IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

TC Energy Corporation and
TransCanada PipeLines Limited
(CLAIMANT)

V.

The United States of America,
(RESPONDENT)

(ICSID Case No. ARB/21/63)

MEXICO'S SUBMISSION PURSUANT TO ARTICLE 1128 OF NAFTA

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1. Pursuant to NAFTA Article 1128, the Government of Mexico is providing its views on certain matters of interpretation of the NAFTA and the United States- Mexico- Canada Agreement (USMCA).

2. Mexico takes no position on the facts of this dispute. No inference should be drawn from the fact that Mexico has chosen to address only some of the issues raised by the disputing parties.

I. ANNEX 14-C OF THE USMCA DOES NOT CONFER JURISDICTION TO DECIDE A CASE OVER FACTS THAT TOOK PLACE AFTER NAFTA'S TERMINATION

3. The consent of a State is an essential requisite to the jurisdiction of a Tribunal, and is limited by the provisions of the applicable Treaty.[1] The NAFTA was terminated on July 1, 2020, and as of that date it was no longer possible for NAFTA Parties to be bound by or violate NAFTA.

4. The USMCA Parties' consent to arbitration must be established pursuant to the provisions of the USMCA. In this case, paragraph 1 of Annex 14-C establishes the terms of the Parties' consent to arbitration with respect to a legacy investment:

> 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:
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> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
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> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
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> (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.

5. This consent is limited to the submission of a "claim" alleging a "breach of an obligation under … Section A of Chapter 11 (Investment) of NAFTA 1994". A breach of a Treaty can only occur if that Treaty is in force.[2] The NAFTA ceased to be in force as of July 1, 2020, and therefore a violation of Section A of Chapter 11 (Investment) of NAFTA was no longer possible as of that date.

6. As explained below, the NAFTA Parties did not include a "survival clause" to extend the substantive obligations of Chapter 11 (Investment) after its termination, nor does the USMCA include any provision that supports such an interpretation.

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

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

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

7. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, Annex 14-C must be interpreted in good faith in accordance with the ordinary meaning of its terms. There is nothing in the ordinary meaning of the text that extends the substantive protections of NAFTA for an additional three-year period.

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

> In the view of the Panel, the NAFTA and the USMCA are separate treaties. Indeed, upon the entry into force of the USMCA, the NAFTA came to an end, "but without prejudice to those provisions set forth in USMCA that refer to the provisions of NAFTA." It would have been possible for the Parties to have inserted a provision in the USMCA providing for the continuation of all obligations under the NAFTA as obligations under the USMCA. But they did not do so. The Parties created self-standing USMCA obligations even though such obligations were stated in "identical or nearly identical form" to obligations under NAFTA. Where the Parties wanted to carry over specific the NAFTA obligations, such as NAFTA Chapter Nineteen, they did so explicitly in Article 34.[3] [Emphasis added]

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

10. Pursuant to Articles 59(1) and 70(1)(a) of the Vienna Convention, a "treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and (a) it appears from the later treaty or is otherwise established that the parties intended that the matter be governed by that treaty", considering that "unless the Treaty otherwise provides or the Parties otherwise agree, the termination of a Treaty under its provisions or in accordance

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

with the present Convention, releases the Parties from any obligation further to perform the Treaty".[4] The NAFTA Parties were conscious of this well-established legal principle.

B. Footnotes 20 and 21 of Annex 14-C cannot be read to extend NAFTA's substantive obligations after its termination

11. Footnote 20 of Annex 14-C states that:

> 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.

12. This footnote simply clarifies that a claim brought during the three-year period (based on a breach that occurred while NAFTA was in force) remains governed by all the relevant provisions that otherwise expired on June 30, 2020. The use of the words "for greater certainty" is not intended to change the scope or meaning of what was already foreseen.

13. Footnote 21 of Annex 14-C states that:

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

14. This footnote refers to a specific situation when an investor that is "party to a covered government contract" has claims under both Annex 14-C for a breach of NAFTA (that arose prior to USMCA entry into force) and Annex 14-E for a breach of the USMCA (that arose on or after USMCA entry into force) and clarifies that Mexico and the United States do not consent to arbitration under Annex 14-C under that situation.

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

C. The definition of "legacy investment" does not extend the USMCA Parties' consent under Annex 14-C

15. The phrase "in existence on the date of entry into force of this Agreement" was included to exclude a category of investments that were established or acquired when the NAFTA was in force −between January 1, 1994 and July 1, 2020−, but were not in existence on the date of entry into force of the USMCA. For example, a contract that was signed by an investor when the NAFTA was in force but ended before July 1, 2020.[5]

16. In simpler terms, the definition of "legacy investment" does not extend the USMCA Parties' consent under paragraph 1 of Annex 14-C to claims arising from measures taken after the entry into force of USMCA.

II. CONCLUSION

17. The NAFTA Parties agreed to change the investment-related protections offered to investors as of the entry into force of the USMCA, and Annex 14-C of the USMCA cannot be used by investor to override that decision and extend the substantive obligations of Chapter 11.

18. Mexico invites the Parties and the Tribunal to consult the relevant sections of the public versions of its Counter-Memorial and Rejoinder to the Ancillary Claim dated December 19, 2022 and April 21, 2023, respectively, in *Legacy Vulcan, LLC v. United Mexican States (ICSID Case No. ARB/19/1)*, which contain Mexico's legal argument with regard to the interpretation of Annex 14-C.[6] For ease of reference, Mexico attaches to this submission a courtesy translation of its legal argument.

All of which is respectfully submitted,

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[5] *See Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States* (ICSID Case No. ARB/21/25), Counter-Memorial, 2 December 2022, ¶¶ 352-357.

[6] *See Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), case materials: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/19/1