Equally, there can be no doubt that APMC is an organ of the State under Article 4 of the ILC Articles.[319] Created under the 1974 Canadian Petroleum Marketing Act,[320] APMC is a public agency that fulfils a public interest mandate on behalf of the Government of Alberta and that is accountable to, and receives policy direction, from the Alberta Minister of Energy.[321] Board members are appointed by the Alberta Government and APMC's mandate was and is developed with the Minister of Energy.[322] The current Chair of the Board of Directors of APMC is also serving as the Alberta Deputy Minister of Energy and Minerals.[323]

289 It is telling that, in February 2022, at the time of the filing of the suit by APMC against the U.S., none other than Alberta's Minister of Energy, Sonya Savage, publicly announced that "[a]fter examining all available options, we have determined a legacy claim is the best avenue to recover the **government's** investment in the Keystone XL project."[324]

290 APMC (and thus the Alberta Government) have maintained their position regarding Annex 14-C.[325] [redacted]

[319] See ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), at **Exhibit CL-283-ENG**, p. 2 of the PDF (Art. 4).

[320] APMC, "Governance" (accessed 8 August 2025), at **Exhibit C-0652-ENG**; see also Petroleum Marketing Act (1974), at **Exhibit CL-381-ENG**, p. 2 (Art. 2.1.2).

[321] APMC, "Governance" (accessed 8 August 2025), at **Exhibit C-0652-ENG**.

[322] APMC, "Governance" (accessed 8 August 2025), at **Exhibit C-0652-ENG**.

[323] Other Board members include Roxanne LeBlanc who has been Assistant Deputy Minister of Finance at Alberta Energy since February 2021, Alberta, "Public agency member biographies" (accessed 8 August 2025), at **Exhibit C-0653-ENG**; APMC, "Governance" (accessed 8 August 2025), at **Exhibit C-0652-ENG**

[324] N. Williams, "Canada's Alberta province files trade challenge over scrapped Keystone XL pipeline", ISDS Platform, 9 February 2022 (accessed on 8 August 2025), at **Exhibit C-0654-ENG** (emphasis added).'

[325] See *APMC v. United States*, Claimant's Rejoinder on Preliminary Objections, 7 July 2025, at **Exhibit C-0641-ENG**, p. 6 *et seq.* (s. II).

[326] The same John Hannaford has submitted an "affidavit" (not a witness statement) with Canada's Rejoinder on the Merits, which makes no mention of his service as Deputy Minister at NRCan in 2022 and 2023 or of this letter. Nor does it refer to the negotiation of Annex 14-C even though Mr Hannaford was Canada's Deputy Minister of International Trade from 2019 to

[redacted]

291 The position of APMC and the statements of Alberta's Minister of Energy (in February 2022) [redacted] were not contradicted at the time or subsequently by Canada, not until the Respondent submitted its Counter-Memorial in this case in July 2024.

292 APMC's continued opposition to the U.S.'s jurisdictional objection relating to Annex 14-C therefore flies in the face of the Respondent's argument that the Respondent has been consistent with regard to its interpretation of Annex 14-C. On the contrary, these countervailing forces within the Canadian State apparatus with regard to Annex 14-C[329] and the

2022 and reportedly "an important player in trade talks including the […] renegotiation of NAFTA." See John Hannaford Affidavit dated 2 July 2025, at **Exhibit R-0260-FRA**; "I. Austen, "He's the Biggest Power Broker in Canada Whom You've Never Heard Of", *The New York Times* (accessed 27 August 2025), at **Exhibit C-0655-ENG;** C.D. Howe Institute, John Hannaford's biography (accessed 27 August 2025) dated 12 September 2024, at **Exhibit C-0656-ENG**.

[327] [redacted]

[328] [redacted] See Resp. Reply on Jurisdiction, p. 29 (para. 79); see also ILC Articles on State Responsibility with commentaries, at **Exhibit CL-111-ENG**, p. 40 *et seq.* (para. 6) ("the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.") and para. 7 ("Nor is any distinction made at the level of principle between the acts of 'superior' and 'subordinate' officials, provided they are acting in their official capacity.").

[329] The mere fact that APMC brought suit against the U.S. – through a Notice of Intent on 9 February 2022 and a Notice of Arbitration on 22 May 2023 -- demonstrates its understanding that the claims were properly brought under Annex 14-C. See *Alberta Petroleum Marketing Commission v. The Government of the United States of America*, ICSID Case No. UNCT/23/4,

inconsistency in the Respondent's conduct in this regard, confirm that positions espoused by States in contentious proceedings should not be relied upon to establish a "practice" regarding the application of a treaty, for purposes of Article 31(3)(b) VCLT.

(iii) The Respondent's failure to make Article 1128 submissions regarding Annex 14-C in certain cases cannot reflect an agreement with the respondents in those cases and there is therefore no practice within the meaning of Article 31(3)(b) VCLT

293 The Respondent misleadingly asserts "*en plus des positions exprimées dans les affaires TC Energy et Legacy Vulcan mentionnées dans le mémoire du Canada sur la compétence, les États-Unis, le Mexique et le Canada ont exprimé des positions identiques dans les affaires* […] "[330] The Respondent thus wrongly suggests that **it** expressed a position in the *TC Energy* and *Legacy Vulcan* cases (via Article 1128 NAFTA submissions). It did not.

294 As for the Respondent's argument that its failure to make Article 1128 NAFTA submissions regarding Annex 14-C in certain cases does not demonstrate a disagreement with the U.S. and Mexico, it is disingenuous.[331]

295 The Respondent had **four opportunities** to file Article 1128 submissions regarding Annex 14-C **prior to July 2024** – none of which it used:[332]

Claimant's Memorial, 16 April 2024, at **Exhibit C-0418-ENG**, p. 102 (paras. 212, 214). It has also consistently asserted that the tribunal has jurisdiction under Annex 14-C (notwithstanding the U.S.'s objections to jurisdiction, first raised in May 2024). *Alberta Petroleum Marketing Commission v. The Government of the United States of America*, ICSID Case No. UNCT/23/4, Respondent's Request for Bifurcation, 16 May 2024, at **Exhibit C-0657-ENG**.

[330] Resp. Reply on Jurisdiction, p. 25 *et seq.* (para. 71).

[331] Resp. Reply on Jurisdiction, p. 32 *et seq.* (para. 88).

[332] See PO3, p. 8 *et seq.* (para. 33) ("the Respondent has not made any submission on the Annex 14-C temporal application issue in the *TC Energy* and *Legacy* proceedings pursuant to NAFTA Article 1128 […] and has not indicated that it intends to raise a similar objection based on the temporal application of Annex 14-C in the present proceeding."); see also Observations on Request for Suspension of the Proceedings, p. 20 *et seq.* (para. 58); see also para. 66 ("the Respondent has a substantial financial and political interest in the outcome of the *TC Energy*

- in *Legacy Vulcan v. Mexico* (in July 2023);[333]
- in *Finley v. Mexico* (in August 2023);[334]
- in *TC Energy v. U.S.* (in September 2023);[335] and,
- in *Coeur Mining v. Mexico* (in February 2024).[336]

296 There is no logical basis to assert, as the Respondent does, that its silence in those cases can be understood as an agreement with the respondent Parties. On the contrary, in circumstances where the Respondent was advancing in parallel an opposite position through APMC, its silence in those cases was better understood as a **disagreement** with the respondent Parties, and thus as meaning that it did not take issue with legacy investors bringing claims under Annex 14-C in connection with measures post-dating the termination of the NAFTA.[337]

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and the *APMC* proceedings […] Obviously, had it joined the U.S. and Mexico in opposing jurisdiction *ratione temporis* in those claims, it would have been acting directly against its own and Alberta's economic interests.").

[333] Canada could have but did not file a (second) Article 1128 submission in July 2023 in *Legacy Vulcan v. Mexico* regarding the claimant's ancillary claim, as did the U.S. See ICSID, Case details for *Legacy Vulcan, LLC v. United Mexican States,* ICSID Case No. ARB/19/1 (accessed on 31 July 2025), at **Exhibit C-0658-ENG**; See Cl. Reply, p. 236 (para. 710); *Legacy Vulcan v. Mexico*, public record at https://www.italaw.com/cases/6866, at **Exhibit C-0585-ENG**.

[334] Canada could have but did not file an Article 1128 submission in August 2023 in *Finley v. Mexico*, as did the U.S. See ICSID, Case details for *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25 (accessed on 31 July 2025), at **Exhibit C-0659-ENG**.

[335] Canada could have but did not file Article 1128 submission in September 2023 in *TC Energy v. U.S.*, as did Mexico. See ICSID, Case details for *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63 (accessed on 31 July 2025), at **Exhibit C-0660-ENG**; See Cl. Reply, p. 236 (para. 710); *TC Energy v. U.S.*, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**.

[336] Canada could have but did not file an Article 1128 submission in February 2024 in *Coeur Mining v. Mexico*, as did the U.S. See ICSID, Case details for *Coeur Mining, Inc. v. United Mexican States*, ICSID Case No. UNCT/22/1 (accessed on 31 July 2025), at **Exhibit C-0661-ENG**; see Cl. Reply, p. 236 (para. 710); *Coeur Mining v. Mexico*, Procedural order No. 4, 28 May 2024, at **Exhibit CL-306-ENG**.

[337] See also Dispute between Argentina and Chile concerning the Beagle Channel (1977), at **Exhibit CL-382-ENG**, p. 188 *et seq.* (para. 172) (referring to Argentina's "continued failure to react to acts openly performed [by Chile, in connection with a boundary dispute], ostensibly by

297 In that context, had the Respondent genuinely agreed with the positions of the U.S. and Mexico in those cases, it would have been all the more important for the Respondent to file Article 1128 submissions as soon as possible, to put an end to claims being brought under Annex 14-C in connection with measures post-dating the termination of the NAFTA.

298 The Respondent has also failed to use every opportunity since July 2024, including the opportunity to file Article 1128 submissions on Annex 14-C in *Amerra Capital v. Mexico* in December 2024.[338]

299 The Respondent's suggestion that its failures to file Article 1128 submissions regarding the interpretation of Annex 14-C is not relevant when assessing the existence of a practice under Article 31(3)(b) VCLT does not pass muster in the circumstances, namely a live dispute on that issue being expressed in different contentious proceedings with billions of dollars at stake. Instead, the Tribunal should draw two conclusions from the Respondent's conduct.

300 **First**, having failed to assert at the earliest opportunity, in each of case and, *a fortiori*, in this case where it is a party to the dispute, that Annex 14-C did not extend the substantive obligations of NAFTA Chapter 11, Section A, Canada cannot have genuinely believed or agreed that that was the case.

301 **Second**, through its omissions, Canada has not been consistent in its approach to Annex 14-C, whereas – and this is undisputed - for there to be a "practice" within the meaning of Article 31(3)(b) VCLT, there must be

virtue of the Treaty, tended to give some support to that interpretation of it which alone could justify such acts"); p. 188 (para. 171) (referring to the "necessity for reaction [from Argentina] in respect of those acts [by Chile, asserting jurisdiction over a given area], if she considered them contrary to the Treaty."); p. 188 *et seq.* (paras. 174 *et seq.*) ("the Court thinks that evidence of acts of jurisdiction performed by either Party in the disputed area is relevant and legally admissible […] in confirmation of the validity of that interpretation of the Treaty which is alleged to have the effect of conferring the rights concerned.").

[338] The Respondent could have but did not file an Article 1128 submission in December 2024 in *Amerra Capital Management v. Mexico*, as did the U.S. See ICSID, Case details for *Amerra Capital Management LLC and others v. United Mexican States,* ICSID Case No. UNCT/23/1 (accessed on 31 August 2025), at **Exhibit C-0662-ENG**.

consistency.[339] There can be no "practice" establishing an agreement amongst the USMCA Parties with regard to the application of Annex 14-C where one party refrained from taking position and only belatedly argued that Annex 14-C did not extend the substantive obligations of Chapter 11, Section A. Notably, Mexico[340] and the U.S.[341] did not promptly and consistently raise that objection under Annex 14-C either. The Respondent's argument that there has been a practice within the meaning of Article 31(3)(b) VCLT must therefore be dismissed.

3.4 Article 32 VCLT: Supplementary means of interpretation

302 The Claimant's position remains that to determine the meaning of Annex 14-C, it is not necessary to look to supplementary means of interpretation, as envisaged under Article 32 VCLT.

303 Article 32 VCLT provides as follows:

> "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."[342]

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[339] See Resp. Reply on Jurisdiction, p. 27 (para. 74(ii)) (referring to a "*pratique* […] ***suivie dans l'application du traité***") (emphasis added); see also United Nations, Documents of the Seventieth Session: Report of the International Law Commission, Supplement No. 10, UN Doc. A/73/10, at **Exhibit CL-383-ENG**, p. 33 (para. 25) ("subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and **consistent**' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation") (emphasis added).

[340] Mexico only raised an Annex 14-C objection belatedly in the case brought by Legacy Vulcan. See Cl. Reply, p. 237 (para. 711) (and evidence cited therein).

[341] Although the U.S. made an Article 1128 submission in *Westmoreland III v. Canada* in April 2024, it did not comment on Annex 14-C (or on Canada's comments regarding Annex 14-C). *Westmoreland v. Canada (III)*, Submission of the United States of America, 10 April 2024, at **Exhibit C-0663-ENG**.

[342] VCLT, at **Exhibit CL-284-ENG**, p. 13 (Art. 32); see also Cl. Reply, p. 237 (para. 714).

304 In its Reply on Jurisdiction, the Respondent wrongly reiterates that supplementary means of interpretation confirm its interpretation of Annex 14-C.[343] However, the paltry evidence that the Respondent has proffered as purportedly supplementary means of interpretation is still of no assistance to its position (**Section 3.4.1**). Furthermore, other documents available regarding the USMCA negotiations – *e.g.*, documents exchanged during the negotiations (**Section 3.4.2**), internal U.S. and Canadian documents (**Section 3.4.3**), as well as documents reflecting the views of USMCA negotiators (**Section 3.4.4**) – continue to support the Claimant's interpretation of Annex 14-C.

3.4.1 The supplementary means of interpretation proffered by the Respondent do not support its case

305 In its Counter-Memorial, the only purportedly supplementary means of interpretation to which the Respondent referred were three isolated, political statements by Canadian and Mexican officials.[344]

306 In its Reply, the Claimant demonstrated why those statements were irrelevant,[345] including because other Canadian State representatives had made statements (i) emphasising that claims could be brought in connection with legacy investments for three years after the termination of the NAFTA and (ii) without mentioning any limitations as to the timing of the State measures at issue.[346]

307 In its Reply on Jurisdiction, the Respondent does not make any comment on those submissions,[347] and simply refers to one new document – an

[343] Resp. Reply on Jurisdiction, p. 34 (para. 90).

[344] Counter-Memorial, p. 96 *et seq.* (paras. 267-269).

[345] Cl. Reply, p. 238 *et seq.* (s. 3.3.5.1).

[346] See Cl. Reply, p. 239 (para. 721) (referring to Minister of International Trade - Briefing book dated 1 November 2019, at **Exhibit C-0586-ENG**, p. 62); see also Van Bael and Bellis, Investors' Right to Bring Investment Claims Under the NAFTA Investment Chapter Expires Soon dated 13 March 2023, at **Exhibit C-0587-ENG**, p. 2 ("[CUSMA], which replaced [NAFTA] on July 1, 2020, kept alive NAFTA's Investment Chapter (Chapter 11) for a 3-year period allowing investors to subject legacy investment claims to arbitration under NAFTA within that survival period.") (written by Mr Romero Martinez, who was part of the Mexican negotiating team for the USMCA and has since moved to private practice).

[347] See Resp. Reply on Jurisdiction, p. 34 (para. 91).

excerpt from a book by Robert Lighthizer, the former U.S. Trade Representative and negotiator of the USMCA.[348] However, the quoted passage simply recalls the undisputed fact that the USMCA ended ISDS as between Canada and the U.S.. It does not mention or shed light on Annex 14-C of the USMCA. It is therefore of no relevance or guidance.

3.4.2 The preparatory work of the treaty supports the Claimant's interpretation of Annex 14-C

308 With its Reply on Jurisdiction, the Respondent has still not submitted into evidence any *travaux préparatoires* or documents evidencing the circumstances of the conclusion of Annex 14-C.[349] It has also not disputed the following points that the Claimant raised in its Reply:

- None of the documents that the Respondent produced during the document production phase of this arbitration support its interpretation of Annex 14-C.[350]
- None of the documents produced by the Respondent contradicts the Claimant's interpretation of Annex 14-C. If anything, they support the Claimant's interpretation of Annex 14-C as they are silent regarding claims arising out of legacy investments and breaches post-dating the termination of the NAFTA, just as they are silent regarding claims arising out of legacy investments and involving a wrongful composite act based on measures that commenced before the termination of the NAFTA.[351]
- Documents obtained by the Claimant further to the Canadian Access to Information Act were almost entirely redacted.[352]

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[348] Resp. Reply on Jurisdiction, p. 34 (para. 91, n. 101); R. Lighthizer, *No Trade is Free* (Broadside Books, 2023), Chapter 12: From NAFTA to USMCA, at **Exhibit RL-192-ENG**.

[349] As previously noted, the VCLT does not define what constitutes "the preparatory work" of a treaty (*travaux préparatoires*) or what type of evidence may reflect "the circumstances of its conclusion" under Article 32. See Cl. Reply, p. 240 (para. 722).

[350] Cl. Reply, p. 240 (para. 724).

[351] Cl. Reply, p. 240 (para. 725).

[352] See Cl. Reply, p. 240 (para. 726) (and evidence cited therein).

- The Respondent does not appear to have provided or commented on the *travaux préparatoires* in other pending NAFTA cases.[353]
- Mexico and the U.S. have not been forthcoming with the *travaux préparatoires* in other pending NAFTA cases.[354]

309 Had the USMCA Parties wished to exclude from the purview of Annex 14-C legacy investment claims arising out of measures post-dating the termination of the NAFTA, that view would be clear from documents constituting the preparatory work of the treaty or otherwise reflecting the circumstances of its conclusion. That is not the case.

3.4.3 Internal Canadian documents support the Claimant's interpretation of Annex 14-C

310 The Respondent does not dispute that evidence from individual States or negotiators can shed light on the circumstances surrounding the conclusion of a treaty.[355] Nevertheless, it has not submitted into evidence further internal documents that would reflect the understanding of Annex 14-C of its own representatives.[356] Nor has it proffered witness testimony in this regard.

311 The Respondent also does not dispute the two following propositions:

i) None of the internal (Canadian) documents that it produced in this arbitration support its interpretation of Annex 14-C; and,

ii) none contradict the Claimant's interpretation of Annex 14-C.[357]

312 In its Reply, the Claimant referred to two internal (Canadian) documents regarding Annex 14-C, both pre-dating the conclusion of the USMCA and noted that, if anything, these documents supported the Claimant's

[353] See Cl. Reply, p. 241 (para. 727) (and evidence cited therein).

[354] See Cl. Reply, p. 241 *et seq.* (paras. 728-729) (and evidence cited therein).

[355] See Cl. Reply, p. 242 *et seq.* (para. 730) (and evidence cited therein) (in which the Claimant advanced this proposition).

[356] See Cl. Reply, p. 243 (para. 731).

[357] See Cl. Reply, p. 243 (para. 732).

interpretation of the annex, and certainly do not contradict it.[358] These two documents are worth recalling:

- A 4 July 2018 mark-up of a draft note entitled "NAFTA-investment" stating the following:

  "The original NAFTA included an ISDS mechanism whereby an investor of a Party could launch a dispute against another NAFTA party government in situations where they were not treated fairly. The modernized NAFTA will not include a trilateral ISDS mechanism. Investment obligations will remain subject to the agreement's state-to-state dispute settlement mechanism. **The original NAFTA ISDS mechanism will remain available to investors with respect to their existing investments for a period of three years after entry-into-force of the new NAFTA,** after which investors will no longer be able to initiate NAFTA ISDS challenges against Canada. Following the entry into force of the Comprehensive Partnership for the Trans-Pacific Partnership (CPTPP), Canadian and Mexican companies will have recourse to ISDS mechanism under that agreement. Separately, the United States and Mexico have agreed to maintain a limited bilateral ISDS mechanism under a modernized NAFTA."[359]

- An internal draft note entitled "Investment chapter summary" dated 4 October 2018 stating the following:

  "The parties have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of the USMCA. Apart from this transition period for existing investments, U.S. investors will not be able to launch an ISDS claim against Canada. The only recourse will be State-to-State dispute settlement if the U.S. government were to bring a claim against Canada on a U.S. investor's behalf. However, if successful, such claims would not result in the award of any damages. This is important because,

[358] See Cl. Reply, p. 242 *et seq.* (s. 3.3.5.3.).

[359] Mark-up of draft note entitled "NAFTA-Investment" dated 4 July 2018, at **Exhibit C-0594-ENG**, p. 2 (emphasis added).

> since 1994, U.S. investors have received 205 million in damages and settlement from cases brought against Canada under NAFTA."[360]

313 The Respondent argues that these two documents "*ne concernent que le mécanisme de règlement des différends (Section B) et non les obligations de fond en tant que telles (Section A)*".[361] That is precisely the point. These two documents (i) do not say that claims arising out of legacy investments and breaches that post-date the termination of the NAFTA will not be covered by the USMCA, and (ii) they suggest that investors will be able to file any claims in relation to legacy investments for a period of three years, without any other temporal restriction.[362] The Respondent's position is simply that these documents do not address the question of what would happen to the substantive NAFTA Chapter 11 Section A provision, because there was no need, which is a circular and misguided argument.[363]

314 Had the USMCA Parties wished to exclude from the ambit of Annex 14-C legacy investment claims arising out of measures post-dating the termination of the NAFTA, that view would be clear from internal Canadian documents regarding the negotiation and/or conclusion of the USMCA.

3.4.4 Documents reflecting the views of USMCA negotiators support the Claimant's interpretation of Annex 14-C

315 In its Reply, the Claimants referred to other documents reflecting the views of USMCA negotiators that support its interpretation of Annex 14-C.[364] The Respondent's objections to these documents are unavailing as described below.

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[360] USMCA Investment Chapter Summary prepared by Canada dated 4 October 2018, at **Exhibit C-0595-ENG**, p. 1.

[361] Resp. Reply on Jurisdiction, p. 35 (para. 93); see also para. 94.

[362] Cl. Reply, p. 243 *et seq.* (paras. 733-736).

[363] Resp. Reply on Jurisdiction, p. 35 (para. 94). See also paragraph 134 above and Cl. Reply, p. 210 *et seq.* (s. 3.3.2.2) (addressing Article 70.1(a) of the VCLT).

[364] Cl. Reply, p. 245 *et seq.* (s. 3.3.5.4).

3.4.4.1 Documents relied on in the *TC Energy v. U.S.* majority decision and dissenting opinion

316 In its Reply, the Claimant noted that references to evidence relating to the conclusion of the USMCA was largely redacted in both the majority decision and the dissenting opinion in *TC Energy v. U.S.* For this and other reasons, the Claimant cautions against reliance on the majority decision.[365]

317 Bearing in mind this caveat, in its Reply, the Claimant cited two documents to which Mr Alvarez referred in his dissenting opinion: (i) a document described as the "U.S.-Canada Closing Term Sheet" dated 28 September 2018 (*i.e.*, pre-dating the conclusion of the USMCA) and stating "Canada agrees to 3-year grandfathering of ISDS";[366] and (ii) an internal U.S. email from Mr Lauren Mandell to Mr Khalil Gharbieh.[367]

318 In its Reply on Jurisdiction, the Respondent objects, rather cynically, to the Claimant's reference to these documents as follows:

> "*Le Canada s'oppose vigoureusement à cette tentative de la demanderesse d'établir un historique des négociations de l'ACEUM en s'appuyant sur des extraits incomplets tirés de pièces* ***qu'elle n'a pas produites au dossier et dont la valeur probante est impossible à examiner pour cette raison*** […]."[368]

319 Yet, the Respondent should have access to both documents, in accordance with Articles 1127(b) and 1129(a) NAFTA, as also confirmed by Section

[365] Cl. Reply, p. 245 (para. 738); see also p. 205 *et seq.* (s. 3.3.1).

[366] See Cl. Reply, p. 245 (para. 739) (referring to *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 8 (para. 21); see also p. 5 (para. 13); see also *APMC v. United States*, Claimant's Rejoinder on Preliminary Objections, 7 July 2025, at **Exhibit C-0641-ENG**, p. 58 *et seq.* (para. 129) (referring to U.S. Canada Term sheet dated September 2018 and stating "there is no evidence Canada understood Annex 14-C as anything other than a general grandfather clause for Chapter 11 regarding legacy investments").

[367] See Cl. Reply, p. 245 *et seq.* (para. 740) (referring to *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 9 *et seq.* (paras. 29 and 31)).

[368] Resp. Reply on Jurisdiction, p. 35 (para. 95) (emphasis added).

26.2 of Procedural Order No. 1 in the *TC Energy v. U.S* case.[369] The Respondent does not allege otherwise in its Reply on Jurisdiction, nor did it allege that it has been precluded from disclosing those documents.

320 In any event, the Claimant has now secured copies of documents matching these descriptions which it now submits into evidence.[370]

321 The Respondent has also failed to clarify whether the "U.S. Canada Closing Term Sheet" dated 28 September 2018 was responsive to any of the Claimant's document requests and if so, why it was not produced.[371] By its very description alone, the document would appear responsive to the Claimant's request for documents exchanged with the U.S. and Mexico relating to the negotiation of Annex 14-C (Request No. 36).[372] Yet, as the Claimant pointed out in its Reply, the Respondent has not submitted or produced a document matching that description in this arbitration.[373]

322 As to the email from Mr Mandell to Mr Gharbieh, the Respondent seeks to discredit it on the grounds that at the time it was sent, Mr Mandell no longer worked for the U.S. Government.[374] However, to the extent

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[369] *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 1, 12 December 2022, at **Exhibit R-0006-ENG**, p. 20 (s. 26.2): ("Pursuant to NAFTA Articles 1127, 1128 and 1129, Non-Disputing NAFTA Parties may attend oral hearings, and are entitled to receive a copy of confidential versions of transcripts, pleadings **and exhibits**, including witness statements and expert reports. Non-Disputing NAFTA Parties shall, pursuant to NAFTA Article 1129, treat all information received from the Respondent as if they were a party to the arbitration, notably in respect of protection of confidential information. As such, they are required to adhere to any Confidentiality Agreement entered into between the parties pursuant to §29.1.") (emphasis added).

[370] Email correspondence between L. Mandell and K. Gharbieh dated 2 March 2021, at **Exhibit C-0638-ENG**; Email correspondence between U.S. and Canadian Government representatives (attaching U.S.- Canada Closing Term Sheet) dated 28 September 2018, at **Exhibit C-0664-ENG**.

[371] See Procedural Order No. 4, Annex A dated 30 November 2024, p. 134 (relating to Request 36). See also *Access Business Group v. Mexico*, Claimant's Post-Hearing Memorial, 27 May 2025, at **Exhibit C-0665-ENG**, p. 23 *et seq.* (para. 17) (showing an excerpt from this document).

[372] See Cl. Reply, p. 245 (para. 739); see also PO4, Annex A, p. 130.

[373] Cl. Reply, p. 245 (para. 739).

[374] Resp. Reply on Jurisdiction, p. 35 *et seq.* (para. 96, n. 104).

relevant, this makes his evidence more probative since he was then free to express his understanding of Annex 14-C, with independence.[375]

3.4.4.2 Other documents reflecting the views of USMCA negotiators

323 In its Reply on Jurisdiction, the Respondent wrongly disputes the relevance of certain documents obtained by the Claimant through Freedom of Information Act requests in the U.S. The Claimant, however, maintains that these documents, which reflect the views of Mr Mandell and other USMCA negotiators, support the Claimant's interpretation of Annex 14-C.[376]

324 In particular, the Respondent first challenges the relevance of a talking points note circulated by Mr Mandell at the USTR on 9 October 2018 (*i.e.*, shortly before the signature of the USMCA) which stated "Narrow Coverage of the **three-year ISDS grandfather clause**: Description: Under the ISDS grandfather clause, investors can bring ISDS claims under NAFTA 1994 for **three additional years with respect to investments established or acquired between January 1, 1994 and the date of the termination of NAFTA 1994.**"[377] The Respondent argues that the

[375] The Respondent refers to the *TC Energy* majority's statement that Mr Mandell may have misunderstood the implication of the first paragraph of Annex 14-C. However, as previously noted, Mr Mandell was the U.S. chief negotiator of Annex 14-C; such a misunderstanding is thus unlikely. See Cl. Reply, p. 246 (para. 741, n. 997); Resp. Reply on Jurisdiction, p. 35 *et seq.* (para. 96, n. 105); see also *APMC v. United States*, Claimant's Rejoinder on Preliminary Objections, 7 July 2025, at **Exhibit C-0641-ENG**, p. 58 (para. 130) ("Almost universally the record of the CUSMA Chapter 14 negotiations demonstrates that where someone speaks for the United States it is Mr. Lauren Mandell. Indeed, other negotiators for the United States were rarely even copied on communications regarding Chapter 14 drafting progress and negotiation in communications between the CUSMA Parties. Mr. Mandell forwarded, discussed, and edited Annex 14-C. He answered internal queries about it.").

[376] The Respondent does not dispute the conclusion in *Sempra Energy* that "the opinion of those who were responsible for the drafting and negotiation of a State's bilateral treaties [is not] irrelevant, in that it serves, precisely, to establish the original intention." See Cl. Reply, p. 242 *et seq.* (para. 730); *Sempra v. Argentina,* Decision on Objections to Jurisdiction, 11 May 2005, at **Exhibit CL-314-ENG**, p. 41 (para. 145); see also *Churchill Mining v. Indonesia*, Decision on Jurisdiction, 24 February 2014, at **Exhibit CL-313-ENG**, p. 54 *et seq*. (paras. 181 and 212).

[377] Cl. Reply, p. 247 (para. 743) (referring to Email from L. Mandell to D. Bahar dated 9 October 2018, at **Exhibit C-0596-ENG**, p. 2) (emphasis added).

grandfathering of ISDS does not reflect an intent to extend the NAFTA's substantive obligations.[378]

325 However, the Respondent does not, and cannot, dispute that this and the other documents to which the Claimant referred do not distinguish between claims based on measures that would pre-date the termination of the NAFTA and those that would post-date the termination of the NAFTA. They only refer to legacy investments, without mentioning a temporal requirement with regard to the breach. They thus confirm that investors with legacy investments were intended to have three years to file claims after the termination of the NAFTA, without distinction between claims based on measures pre-dating the termination of the NAFTA and those post-dating the termination of the NAFTA.[379]

326 The USTR talking points note that Mr Mandell circulated on 19 October 2018 for an OECD Investment Committee Meeting, on which the Respondent does not comment in its Reply on Jurisdiction, confirms the same.[380] The key language of that document is recalled below:

> "First, investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the **NAFTA rules and procedures** with respect to those **'legacy investments' for three years after the termination of the NAFTA**.
>
> Second, apart from these legacy investment claims and claims that are currently pending under the NAFTA, there will be no ISDS between the United States and Canada."[381]

[378] Resp. Reply on Jurisdiction, p. 36 (para. 97).

[379] Cl. Reply, p. 248 (para. 745).

[380] See Cl. Reply, p. 247 *et seq.* (para. 744).

[381] Email from L. Mandell to M. Tracton dated 19 October 2018, at **Exhibit C-0597-ENG**, p. 1 *et seq.* (enclosing talking points for OECD meeting) (emphasis added); see also Email from L. Mandell to Mexican and Canadian State representatives dated 17 October 2018, at **Exhibit C-0666-ENG** (obtained through FOIA request and discussing the OECD meeting); Email correspondence between L. Mandel and M. Tracton dated 20 October 2018, at **Exhibit C-0667-ENG** (obtained through FOIA request and discussing the OECD meeting).

327 These talking points refer to both the "NAFTA **rules**" and to the NAFTA "procedures". In other words, they use the terms "rules" to refer to substantive obligations, by opposition to the "dispute settlement **procedures**", as explained in the same document:

> "The USMCA features a chapter on investment, Chapter 14, which I will briefly describe.
>
> The Investment Chapter updates **both the investment rules and investor-State dispute settlement (ISDS) procedures** in the NAFTA.
>
> With respect to **investment rules**, the agreement contains all the **core protections found in the NAFTA**, including rules prohibiting (1) **expropriation** without prompt, adequate, and effective compensation; (2) **discrimination**; (3) performance requirements; (4) nationality-based requirements on the appointment of senior management; (5) restrictions on the transfer of investment-related capital; and (6) **denial of justice and other breaches of the customary international law minimum standard of treatment (MST)**."[382]

328 Accordingly, this document confirmed that "investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules [*i.e.*, as set out in Chapter 11, Section A] and procedures [*i.e.*, as set out in Chapter 11, Section B]."

329 Importantly, when sending these talking points, Mr Mandell wrote to his colleague, Mr Michael Tracton, the Director of the Office of Investment Affairs at the U.S. Department of State, "**Canada okayed our approach** this afternoon."[383]

330 The Respondent also dismisses the relevance of the 27 September 2018 report of the U.S. Industry Trade Advisory Committee on Services (the

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[382] Email from L. Mandell to M. Tracton dated 19 October 2018, at **Exhibit C-0597-ENG**, p. 2 (emphasis added).

[383] Email from L. Mandell to M. Tracton dated 19 October 2018, at **Exhibit C-0597-ENG**, p. 1 (emphasis added); see also M. Tracton Linkedin Profile (accessed 7 August 2025), at **Exhibit C-0668-ENG**.

"**ITAC**"), regarding the USMCA negotiations,[384] on the grounds that the *TC Energy* majority found the ITAC not to be part of the negotiating team and that this document was not shared with the other State parties.[385]

331 However, the Respondent does not dispute that ITAC has – and had – direct access to policymakers at the U.S. Commerce Department and the Office of USTR and that, in that capacity, ITAC advisors assist in developing industry positions on U.S. trade policy and negotiating objectives.[386] Nor does the Respondent independently confirm that this document was not shared with Canada during the USMCA negotiations.

332 Finally, the Respondent objects to the Claimant's reference to the testimony of Mr Kenneth Smith Ramos, the Chief Negotiator of the USMCA for Mexico, in the *Cyrus Financial v. Mexico* case, on the grounds that (i) Mr Smith Ramos is not a witness in this case and that (ii) he is now in private practice.[387] However, Mr Smith Ramos' testimony was submitted through sworn witness statement and is, *a fortiori* credible **because** it was provided after he left office and thus freely and independently. It is for the Tribunal to determine the weight to be accorded to this evidence in the circumstances, including in light of the asymmetry of information between the Parties regarding the negotiation of the USMCA.[388]

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[384] Report of the Industry Trade Advisory Committee on Services dated 27 September 2018, at **Exhibit C-0599-ENG**, p. 20 ("[T]he [proposed] transition period for bringing ISDS claims under the original NAFTA is limited to 3 years from the date of NAFTA termination. The 3-year window is short compared to the 10-year period typically provided under terminated BITs."); see Cl. Reply, p. 248 (paras. 746-747).

[385] Resp. Reply on Jurisdiction, p. 36 (para. 98).

[386] See U.S. Department of Commerce, International Trade Administration, Industry Trade Advisory Center: Become an Advisor (accessed 12 February 2025), at **Exhibit C-0600-ENG**, p. 1; U.S. Trade Act of 1974 (excerpt), at **Exhibit CL-384-ENG**, p. 27 *et seq.* (s. 135(e)).

[387] Resp. Reply on Jurisdiction, p. 37 (para. 99); see also Cl. Reply, p. 248 *et seq.* (referring to *Cyrus Capital Partners, L.P. Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Claimants' Counter-Memorial on Jurisdiction, 29 August 2024, at **Exhibit CL-315-ENG**, p. 63 *et seq.* (paras. 232-233) (citing the witness statement of Mr Smith Ramos).

[388] See Procedural Order No. 1 dated 23 August 2023, p. 3 (para. 1.2); see also IBA Rules on the Taking of Evidence in International Arbitration (2020), at **Exhibit CL-385-ENG**, p. 22 (Art. 9(1)).

4 THE TRIBUNAL HAS JURISDICTION *RATIONE MATERIAE*

333 In its Memorial, the Claimant established that it holds a protected investment for the purposes of the NAFTA and Annex 14-C of the USMCA.[389] The Respondent does not dispute the Claimant's position.[390]

334 The Claimant also established that it holds a protected investment for the purposes of Article 25 of the ICSID Convention.[391]

335 In its Request for Bifurcation and in its Reply on Bifurcation, the Respondent challenged the Claimant's position, arguing that the present dispute does not arise out of an investment for the purpose of Article 25 of the ICSID Convention.[392] Its submissions were addressed in the Claimant's Response on Bifurcation[393] and Rejoinder on Bifurcation.[394]

336 In its Counter-Memorial, the Respondent, instead of engaging with the Claimant's arguments on this point, simply referred back to its submissions on bifurcation,[395] while introducing the new argument that the Claimant allegedly failed to give notice of its investment under the Investment Canada Act.[396] However, the Respondent failed to explain how this purported failure would be relevant to this Tribunal's jurisdiction, as the Claimant pointed out in its Reply.[397]

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[389] Memorial, p. 126 *et seq.* (paras. 400-419); see also Response to Request for Bifurcation, p. 10 *et seq.* (paras. 23-46).

[390] See Request for Bifurcation, p. 5 *et seq.* (paras. 17-48) (Where the Respondent does not contest the fact that the Claimant holds an investment for the purposes of the NAFTA); Reply on Bifurcation, p. 5 *et seq.* (paras. 9-48 and n. 10) ("[L]*'objection du Canada à la compétence du Tribunal se fonde exclusivement sur l'article 25 de la Convention CIRDI*"); Counter-Memorial, p. 97 (para. 271); and Resp. Reply on Jurisdiction, p. 71 *et seq.* (paras. 197-227).

[391] Memorial, p. 132 *et seq.* (paras. 420-430). See also Response to Request for Bifurcation, p. 10 *et seq.* (s. II(A)); Rejoinder on Bifurcation, p. 16 *et seq.* (s. II(C)).

[392] Request for Bifurcation, p. 5 *et seq.* (paras. 17-48); Reply on Bifurcation, p. 5 *et seq.* (s. II).

[393] Response to Request for Bifurcation, p. 8 *et seq.* (s. II(A)).

[394] Rejoinder on Bifurcation, p. 16 *et seq.* (s. II(C)).

[395] Counter-Memorial, p. 97 (para. 271); see also Cl. Reply, p. 191 *et seq.* (paras. 558-559).

[396] Counter-Memorial, p. 97 *et seq.* (para. 272).

[397] See Cl. Reply, p. 192 (para. 560).

337 In its Reply on Jurisdiction, the Respondent simply repeats its position on the alleged absence of an investment under Article 25 of the ICSID Convention, but again largely ignores the Claimant's submissions.[398] The Respondent reiterates its argument that the Claimant had allegedly breached the Canada Investment Act, apparently as a new ground for the Tribunal to decline jurisdiction.[399]

338 As demonstrated below, the Claimant holds an investment for the purposes of Article 25 of the ICSID Convention (**Section 4.1**) and the dispute arises from that investment (**Section 4.2**). Furthermore, the Claimant's alleged breach of Canadian domestic law, namely the Canada Investment Act, is irrelevant and does not affect the existence of the Claimant's investment under Article 25 of the ICSID Convention nor therefore the Tribunal's jurisdiction (**Section 4.3**).

4.1 The Claimant holds an investment for the purposes of Article 25 of the ICSID Convention

339 The Respondent does not dispute in any of its pleadings that the Claimant holds an investment within the meaning of Article 1139 NAFTA.[400] The Respondent argues that the Claimant does not have an investment within the meaning of Article 25 of the ICSID Convention, such that the Tribunal has no jurisdiction, regardless of whether the Claimant holds an investment under the NAFTA.[401] The Respondent's position is unfounded.

340 In the absence of any definition of the term "investment" in Article 25 of the ICSID Convention, the definition in the NAFTA and the USMCA prevails for the purpose of determining whether the Claimant holds a protected investment (**Section 4.1.1**). In any event, the Claimant does hold a protected investment under Article 25 of the ICSID Convention (**Section 4.1.2**).

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[398] Resp. Reply on Jurisdiction, p. 71 *et seq.* (s. V).

[399] Resp. Reply on Jurisdiction, p. 86 *et seq.* (paras. 228-229).

[400] See Resp. Reply on Jurisdiction, p. 71 *et seq.* (s. V). See also references at footnote 390 above.

[401] Resp. Reply on Jurisdiction, p. 72 *et seq.* (paras. 201-225).

4.1.1 The term "investment" in Article 25 of the ICSID Convention is to be interpreted by reference to the definition of a protected investment under the NAFTA

341 As the Claimant explained in its Response to the Request for Bifurcation, the drafters of the ICSID Convention deliberately omitted any definition of "investment",[402] leaving such definition to international investment treaties.[403] In the present case, therefore, the definition of "investment" in the NAFTA is dispositive.[404]

342 In its Reply on Jurisdiction, the Respondent ignores the Claimant's position and reiterates its arguments that the "objective" definition of investment under Article 25 of the ICSID Convention: (i) constrains the definitions of "investments" under international investment treaties;[405] and (ii) takes precedence in the analysis of a tribunal's jurisdiction *ratione materiae*.[406] This is not correct.

343 **First**, the deliberate omission of any definition of the term "investment" from the ICSID Convention entails that it is for the parties to an international investment treaty to determine which investments they agree to protect, and that investment arbitration tribunals appointed pursuant to those treaties must defer to such determination. This is a well-established principle.[407] As the Tribunal in *Awdi v. Romania* held:

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[402] Response to Request for Bifurcation, p. 33 *et seq.* (paras. 80-85).

[403] Response to Request for Bifurcation, p. 34 *et seq.* (paras. 86-90).

[404] Response to Request for Bifurcation, p. 36 (para. 91).

[405] Resp. Reply on Jurisdiction, p. 72 *et seq.* (para. 201).

[406] Resp. Reply on Jurisdiction, p. 73 (para. 202).

[407] See, *e.g.*, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, at **Exhibit RL-018-ENG**, p. 1384 (para. 31) ("[T]he definition of 'investment' is controlled by consent of the Contracting Parties, and the particular definition set forth in Article 1 (a) of the Agreement is the one that governs the jurisdiction of ICSID"); *Smurfit Holdings B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/18/49, Award, 21 August 2024, at **Exhibit CL-386-ENG**, p. 57 (para. 220) ("[T]he fact that the ICSID Convention does not incorporate a specific definition of investment gives deference to the legal instruments for the protection of investments negotiated by the parties. In this regard, such instruments are the foundation upon which the jurisdiction of the Centre rests"); *Biwate*r *Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No.

> "Absent a definition in Article 25, […] **the principal legal framework to determine the existence of an 'investment' must lie in the will of the Parties as set forth in the definition of an 'investment' under the BIT** as long as such will is compatible with Article 25 of the ICSID Convention. The *Salini* criteria may be useful to describe typical characteristics of an investment, but they cannot, as a rule, override the will of the parties, given the undefined and somewhat flexible term used by the drafters of the ICSID Convention."[408]

344 **Second**, if the interpretation of the term "investment" under Article 25 of the ICSID Convention were to prevail over State parties' specific agreements in the relevant instruments, the definition of "investment" in international investment treaties would apply differently based on the forum chosen by the parties for the resolution of their dispute, ICSID or other, leading to absurd results.[409] Article 25 of the ICSID Convention

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ARB/05/22, Award, 24 July 2008, at **Exhibit RL-144-ENG**, p. 86 (para. 312) ("[I]t is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate a definition of 'investment' were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States"); *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2021, at **Exhibit RL-038-ENG**, p. 141 (para. 364) ("If Claimants' contributions were to fail the Salini test, those contributions – according to the followers of this test – would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants' contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote."). See also Response to Request for Bifurcation, p. 35 *et seq.* (paras. 89-90).

[408] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, at **Exhibit CL-214-ENG**, p. 53 *et seq.* (para. 197) (emphasis added).

[409] See *Addiko Bank v. Croatia*, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, 12 June 2020, at **Exhibit CL-287-ENG**, p. 90 (para. 258) ("The Tribunal sees no reason to assume that in offering [investors the choice between several arbitration rules], the Contracting States intended *the treaty itself* to be interpreted differently, based on which procedural mechanism different investors might choose to elect. **A particular jurisdictional requirement in a treaty, or a particular substantive obligation imposed by a treaty, should not have a different meaning for a tribunal constituted under the ICSID Arbitration Rules than it would for a tribunal constituted**

must be interpreted in a way that is compatible with the applicable instrument of consent,[410] giving it appropriate weight.[411]

345 The position advocated by Canada that the Tribunal should ignore the clear definition of a protected investment under Article 1139 NAFTA and adopt the subjective interpretation of this term in Article 25 of the ICSID has never been followed by any investment treaty arbitration tribunal. Tribunals have consistently confirmed the opposite.[412] As explained by the

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under the UNCITRAL Arbitration Rules, the ICC Rules, or the SCC Rules. Either way, the treaty says what it says, and a tribunal constituted under any set of procedural rules should apply that treaty according to its terms (interpreted in accordance with VCLT principles of treaty interpretation), as well as in accordance with general principles of international law which apply to all such treaties.") (emphasis added).

[410] See *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 dated 14 January 2010, at **Exhibit RL-024-ENG**, p. 23 (paras. 92-93).

[411] See *Ambiente Ufficio and others v. the Argentine Republic*, ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, at **Exhibit RL-037-ENG**, p. 153 *et seq.* (paras. 462-463) ("[…] In this regard, the very fact that BITs regularly combine (and do so also in the present case) a detailed definition of the term 'investment' with explicit authorization for the investor to resort to ICSID arbitration, **should be given great weight in deciding whether or not the transaction in question is an investment for the purposes of Art. 25 of the ICSID Convention**.") (emphasis added).

[412] See, *e.g.*, the cases cited in Resp. Reply on Jurisdiction, p. 73 (paras. 201-202), *i.e.*, *Československá Obchodní Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, at **Exhibit RL-217-ENG**, p. 274 *et seq.* (paras. 66-67 and 89-91) (affirming a strong presumption that the parties' acceptance of ICSID jurisdiction over a certain transaction, by reference to the applicable BIT, implies that they consider such transaction to be an "investment" for the purpose of Article 25); *Joy Mining v. Egypt*, Award on Jurisdiction, 6 August 2004, at **Exhibit CL-013-ENG**, p. 11 *et seq.* (paras. 46-63) (holding that the purported investment did not qualify as one neither under the applicable investment treaty, nor under Article 25 of the ICSID Convention, in application of the *Salini* test); *Malaysian Historical Salvors, SDN, BHD v. The Government of* Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, at **Exhibit RL-218-ENG**, p. 16 *et seq.* (paras. 55-147); *Saba Fakes v. Turkey*, Award, 14 July 2010, at **Exhibit CL-014-ENG**, p. 31 *et seq.* (paras. 93-111) (all applying the Salini test after ascertaining that the alleged investment fell under the definition of "investment" under the applicable BIT); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, at **Exhibit RL-214-ENG**, p. 75 (para. 217); *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019, at **Exhibit RL-220-ENG**, p. 168 (paras. 879) (both noting that the objective test of whether any given right is an "investment" is inherent in the term "investment" as included in the BIT); and *Fedax v. Venezuela*, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, at **Exhibit RL-**

tribunal in *Gavrilovic v. Croatia*, "**[a] tribunal would need compelling reasons to disregard such a mutually agreed definition of investment**."[413]

346 There are no reasons, let alone compelling ones, to disregard the clear terms of Article 1139 NAFTA in the present case. In the absence of a definition of the term "investment" in the ICSID Convention, therefore, the Tribunal should only consider whether the Claimant's investment meets the requirements of Article 1139 NAFTA, which is undisputed.

347 In any event, contrary to the Respondent's argument, the Claimant holds a protected investment under Article 25 of the ICSID Convention.

018-ENG, p. 1384 (para. 31) (noting that the definition of protected investment is governed by the applicable BIT).

[413] *Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, at **Exhibit CL-387-ENG**, p. 56 *et seq*. (paras. 191-193) (emphasis added). See also, *e.g.*, *CSOB v. Slovakia*, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, at **Exhibit RL-217-ENG**, p. 274 (paras. 66-67) ("The Parties' acceptance of the Centre's jurisdiction with respect to the rights and obligations arising out of their agreement therefore **creates a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention**.") (emphasis added); *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, at **Exhibit CL-217-ENG**, p. 59 *et seq.* (para. 130) ("[I]n most cases […] it will be appropriate to defer to the State parties' articulation in the instrument of consent (*e.g.* the BIT) of what constitutes an investment. **The State parties to a BIT agree to protect certain kinds of economic activity, and when they provide that disputes between investors and States relating to that activity may be resolved through, *inter alia*, ICSID arbitration, that means that they believe that that activity constitutes an 'investment' within the meaning of the ICSID Convention as well**. That judgment, by States that are both Parties to the BIT and Contracting States to the ICSID Convention, should be given considerable weight and deference. A tribunal would have to have compelling reasons to disregard such a mutually agreed definition of investment.") (emphasis added); *Malaysian Historical Salvors v. Malaysia*, Decision on the Application for Annulment, 16 April 2009, at **Exhibit CL-388-ENG**, p. 31 (paras. 73-74) ("It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term 'investment' as found in Article 25(1) of the Convention, risks crippling the institution."); *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, at **Exhibit RL-227-ENG**, p. 10 (para. 42) ("For ICSID arbitral tribunals to reject an express definition desired by two States-party to a treaty seems a step not to be taken without the certainty that the Convention compels it").

4.1.2 The Claimant holds a protected investment under Article 25 of the ICSID Convention

348 The Claimant established in the Memorial that it holds an "investment" not only for the purpose of the NAFTA, but also for the purpose of Article 25 of the ICSID Convention, since its investment possesses the required elements of a contribution, duration, risk and contribution to the economy of the host State (*i.e.*, it meets the so-called *Salini* test).[414]

349 In its Reply on Jurisdiction, the Respondent (i) wrongly argues that the Claimant's capital expenditures are insufficient to constitute an investment, [415] and (ii) attempts to create additional jurisdictional requirements under Article 25 of the ICSID Convention out of thin air.[416]

4.1.2.1 The Claimant's investment satisfies the "contribution" requirement under the *Salini* test

350 As explained in the Claimant's Memorial, the Claimant's investment comprises:

- Several enterprises within the meaning of Article 1139(a) NAFTA;[417]
- Interests in enterprises entitling the Claimant to share in income and profits within the meaning of Article 1139(e) NAFTA;[418]
- Interests arising from the commitment of capital and other resources to all aspects of developing the GNLQ and Gazoduq Projects within the meaning of Article 1139(h) NAFTA;[419] and
- Tangible and intangible property acquired through those capital expenditures, acquired in the expectation or used for the purpose of

[414] Memorial, p. 133 *et seq.* (paras. 422-429).

[415] Resp. Reply on Jurisdiction, p. 77 *et seq.* (paras. 211-217).

[416] Resp. Reply on Jurisdiction, p. 74 *et seq.* (paras. 205-207 and 210-217).

[417] See Memorial, p. 127 *et seq.* (paras. 404 and 406); Cl. Reply, p. 391 *et seq.* (para. 1150).

[418] See Memorial, p. 127 *et seq.* (para. 405); Cl. Reply, p. 391 *et seq.* (para. 1150).

[419] See Memorial, p. 128 *et seq.* (paras. 407-418); Cl. Reply, p. 391 *et seq.* (para. 1150).

economic benefit or other business purposes within the meaning of Article 1139(g).[420]

351 In terms of capital expenditures, the Claimant demonstrated in its Reply, that, from 2013 onwards, it made monetary contributions towards the investment in the amount of **USD 124.5 million**.[421] Such expenditures went into the business activities of GNLQ and Gazoduq for the development of their respective Projects:[422]

	2013-2014	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**	**Total**
GNLQ	7.54	6.71	7.23	9.55	19.14	19.76	15.52	9.11	2.30	96.90
Gazoduq	N/A	N/A	N/A	N/A	2.50	18.72	6.16	2.49	22.0	29.91
Total	7.54	6.71	7.23	9.55	21.64	38.48	21.68	11.61	2.32	126.81
Deduction for related party expenses										- 2.29
Total										**124.51**

352 In its Reply on Jurisdiction, the Respondent disputes that the Claimant's investment constitutes a "contribution" for the purpose of Article 25 of the ICSID Convention,[423] arguing that the Claimant failed to provide comprehensive evidence of each expenditure[424] and that a significant part of such expenditures was made outside of Canada.[425] These arguments are without merit.

[420] Memorial, p. 131 *et seq.* (paras. 415-417); Cl. Reply, p. 391 (para. 1150).

[421] Second Expert Report of Secretariat dated 18 April 2025, at **Exhibit CER-3 (Second)**, p. 131 (para. 6.16).

[422] Second Expert Report of Secretariat dated 18 April 2025, at **Exhibit CER-3 (Second)**, p. 132 (Table 12).

[423] Resp. Reply on Jurisdiction, p. 75 *et seq*. (para. 207).

[424] Resp. Reply on Jurisdiction, p. 79 *et seq*. (para. 215).

[425] Resp. Reply on Jurisdiction, p. 80 (para. 216).

353 **First**, the requirement of a "contribution" for the purpose of Article 25 of the ICSID Convention is broader than what the Respondent contends.[426] Tribunals have rightly held that any dedication of resources whether in the form of financial obligations, services, know-how, labour, technology can constitute a contribution.[427] In the *Deutsche Bank v. Sri Lanka* award, the tribunal concluded, citing the *L.E.S.I* case, that "contributions" can take many forms "as long as they have an economic value", meaning that the investor "must have committed some expenditure, in whatever form, in order to pursue an economic objective."[428]

354 Furthermore, prior tribunals have recognised that Article 25 of the ICSID Convention does not impose any quantitative or qualitative requirements for an investor's contribution.[429]

355 In the present case, the Claimant's contribution consisted in significant capital expenditures, together with know-how, contractual rights and proprietary rights held by the Claimants for the advancement of the GNLQ and Gazoduq Projects.[430] There is no basis to disregard such contributions for the purpose of determining the Tribunal's jurisdiction under Article 25 of the ICSID Convention.

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[426] See R. Dolzer *et al.*, *Principles of International Investment Law*, Chapter IV Investment, at **Exhibit CL-194-ENG**, p. 6 of the PDF ("With regard to a *contribution*, tribunals have accepted a large variety of assets as investments. A contribution may be financial but may also consist of anything that has economic value such as know-how, management, equipment, material, personnel, labour, and services. There is no minimum value, but purely symbolic contributions will not qualify.").

[427] *Romak v. Uzbekistan*, Award, 29 November 2009, at **Exhibit CL-389-ENG**, p. 55 (para. 214).

[428] *Deutsche Bank v. Sri Lanka*, Award, 31 October 2012, at **Exhibit CL-016-ENG**, p. 60 (para. 297) citing *LESI v. Algeria*, Decision on Jurisdiction, 12 July 2006, at **Exhibit CL-015-FRA**, p. 17 *et seq.* (para. 73(i)).

[429] See, *e.g.*, *Gavrilovic v. Croatia*, Award, 26 July 2018, at **Exhibit CL-387-ENG**, p. 62 *et seq.* (paras. 210-211); *Hope Services LLC v. Republic of Cameroon*, Award, 23 December 2021, at **Exhibit CL-390-FRA**, p. 62 (para. 198) ("**[A]*ucune stipulation du Traité ou de la Convention n'impose une valeur minimale pour qu'une contribution puisse constituer un investissement***. *Ainsi, toute appréciation de telles contributions dépend largement des circonstances de chaque espèce.*") (emphasis added).

[430] See paragraphs 351-352 above.

356 **Second**, the Respondent's argument that the Claimant has not sufficiently evidenced its expenditures is disingenuous. Neither the NAFTA, nor Article 25 of the ICSID Convention require that investors disclose the entirety of invoices issued throughout a project to establish jurisdiction *ratione materiae* – unsurprisingly, since that would place an unduly heavy burden on claimants.

357 Moreover, in this case, the vast majority of expenditure (*i.e.*, for 2013-2019, around 70% of the total) is set out in audited financial statements, which classify the expenditure by type.[431] As for the unaudited years (2020-2022), the Tribunal, upon the Respondent's request,[432] ordered the Claimant to produce a **sampling of external costs** for these years.[433] The Claimant complied with this request,[434] and the Respondent's attempt to re-argue this matter should be disregarded. Nothing prevents tribunals from relying on unaudited financial statements, since many enterprises are not subject to mandatory auditing (including GNLQ and Gazoduq, after the shareholders waived the contractual audits), particularly where (as here) those accounts have been subject to sampling and verification by the Parties' quantum experts.[435]

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[431] Second Expert Report of Secretariat dated 18 April 2025, at **Exhibit CER-3 (Second)**, p. 126 *et seq.* (para. 6.5).

[432] Resp. Reply on Jurisdiction, p. 79 *et seq.* (para. 215), Procedural Order No. 5, Annex A dated 20 December 2024, p. 95.

[433] PO5, Annex A, p. 95 (Request No. 32). With respect to the Request No. 30, the Claimant explained that the exhibit C-0346 was populated from the financial statements of GNLQ and Gazoduq which had already been disclosed.

[434] The Respondent indeed referred to the produced documents in Resp. Reply on Jurisdiction, p. 80 (n. 225, 226).

[435] See *Casinos Austria v. Argentina*, Award, 5 November 2021, at **Exhibit CL-391-ENG**, p. 179 (para. 532) ("In the Tribunals view, it is appropriate to use the actual results for the time from January to August 2013, even though these results had not been audited at the Valuation Date […]"); see also p. 186 *et seq.* (para. 489) (Rejecting the respondent's contrary view); *Ebrahimi v. Iran*, Final Award, 12 October 1994, at **Exhibit CL-392-ENG**, p. 47 (para. 173) (rejecting the argument that a discount should be applied to the valuation to reflect the lack of audited accounts and noting that the respondent had "ample opportunity" to identify any recording errors). Contrary to Canada's assertions, *PSEG v Turkey* does not support its case on unaudited financial statements, as in that case the financial statements were subject to auditing "**by the Claimants'** expert, who […] also introduced the necessary corrections justified by its own revisions". *PSEG v. Turkey*, Award, 19 January 2007, at **Exhibit CL-199-ENG**, p. 82 (para. 320) (emphasis added).

358 In its Rejoinder on the Merits, the Respondent further attempts to cast doubt on the reliability of the unaudited accounts by listing for instance, a limited number of errors related to the amortization, summation error and error on the sum of individual expenses.[436] As explained by Secretariat, these anomalies either relates to accounting concepts that do not impact the quantification of the sunk costs or are simply not relevant for the purpose of Secretariat's analysis and sunk cost calculation.[437]

359 **Third**, the Respondent's contention that "a significant part" of the Claimant's expenditures were made outside of Canada [438] is wrong. Whereas the Respondent misleadingly lists Bechtel as a "non-Canadian" vendor,[439] the Claimant in fact contracted with and paid Bechtel Canada Co (based in Pointe-Claire, Québec) for its technical studies.[440] It also hired a specialised workforce and consultants based in Canada,[441] and set up its "global entrepreneurial team" in Canada.[442]

360 In any case, the fact that certain expenditures were paid to U.S. firms is irrelevant. As the *L.E.S.I. v. Algeria* tribunal put it:

> "*De même est-il fréquent que ces investissements soient effectués dans le pays concerné, mais il ne s'agit pas non plus d'une condition absolue.* ***Rien n'empêche en effet que des investissements soient en partie du moins engagés depuis le pays***

[436] Rejoinder on the Merits, p. 380 (para. 952).

[437] Secretariat II, at **Exhibit CER-3 (Second)**, p. 128 (para. 6.7).

[438] Resp. Reply on Jurisdiction, p. 80 (para. 216).

[439] Resp. Reply on Jurisdiction, p. 80 (para. 216, n. 225). The Respondent refers to the fact that the invoices were issued **to** the Claimant's U.S. subsidiary, which says nothing about the location of the vendor.

[440] FEED Agreement between GNLQ and Bechtel dated 24 July 2019, at **Exhibit JI-0184-ENG**; Bechtel Invoices, at **Exhibit SEC-0472-ENG**.

[441] Le Verger I, at **Exhibit CWS-3**, p. 7 (para. 21); Illich I, at **Exhibit CWS-1**, p. 28 *et seq*. (paras. 72-76). The Canadian team included Cathy Baptista, Carolina Rinfret, Marie-Christine Demers, Denis Roux, Marie-Claude Lavigne, Stéphan Tremblay, Lise Castonguay, Caroline Hardy, Sylvain Ménard.

[442] See Illich I, at **Exhibit CWS-1**, p. 25 *et seq.* (paras. 62, 66 and 68-69). See also Bidwai I, at **Exhibit CWS-2**, p. 3 (para. 17).

> ***de résidence du contractant mais en vue et dans le cadre du projet à réaliser à l'étranger***."[443]

361 Canada's reliance on the *Grand River*, *Archer Daniels*, *Canadian Cattlemen*, *Apotex* and *Bayview* cases, in which tribunals declined jurisdiction over investments located outside the host State[444] is inapposite. Canada conflates the notion of "investments" (*i.e.*, assets), which in accordance with Article 1101(1) must be "in the territory" of the host State, and the resources expended to make those investments, to which no territorial limit applies. As the English High Court noted in interpreting the requirement in the Ukraine-Russia BIT that investments must be "within the territory of the other Contracting State":

> "[G]iven my view that Article 1(1) is concerned to identify assets into which there may be investment, not which are invested, the reference to 'within the territory of the other Contracting State' identify **where the assets which are invested into are located, and not to where any resources expended to acquire such assets are directed**."[445]

362 As confirmed by the tribunal in *Quiborax v. Bolivia*, expenditures made for the purpose of acquiring or developing an asset, "[r]egardless of where payment was made […] qualifies as a contribution of money", provided that the *raison d'être* of the transaction, *i.e.*, the underlying project, is located in the territory of the host State.[446] In the present case, it is undisputed that the investment was located in Canada.

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[443] *LESI v. Algeria*, Decision on Jurisdiction, 12 July 2006, at **Exhibit CL-015-FRA**, p. 18 (para. 73 (i)) (emphasis added).

[444] Resp. Reply on Jurisdiction, p. 80 *et seq.* (para. 217).

[445] *PAO Tatneft v. Ukraine*, Judgment, 13 July 2018, at **Exhibit CL-393-ENG**, p. 18 (para. 81) (emphasis added).

[446] *Quiborax v. Bolivia*, Decision on Jurisdiction, 27 September 2012, at **Exhibit RL-214-ENG**, p. 78 (para. 229).

4.1.2.2 Article 25 of the ICSID Convention does not require any additional elements

363 In its Reply on Jurisdiction, the Respondent argues that Article 25 of the ICSID Convention requires proof of (i) an investor's vested right to the realisation of its projects;[447] and (ii) an economic activity as a going concern carried out by the investment vehicles and to which capital expenditures must be directed. There is, however, no basis for reading these self-serving requirements into Article 25 of the ICSID Convention.[448]

(i) Article 25 of the ICSID Convention does not require that an investor holds the right to develop a project

364 The Respondent argues that an investment is protected under international law only if it "materialise[s]" from an economic and legal point of view.[449] According to the Respondent, such "materialisation" implies a vested right in the realisation of a project, implying that it be authorised.[450] This argument is misguided.

365 **First**, the Respondent's argument is based on its own failure to issue environmental permits, which is the object of the present dispute on the merits. Such failure cannot affect the Tribunal's jurisdiction. As the tribunal in *Devas v. India* held:

> "**The non-issuance of a governmental license** may pertain to the quantum of damages that may be claimed against the Respondent, if there was a breach of the Treaty, but **it does not pertain to** the validity of the Agreement or **whether an investment was made by the Claimants**."[451]

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[447] Resp. Reply on Jurisdiction, p. 74 *et seq.* (paras. 205-207).

[448] Resp. Reply on Jurisdiction, p. 76 *et seq.* (paras. 210-225).

[449] Resp. Reply on Jurisdiction, p. 74 *et seq.* (para. 205).

[450] Resp. Reply on Jurisdiction, p. 75 (para. 206); p. 82 (para. 221).

[451] *CC/Devas (Mauritius) Ltd v. India*, Award on Jurisdiction and Merits, 25 July 2016, at **Exhibit CL-394-ENG**, p. 55 (para. 206) (emphasis added). See also, *e.g.*, *Houben v. Burundi*, Award, 12 January 2016, at **Exhibit CL-403-FRA**, p. 31 *et seq.* (para. 129) ("[…] [D]*ans la présente affaire, le projet immobilier n'avait pas connu de début de réalisation sur le terrain,*

366 In other words, Canada cannot rely on its own wrongful decision not to authorise the GNLQ Project as a basis to challenge the Tribunal's jurisdiction and thus benefit from its own wrong.

367 **Second**, the Respondent fails to provide any support for its assertion that international law protection materialises only where a claimant possesses "*un droit réel reconnu par le droit municipal*" to develop a project.[452] The Respondent's reference to the Interim Award on Jurisdiction and Admissibility in *Yukos v. Russia* is inapposite.[453] The passage quoted by the Respondent is part of the summary of the parties' positions on the application of Article 17 of the ECT, not the Tribunal's findings.[454] As for the Respondent's reference to the *KT Asia v. Kazakhstan* award,[455] it is simply to the tribunal's finding that the language of the BIT stresses the importance of "assets" in the definition of "investments", whereas Article 25 of the ICSID Convention stresses the importance of "contributions".[456] These cases do not support the Respondent's position.

368 In any event, the Claimant's investment comprised a number of rights recognised under Canadian law. The Claimant held:

n'ayant pas même dépassé le stade des autorisations d'urbanisme. […] *En l'espèce, le fait que M. Houben ait préalablement fait l'acquisition d'un terrain sur le sol burundais suffit à constater qu'il ne s'agissait pas d'une dépense de préinvestissement.*"); *Muszynianka spółka z ograniczoną Odpowiedzialnością v. The Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020 dated 7 October 2020, at **Exhibit RL-149-ENG**, p. 92 *et seq.* (para. 293) (Where the tribunal held that the claimant who owned a shareholding of a locally incorporated company held an investment despite not having a permit for its operations at the time of acquisition); "Article 25" in Stephan W. Schill *et al.* (eds.), *Schreuer's Commentary on the ICSID Convention* (Cambridge University Press), 3d Edition, at **Exhibit CL-187-ENG**, p. 232 (para. 394).

452 Resp. Reply on Jurisdiction, p. 74 *et seq.* (para. 205).

453 Resp. Reply on Jurisdiction, p. 74 *et seq.* (para. 205 and n. 203).

454 *Yukos Universal Limited (Isle of Man) v. Russian Federation,* PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, at **Exhibit CL-297-ENG**, p. 163 *et seq.* (paras. 448-449).

455 Resp. Reply on Jurisdiction, p. 74 *et seq.* (para. 205 and n. 203).

456 *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2023, at **Exhibit RL-222-ENG**, p. 43 *et seq.* (paras. 166-167).

- rights arising from its partnership interest in Symbio as well as from its ownership of GNLQ[457] and Gazoduq;[458]
- rights under the 25-year export license issued by the National Energy Board to GNLQ;[459]
- [redacted][460]
- [redacted] to the authorisations HQ agreed to obtain, with respect to the supply of the 550MW block of hydroelectricity;[461]
- rights over tangible property such as office furniture, leasehold improvements, technical equipment, computer hardware and software and any other assets necessary for the developments of both projects;[462] and
- rights over intangible property which include the intellectual property over technical studies prepared for the development of the projects, as well as the technical knowledge and know-how the Claimant contributed towards the projects.[463]

369 The Respondent's argument therefore fails not only on the law, but also on the facts of the present case.

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[457] Response to Request for Bifurcation, p. 11 (para. 25).

[458] Response to Request for Bifurcation, p. 11 (para. 25).

[459] NEB, Letter Decision concerning GNLQ's application for a Licence to Export Gas as LNG dated 27 August 2015, at **Exhibit C-0109-ENG**; NEB, Licence GL-317 dated 26 May 2016, at **Exhibit C-0110-FRA**. The Claimant notes, in this respect, that the issuance of a license or a permit may constitute an investment under the NAFTA and Article 25(1) of the ICSID Convention (see, for instance, *Pope & Talbot v. Canada*, Interim Award, 26 June 2000, at **Exhibit CL-196-ENG**, p. 2 (para. 4) and p. 32 (para. 96).

[460] [redacted] at **Exhibit C-0091-ENG**, p. 3 (Art 2).

[461] Pre-Project Agreement between GNLQ and HQ dated 13 November 2018, at **Exhibit C-0185-FRA**, p. 5 *et seq.* (Art. 5) and p. 23 *et seq.* (Annex 7).

[462] See "Detailed Project Expenditures from Financial Statements (Confidential)" (January 2022), at **Exhibit C-0346-ENG**. See also Response to Request for Bifurcation, p. 17 *et seq.* (para. 39).

[463] See Response to Request for Bifurcation, p. 17 *et seq.* (para. 39).

(ii) Article 25 of the ICSID Convention does not require an "ongoing economic activity"

370 The Respondent argues that projects under development cannot be considered as "investments" for the purpose of Article 25 of the ICSID Convention, unless the investor already has an ongoing commercial activity in the host State.[464] According to the Respondent, capital expenditures must give rise to rights pertaining to the activities of an investment, rather than to preparatory activities,[465] and enterprises must be "*en activité*",[466] in order to constitute "investments". This novel position is unfounded.

371 **First**, as noted by leading commentators, the fact that "shareholdings qualify as investments is so well accepted that the point hardly merits discussion anymore in actual practice".[467] There is a presumption that the ownership of shares in companies of the host State constitutes an investment.[468] In the *Patel Engineering v. Mozambique* award, on which the Respondent relies,[469] the tribunal confirmed that a non-restrictive interpretation of an "enterprise" should be adopted, accepting that the acquisition of equity in an enterprise satisfies the inherent features of an investment, going so far as stating that no further scrutiny was warranted.[470]

372 **Second**, there is no requirement under the NAFTA, the USMCA, or in the ICSID Convention that an enterprise must be engaging in a commercial activity to constitute an "investment". The Respondent itself admits that

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[464] Resp. Reply on Jurisdiction, p. 78 *et seq.* (para. 214).

[465] Resp. Reply on Jurisdiction, p. 77 *et seq.* (paras. 210-211).

[466] Resp. Reply on Jurisdiction, p. 82 *et seq.* (para. 221). See also, generally, Resp. Reply on Jurisdiction, p. 77 *et seq.* (paras. 219-225).

[467] "Article 25" in Stephan W. Schill *et al.* (eds.), *Schreuer's Commentary on the ICSID Convention* (Cambridge University Press), 3d Edition, at **Exhibit CL-187-ENG**, p. 194 (para. 284).

[468] *Komaksavia v. Moldavia*, Final Award, 3 August 2022, at **Exhibit CL-395-ENG**, p. 47 (para. 147).

[469] Resp. Reply on Jurisdiction, p. 84 *et seq.* (para. 225).

[470] *Patel Engineering Limited v. The Republic of Mozambique*, PCA Case No. 2020-21, Final Award, 7 February 2009, at **Exhibit RL-232-ENG**, p. 60 (para. 311).

"[i]*l est vrai que dans certains cas, il peut y avoir un investissement même si l'entreprise n'est pas en activité (*'going concern*')*".[471]

373 **Third**, the Respondent's argument ignores the text of the NAFTA, which explicitly protect the establishment of investments and not only their operation. Article 1139(g) NAFTA defines an "investment" as "real estate or other property, tangible or intangible, **acquired in the expectation** or used for the purpose **of economic benefit or other business purposes**".[472] Article 1139 also defines "investor of a Party" as "an enterprise of such Party, **that seeks to make**, is making or has made an investment".[473] A footnote in Article 14.1 of USMCA further clarifies that:

> "**[A]n investor 'attempts to make' an investment** when that investor has taken concrete action or actions to make an investment, such as **channeling resources or capital in order to set up a business, or applying for a permit or license**".[474]

374 Articles 1102 and 1103 NAFTA also expressly apply to the "establishment" of investments.[475] As the *Patel Engineering v. Mozambique* tribunal noted, while investment treaties do not necessarily provide for the protection of "so-called 'pre-establishment rights'",[476] the NAFTA and the USMCA clearly do.[477]

375 The few decisions that have denied jurisdiction over so-called "pre-investment" activities, on which the Respondent relies,[478] are irrelevant as

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[471] Resp. Reply on Jurisdiction, p. 84 *et seq.* (para. 225).

[472] North American Free Trade Agreement (1994), Chapter Eleven, at **Exhibit CL-001-ENG**, p. 21 (Art. 1139, definition of "investment", letter (g)) (emphasis added).

[473] NAFTA, at **Exhibit CL-001-ENG**, p. 22 (Art. 1139, definition of "investor of a Party") (emphasis added).

[474] USMCA, Chapter 14, at **Exhibit CL-262-ENG**, p. 2 (n. 3) (emphasis added).

[475] NAFTA, at **Exhibit CL-001-ENG**, p. 2 (Arts. 1102(1), 1102(2), 1103(1) and 1103(2)).

[476] *Patel Engineering v. Mozambique*, Final Award, 7 February 2009, at **Exhibit RL-232-ENG**, p. 64 (para. 332).

[477] *Patel Engineering v. Mozambique*, Final Award, 7 February 2009, at **Exhibit RL-232-ENG**, p. 64 *et seq.* (paras. 332-338). See also *Nordzucker AG v. The Republic of Poland*, UNCITRAL, Partial Award, 10 December 2008, at **Exhibit RL-025-ENG**, p. 59 *et seq.* (para. 198).

[478] See Resp. Reply on Jurisdiction, p. 78 *et seq.* (paras. 212-214 and references included therein).

none of these cases were brought under the NAFTA or the USMCA,[479] as indeed noted in one of them, *Nordzucker v. Poland*,[480] in which the tribunal expressly acknowledged that its finding could have been different had the dispute been decided under the NAFTA.[481] These cases are also distinguishable on the facts:[482]

- The claimant in the *Mihaly v. Sri Lanka* case[483] was in the process of negotiating contracts with the host State, which were never concluded;[484] the tribunal clarified that its decision only referred to that specific situation;[485]

[479] See Response to Request for Bifurcation, p. 25 *et seq.* (paras. 60 and 69).

[480] Resp. Reply on Jurisdiction, p. 78 (para. 213, n. 215).

[481] *Nordzucker v. Poland*, Partial Award, 10 December 2008, at **Exhibit RL-025-ENG**, p. 59 *et seq.* (para. 198).

[482] Incidentally, the Claimant notes that the reasoning in *Pantechniki v. Albania*, on which the Respondent relies (Resp. Reply on Jurisdiction, p. 78 (para. 212)) is not relevant in the present context. The sole arbitrator upheld jurisdiction *ratione materiae* over works to be carried out under two contracts with the government. He ruled that "it is conceivable that a particular transaction is so simple and instantaneous that it cannot possibly be called an 'investment'", a point which is of no relevance in the present case, given the complexity of the Claimant's investment. The issue of pre-investment expenditures did not arise (see *Pantechniki v. Albania*, Award, 30 July 2009, at **Exhibit RL-227-ENG**, p. 10 *et seq.* (paras. 43-48)).

[483] See Resp. Reply on Jurisdiction, p. 78 *et seq.* (para. 214).

[484] See *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2022, at **Exhibit RL-011-ENG**, p. 155 (para. 47) ("Ultimately, there was never any contract entered into between the Claimant and the Respondent for the building, ownership and operation of the power station.").

[485] *Mihaly v. Sri Lanka*, Award, 15 March 2022, at **Exhibit RL-011-ENG**, p. 155 (paras. 48-49) ("It is in this factual setting that the Tribunal has been asked to consider whether or not, the undoubted expenditure of money, following upon the execution of the Letter of Intent, in pursuit of the ultimately failed enterprise to obtain a contract, constituted 'investment' for the purpose of the Convention. The Tribunal has not been asked to and cannot consider in a vacuum whether or not in other circumstances expenditure of moneys might constitute an 'investment' […] The Tribunal repeats that, in other circumstances, similar expenditure may perhaps be described as an investment.").

- The *Zhinvali v. Georgia*[486] tribunal was confronted with similar failed contractual transactions with the State,[487] combined with the lack of physical presence of the investor in the host State;[488]
- The *Kaloti v. Peru* case[489] concerned five shipments of gold, which the claimant did not own, and minimal operations in the host State;[490]
- The findings of the tribunal in *F-W Oil v. Trinidad and Tobago*[491] were based on the language of a pre-investment agreement,[492] and not illustrative of a general principle; furthermore, the tribunal noted that, in certain circumstances, "pre-contract expenditures can be recovered";[493] and,
- In *Global Trading v. Ukraine*,[494] the tribunal declined jurisdiction on the ground that the relevant contracts were not an investment in the host State as they were evidently "pure commercial transactions",[495] a factual scenario that is not comparable to the present case.

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[486] See Resp. Reply on Jurisdiction, p. 76 (para. 210, fn 207).

[487] *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/01, Award, 24 January 2003, at **Exhibit RL-012-ENG**, p. 38 (para. 190) ("According to the Claimant in a summation of its grievances, the Respondent 'broke three separate promises to sign the Concession Agreement […]").

[488] See *Zhinvali v. Georgia*, Award, 24 January 2003, at **Exhibit RL-012-ENG**, p. 88 (para. 382).

[489] See Resp. Reply on Jurisdiction, p. 77 (para. 210, n. 208).

[490] *Kaloti Metals & Logistics, LLC v. Republic of* Peru, ICSID Case No. ARB/21/29), Award, 15 May 2024, at **Exhibit RL-225-ENG**, p. 113 (para. 383) ("[T]he Claimant has failed to establish that it has an investment in the territory of Peru within the meaning of Article 10.28 of the TPA. It has been unable to demonstrate that it owned and/or controlled the gold in the five seized shipments […] The Claimant did have some operations in Peru; it leased an office there and weighed and assayed gold before the gold was exported to the United States. But all of this was to support the business of the Claimant in buying gold in Peru and exporting it to the United States.").

[491] Resp. Reply on Jurisdiction, p. 77 (para. 210, n. 207).

[492] *FW-Oil Interests, Inc. v. Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006, at **Exhibit RL-013-ENG**, p. 59 *et seq*. (para. 143).

[493] *FW-Oil Interests, Inc. v. Trinidad and Tobago,* Award, 3 March 2006, at **Exhibit RL-013-ENG**, p. 58 *et seq*. (paras. 141, 144).

[494] See Resp. Reply on Jurisdiction, p. 78 (para. 212, n. 213).

[495] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine,* ICSID Case No. ARB/09/11, Award, 1 December 2010, at **Exhibit RL-228-ENG**, p. 19 (para. 56).

376 To conclude, the Respondent cannot rely on these decisions to create a requirement where none exists.

4.2 The present dispute arises out of the Claimant's investment

377 In the Memorial, the Claimant established that it holds an "investment" for the purpose of both the NAFTA and Article 25 of the ICSID Convention. The present dispute arises directly out of such investment, which the Claimant submits was not afforded the treatment provided for under Articles 1102, 1103 and 1105 NAFTA, and was indirectly expropriated in breach of Article 1110 NAFTA.[496]

378 In its Reply on Jurisdiction, the Respondent argues that, even if GNLQ and Gazoduq were to be considered investments, the impugned measures would not be linked to them, but rather to the authorisation of the Symbio Project, which could not constitute an investment until it was authorised.[497] The Respondent concludes that the Claimant "*ne peut prétendre avoir un différend en relation directe avec un investissement*".[498] The Respondent's convoluted arguments are unfounded.

379 **First**, Article 1101 NAFTA, Chapter 11 of the NAFTA applies to "measures adopted or maintained by a Party relating to […] investors of another Party [and/or] investments of investors of another Party in the territory of the Party […]".[499] The EAs of the Project directly relate to the Claimant's shares in GNLQ and Gazoduq, and the Claimant's further rights and interests – and so do the impugned measures.

380 **Second**, the present dispute arises directly out of the Claimant's investment for the purpose of Article 25 of the ICSID Convention. Indeed, the dispute relates directly to the treatment of such investments in the context of the EAs of the GNLQ and Gazoduq Projects. The Respondent's reliance on *Accession Mezzanine v. Hungary* to argue that no investment (and therefore no link to a dispute) exists where a claimant does not have the

[496] See Memorial, p. 135 *et seq.* (s. IV); Cl. Reply, p. 251 *et seq.* (s. 4).

[497] Resp. Reply on Jurisdiction, p. 85 (para. 226).

[498] Resp. Reply on Jurisdiction, p. 85 (para. 227).

[499] NAFTA, at **Exhibit CL-001-ENG**, p. 1 (Art. 1101(1)).

right to a licence,[500] is misleading. The tribunal in that case had to determine what right formed the basis of an expropriation claim and concluded that no such right existed.[501] It did not make any finding regarding an alleged nexus between a dispute and an investment for the purpose of Article 25 of the ICSID Convention.

381 Other tribunals have clarified that the interpretation of the terms "arising directly of an investment" in Article 25 is not as narrow as the Respondent contends. In *AES v. Argentina*, the tribunal noted "it is well established by commentators relying on constant practice that [these terms] **should not be given a restrictive interpretation**".[502] The *Tokios Tokeles v. Ukraine* tribunal held that "[i]n order for the directness requirement to be satisfied, the dispute and investment must be '**reasonably closely connected**'",[503] which is the case where a dispute "arises from the investment itself or the operations of its investment".[504] There is no doubt that the present dispute is "reasonably" closely connected to the Claimant's enterprises, capital expenditures and related interests.

4.3 The absence of a notice of investment under the Investment Canada Act is irrelevant

382 In the Counter-Memorial, the Respondent argued that the Claimant's failure to file a notice of investment under the Investment Canada Act

[500] Resp. Reply on Jurisdiction, p. 85 (para. 227), referring to *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, at **Exhibit RL-119-ENG**, p. 41 *et seq.* (paras. 145 and 185).

[501] See *Accession Mezzanine v. Hungary*, Award, 17 April 2015, at **Exhibit RL-119-ENG**, p. 42 (para. 146).

[502] *AES v. Argentina,* Decision on Jurisdiction, 26 April 2005, at **Exhibit CL-396-ENG**, p. 21 (para. 60) (emphasis added).

[503] *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, at **Exhibit RL-048-ENG**, p. 39 (para. 88) (emphasis added).

[504] *Tokios Tokelės v. Ukraine*, Decision on Jurisdiction, 29 April 2004, at **Exhibit RL-048-ENG**, p. 40 *et seq.* (para. 91). See also *Inmaris v. Ukraine*, Decision on Jurisdiction, 8 March 2010, at **Exhibit CL-217-ENG**, p. 37 (para. 86); *Magyar Farming Company Ltd, Kintyre KFT, and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019 dated 13 November 2019, at **Exhibit CL-397-ENG**, p. 75 (para. 276) ("In other words, the Tribunal should look at the investment as a whole and ascertain whether the dispute has a sufficiently direct link with the overall investment").

supported its contention that the Claimant did not make an investment in Canada.[505] In the Reply, the Claimant explained that this fact is irrelevant to the Tribunal's jurisdiction over the present dispute, since nothing in the Investment Canada Act affects the definition of an investment under the USMCA, the NAFTA or Article 25 of the ICSID Convention.[506]

383 In the Reply on Jurisdiction, the Respondent (i) argues that the Claimant breached the Investment Canada Act[507] and (ii) implies that the Tribunal should decline jurisdiction as a result of the illegality of the Claimant's investment.[508] However, the Claimant did not breach the Investment Canada Act (**Section 4.3.1**) and, in any event, this alleged breach would have no impact on the Tribunal's jurisdiction (**Section 4.3.2**).

4.3.1 The Claimant did not breach the Investment Canada Act

384 The Respondent argues that (i) the Claimant breached the Investment Canada Act by failing to submit a notice of investment;[509] and (ii) the lack of such notice confirms that "*il n'y avait pas encore eu de réel investissement au Canada.*"[510] This is wrong.

385 **First**, the provision invoked by the Respondent, *i.e.*, Article 12 of Chapter 28 of the Investment Canada Act, provides:

> "**Where an investment is subject to notification under this Part**, the non-Canadian making the investment shall, at any time prior to the implementation of the investment or within thirty days

[505] Counter-Memorial, p. 98 (para. 272) ("*En ce qui a trait au moyen déclinatoire fondé sur l'article 25 de la Convention CIRDI, il convient de constater que la demanderesse n'a jamais transmis d'avis conformément à la Loi sur Investissement Canada.* […] *L'absence d'un tel avis vient étayer le fait que la demanderesse, une personne non-canadienne, n'a pas effectué d'investissement au Canada.*").

[506] Cl. Reply, p. 192 (para. 560).

[507] Resp. Reply on Jurisdiction, p. 86 (para. 228).

[508] Resp. Reply on Jurisdiction, p. 86 *et seq.* (para. 229).

[509] Resp. Reply on Jurisdiction, p. 86 (para. 228).

[510] Resp. Reply on Jurisdiction, p. 86 (para. 228).

> thereafter, in the manner prescribed, give notice of the investment to the Director providing such information as is prescribed."[511]

386 Under Article 11 the notice requirement applies, in relevant part, to "investment[s] to establish a new Canadian **business**".[512] As the Respondent itself points out, Interpretation Note No. 4 of the Investment Canada Act clarifies that:

> "**An undertaking or enterprise must be capable of generating revenue and be carried on in anticipation of profit before it is considered to be a business**. It must therefore be actively earning revenue or be in a present position to produce revenue earning goods or services. Market research, test marketing or feasibility studies are not by themselves considered activities capable of generating revenue. […]".[513]

387 Thus, the notice requirement of Article 12 did not apply to GNLQ and Gazoduq, which were not yet generating revenues.

388 **Second**, the term "investment" is not defined under the Investment Canada Act.[514] The notice requirement applies to "investments" that involve either the establishment or the acquisition of a "business",[515] *i.e.*, a limited category of what may be considered an "investment" under the Investment Canada Act. As a result, the lack of notice does not imply that there were no "real investments" for the purpose of Canadian law, contrary to the Respondent's contention.[516]

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[511] Investment Canada Act (ICA), R.S.C. 1985, c. 28 (1st Supp.), at **Exhibit R-0047-FRA**, p. 9 (Art. 12) (emphasis added).

[512] Investment Canada Act, at **Exhibit R-0047-FRA**, p. 9 (Art. 11) (emphasis added).

[513] Investment Canada Act, "All Interpretation Notes", at **Exhibit C-0669-ENG**, p. 6 *et seq.* (Interpretation Note No. 4) (emphasis added). See also Investment Canada Act, at **Exhibit R-0047-FRA**, p. 1 (Art. 3) ("**business** includes any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit") (emphasis in original).

[514] See Investment Canada Act, at **Exhibit R-0047-FRA**, p. 1 *et seq.* (Art. 3).

[515] Investment Canada Act, at **Exhibit R-0047-FRA**, p. 9 (Art. 11).

[516] Resp. Reply on Jurisdiction, p. 86 (para. 228) ("*L'absence d'avis indique qu'il n'y a pas eu de révision de 'l'investissement' par les autorités canadiennes et donc pas d'investissement établi en conformité avec les lois du Canada. Cette absence de notification est également une*

4.3.2 In any event, the alleged breach of the Investment Canada Act would not affect the Tribunal's jurisdiction

389 For the first time in the Reply on Jurisdiction, the Respondent implies that the Claimant's alleged failure to comply with the Investment Canada Act makes the Claimant's investment illegal, depriving the Tribunal of jurisdiction.[517] This objection to the Tribunal's jurisdiction is not only belated;[518] it is in any case unfounded.

390 **First**, the NAFTA, the USMCA, or Article 25 of the ICSID Convention do not contain any legality requirement.[519] Thus, assuming the lack of notice of investment was an illegal omission, there is no basis for the Respondent to argue that it would deprive the Tribunal of jurisdiction.[520]

391 **Second**, only serious breaches of domestic law, such as fraud or corruption, in the making of an investment may exceptionally justify that a tribunal

confirmation de la nature très préliminaire des activités de la demanderesse et suggère qu'il n'y avait pas encore eu de réel investissement au Canada").

[517] Resp. Reply on Jurisdiction, p. 86 *et seq.* (para. 229). In the Resp. Reply on Jurisdiction, p. 87 (n. 253), the Respondent cites Annex 1138.2, which refers to Canada's decisions "following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review". Pursuant to Annex 1138.2, such decisions are excluded from the dispute settlement mechanism provided for in Chapter 20, Section B of the NAFTA, *i.e.*, from the dispute settlement mechanism provided for disputes between the NAFTA Parties, not between investors and States. This provision is therefore wholly irrelevant in the present case.

[518] See ICSID Convention, Regulations and Rules (2022) (English version), at **Exhibit CL-367-ENG**, Rule 30(1) ("A reply and rejoinder shall be limited to responding to the previous written submission and addressing any relevant facts that are new or could not have been known prior to filing the reply or rejoinder"), Rule 43(2) ("A party shall notify the Tribunal and the other party of its intent to file a preliminary objection as soon as possible.").

[519] See, *e.g.*, *Metal-Tech v. Uzbekistan*, Award, 4 October 2013, at **Exhibit CL-398-ENG**, p. 41 (para. 127); *Longreef A.V.V v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/5, Decision on Jurisdiction, 12 February 2014 dated 12 February 2014, at **Exhibit CL-399-ENG**, p. 77 (para. 244); *Rand Investments and Others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, at **Exhibit RL-160-ENG**, p. 49 (para. 229).

[520] See, *e.g.*, *Durres Kurum Shipping Sh. P.K. and Others v. Republic of Albania*, ICSID Case No. ARB/20/37, Award, 26 July 2024, at **Exhibit RL-273-ENG**, p. 63 (para. 227); *Capital Financial Holdings v. Cameroon*, Award, 22 June 2017, at **Exhibit CL-400-FRA**, p. 96 (paras. 466-467).

decline jurisdiction over a claim.[521] If established, the illegality invoked by the Respondent would be nowhere near the degree of seriousness required for denying jurisdiction. The Respondent's argument must therefore fail.

[521] See, *e.g.*, *Krederi v. Ukraine*, Award, 2 July 2018, at **Exhibit CL-401-ENG**, p. 46 *et seq.* (para. 348); *Desert Line v. Yemen*, Award, 6 February 2008, at **Exhibit CL-402-ENG**, p. 24 (para. 104); *LESI v. Algeria*, Decision on Jurisdiction, 12 July 2006, at **Exhibit CL-015-FRA**, p. 26 (para. 83(iii)).

5 PRAYERS FOR RELIEF

392 The Claimant respectfully renews its requests for relief, as stated at paragraph 1434 of the Claimant's Reply.

Respectfully submitted,

28 August 2025

For and on behalf of the Claimant,

Ruby River Capital LLC

Counsel for the Claimant

Domitille Baizeau
Marc D. Veit
Lorraine de Germiny
Augustin Barrier
Robert Bradshaw
Isabella Cannatà
Robert Denison
Margaux Bergère