PUBLIC VERSION

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

TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED

Claimants

-and-

UNITED STATES OF AMERICA

Respondent.

ICSID CASE NO. ARB/21/63

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

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

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. And in 2022, Professor Schreuer reiterated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26. In their Counter-Memorial, Claimants have not expressly abandoned their counter-textual reading of the USMCA Protocol, but they spend little time defending it. Claimants now argue that "the only way to avoid prejudice to the USMCA provisions that refer to provisions of NAFTA is to give effect to those NAFTA provisions" and that "[i]n the context of paragraphs 1 and 3 of Annex 14-C, this means giving effect to the referenced obligations in Sections A and B of NAFTA Chapter 11 for three years after the termination of NAFTA with respect to legacy investments."[36]

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

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

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

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

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

2) Claimants' Applicable Law Argument Is Meritless

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

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

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

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

32. As Professor Schreuer has explained elsewhere:

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

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

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

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

> The consent under paragraph 1 and the submission of a claim to arbitration *in accordance* with Section B of Chapter 11 (Investment) of NAFTA 1994 *and this Annex* shall satisfy the requirements of:
>
> (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; . . .[47]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42. It is notable, moreover, that the same provisions that Claimants rely on in the Annex 14-C context also applied in the NAFTA context without having the impact that Claimants urge here. *First,* the same language from NAFTA Articles 1116(1) and 1117(1), incorporated into Paragraph 1 of Annex 14-C, was never interpreted to be the applicable law clause for disputes under NAFTA Chapter 11. Rather, the applicable law clause was NAFTA Article 1131, titled "Governing Law," which provides that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[64]

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

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

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

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

C. Claimants' Analysis of the Relevant Context Is Flawed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[86] Claimants' Counter-Memorial ¶ 35.

[87] *Id.* ¶ 38.

[88] Gardiner's Supplementary Report ¶ 30.

[89] U.S. Memorial ¶ 51.

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

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

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

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

> [E]ven if the literal text of Footnote 21 could be read to refer to categories of investors rather than specific claims**,** *that literal interpretation must be adjusted to reflect the context*, particularly given that . . . Respondent's interpretation would lead to an absurd result.[94]

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

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

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

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[95] Gardiner's Supplementary Report ¶ 31.
[96] *Id.*
[97] *Id.*
[98] Claimants' Counter-Memorial ¶ 67.
[99] Gardiner's Supplementary Report ¶ 31. *See also* RICHARD GARDINER, TREATY INTERPRETATION 185 (2d ed. 2015) ("[T]he ordinary meaning is the starting point of an interpretation, but only if it is confirmed by investigating the context and object and purpose, and if on examining all other relevant matters (such as whether an absurd result follows from applying a literal interpretation) no contra-indication is found, is the ordinary meaning determinative.") **(RL-095)**.
[100] Gardiner's Supplementary Report ¶ 31.

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

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

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

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

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

66. In their Counter-Memorial, Claimants contend that "absent an express agreement to the contrary (there is no such agreement in the present case), Annex 14-C applies only to 'acts or facts' that occur, or measures taken, after the entry into force of USMCA."[106] Claimants' argument relies on the rule expressed in Article 28 of the Vienna Convention, which provides: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."[107] Claimants' reliance on this rule is wrong on multiple counts.

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

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

> For greater certainty, this Chapter, *except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims)* does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.[110]

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

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

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

[111] Claimants reference in a footnote talking points prepared by the Office of the U.S. Trade Representative explaining the need for this language in the following terms: "The original text stated that the Investment Chapter does not apply to acts/events that occurred prior to entry into force of the USMCA, consistent with the default Vienna Convention rules. In the scrub, we clarified that there is one exception: *Annex 14-C (the grandfather provision) allows investors to bring ISDS claims with respect to legacy investments where the alleged breach took place before entry into force of the USMCA*." Attachment to Email from Daniel O'Brien to John M. Melle et al. (Nov. 28, 2018) **(C-114)** (emphasis added). The United States does not believe that these talking points are properly considered preparatory work of the treaty (because they were not, it appears, shared with the other USMCA Parties) or that it is, in any event, necessary to consider preparatory work of the treaty to interpret Annex 14-C. However, to the extent Claimants attempt to rely on this document, it is notable that it contains no reference to the ability of investors to bring ISDS claims with respect to alleged breaches taking place *after* the entry into force of the USMCA.

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

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

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

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

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

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

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

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

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

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

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

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

D. Claimants Misapply the USMCA's Object and Purpose

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

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

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

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

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

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

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

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

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

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

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

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

[126] U.S. Memorial ¶ 53.

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

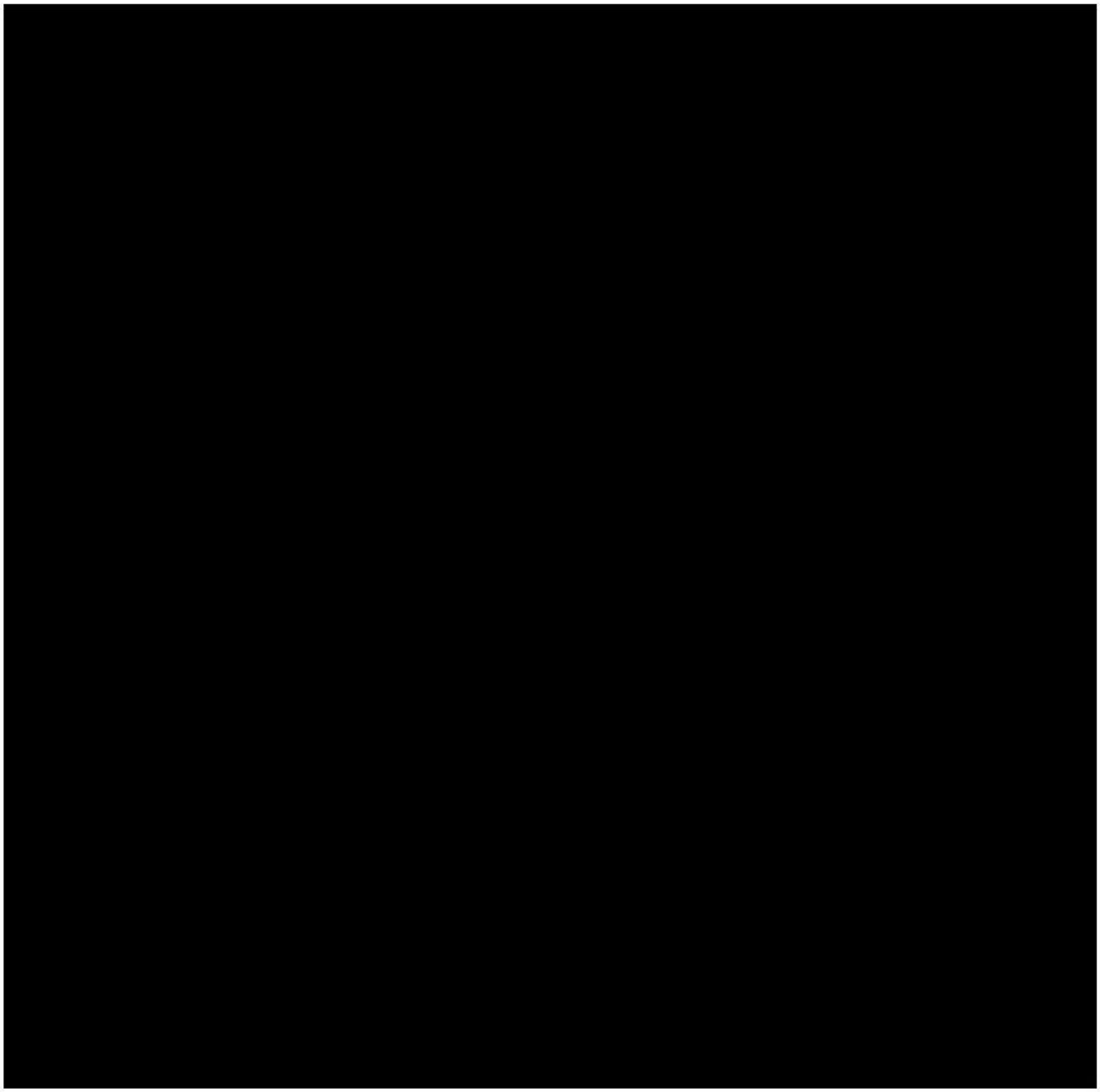
[128] U.S. Memorial ¶ 65. Claimants' assertion, based on Professor Gardiner's work, that "[r]ecourse to preparatory work is always *permissible* under the Vienna rules to 'confirm' the meaning reached by the general rule in article 31" gets them nowhere. Claimants' Counter-Memorial ¶ 99 n.151 (emphasis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

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

[redacted]

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

[redacted]



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

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

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

[redacted]

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

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

94. By contrast to Claimants, the United States has provided examples of how each of the USMCA Parties previously allowed for the post-termination survival of a treaty's substantive obligations for a set period, including obligations with respect to the settlement of disputes. That type of language can be found in the survival clauses present in *all* of the USMCA Parties' model BITs: "For ten years from the date of termination, all other Articles *shall continue to apply to covered investments* established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments."[141] If the USMCA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Agreement	**Provision**
Free Trade Agreement Between Canada and the Republic of Peru	[T]he [legacy BIT] *shall remain operative* for a period of fifteen years after the entry into force of this Agreement for the purpose of any breach of the obligations of the [legacy BIT] that occurred before the entry into force of this Agreement. . . . [156]
Free Trade Agreement Between Canada and the Republic of Panama	[T]he [legacy BIT] *remains operative* for a period of 15 years after the entry into force of this Agreement for the purpose of any breach of the obligations of the [legacy BIT] that occurred before the entry into force of this Agreement. . . . [157]

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

Agreement	**Provision**
Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments	The [legacy BIT] *shall continue to apply* for a period of three years from the date of termination to any investment . . . which was made before the entry into force of the Agreement . . . with respect to any act or fact that took place or any situation that existed before the date of termination.[158]

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

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

[158] Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (Mar. 8, 2018) **(CL-038)** (emphasis added).
[159] Claimants' Counter-Memorial ¶ 52.
[160] *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) **(RL-017)** ("For ten years from the date of termination, all other Articles *shall continue to apply to covered investments* established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.") (emphasis added).

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

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

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

[161] U.S. Memorial ¶ 70.

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

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

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

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

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

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

[164] *Canfor Corp. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 5, ¶ 19 (May 28, 2004) **(RL-066)** (noting that "the internal materials of an individual NAFTA Party established solely for that Party and not communicated to the other Parties during the negotiations of the Agreement do not reflect the common intention of the NAFTA Parties in drafting, adopting, or rejecting a particular provision"); Humphrey Waldock, Third Report on the Law of Treaties 58 (¶ 21), U.N. Doc. A/CN.4/167 (1964) **(RL-050)** ("Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties.").
[165] Email Exchange between C.J. Mahoney, Lauren Mandell, and Daniel Bahar, "RE: grandfather trigger," Nov. 27, 2018, at email from Lauren Mandell at 11:33 AM (p. 2 of PDF) **(C-116)**. *See also id.* at email from Lauren Mandell at 5:49 PM (pp. 1-2 of PDF) (referring to a "4-year safeguard").
[166] *Id.* at email from C.J. Mahoney at 11:44 AM (p. 2 of PDF).
[167] Claimants' Counter-Memorial ¶ 107.
[168] *Id.*

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

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

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

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

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[169] *Id.* ¶ 106 n.168.
[170] U.S. Department of State, "2021 Investment Climate Statements: Canada" **(C-093)**.
[171] Michelle Hoffman, "Canada-United States-Mexico Agreement," The Canadian Bar Association (Feb. 1, 2019) **(C-103)**. *See also* Global Affairs Canada, "The Canada-United States-Mexico Agreement: Economic Impact Assessment" at 32 (Feb. 26, 2020) **(C-097)** ("With respect to the NAFTA ISDS, the parties agreed to a transitional period of three years, during which ISDS cases can still be brought forward under NAFTA for investments made prior to the entry into force of CUSMA.").
[172] Annex 14-C, ¶ 1 **(C-0002)**.
[173] Claimants' Counter-Memorial ¶ 109 (quoting Email exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item" (Oct. 19, 2018), at p. 1 of attachment "Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings" **(C-118)**). *See also id.* ¶ 110 (discussing a similar statement in Email from Karin Kizer to Lauren Mandell, "Background for Brussels Conference (11.16.18)" (Nov. 17, 2018), at p. 2 of attachment **(C-119)**).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The original text stated that the Investment Chapter does not apply to acts/events that occurred prior to entry into force of the USMCA, consistent with the default Vienna Convention rules. In the scrub, we clarified that there is one exception: *Annex 14-C (the grandfather provision) allows investors to bring ISDS claims with respect to legacy investments where the alleged breach took place before entry into force of the USMCA*.[186]

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

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

[185] 2019 Trade Policy Agenda: Negotiations with China, Japan, the EU, and UK; new NAFTA/USMCA; U.S. Participation in the WTO; and other matters, Hearing Before the House Committee on Ways & Means, Serial No. 116-27, at 61, 85-86 (June 19, 2019) **(R-0014)**.
[186] Attachment to Email from Daniel O'Brien to John M. Melle et al. (Nov. 28, 2018) **(C-114)** (emphasis added).
[187] Claimants' Counter-Memorial ¶ 112. *See also id.* ¶ 109 n.173 ("There is no indication in these materials that paragraph 1 of Annex 14-C excludes claims in connection with measures taken during the transition period."); *id.* ¶ 113 ("There is no indication [in the Canadian legislation] that such causes of action are limited to claims regarding measures that predated the entry into force of USMCA.").

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

120. Likewise, it is hard to understand how Deputy Prime Minister Freeland could have celebrated the end of ISDS in multiple statements made about the USMCA if the reality had been, as Claimants argue, that Canada would in fact remain exposed to the threat of investor claims based on acts or omissions occurring in the three years after the USMCA's entry into force. Claimants' response to the Deputy Prime Minister's statements is telling: in the place of substantive argument, they offer the bare assertion that "Deputy Prime Minister Freeland was clearly referring to the elimination of ISDS after the end of the transition period. She was not speaking to Annex 14-C."[189] Claimants do not, however, provide any support for this reading of Deputy Prime Minister Freeland's statements, and their argument is inconsistent with the language of the statements themselves.

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

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

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

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

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

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

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

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[196] U.S. Memorial ¶ 89.

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

[198] Claimants' Counter-Memorial ¶ 117.

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

[200] Claimants' Counter-Memorial ¶ 111.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Claimants' Equitable Arguments Are a Meritless Distraction

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

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

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

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

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

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

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

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

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

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

> **its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. (*Nullus commodum capere de sua injuria propria*.)** Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right . . . .[212]

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

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

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[212] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 1962 I.C.J. 6 (June 15), at Separate Opinion of Judge Alfaro, p. 40 **(CL-138)** (emphases added).
[213] *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award ¶ 246 (Aug. 18, 2008) **(RL-046)**.
[214] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II ¶ 7.111 (Aug. 30, 2018) **(CL-171)**; *see also Resolute Forest Product v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Final Award ¶ 441 (July 25, 2022) **(RL-119)** ("*Resolute* Award").
[215] *Resolute* Award ¶ 442.
[216] *Id.* ¶ 460.

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

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

[217] The Tribunal is invited to examine the statements made in the cases relied upon by Claimant with the alleged "contradictory" statements made in this case. *See* Claimants' Counter-Memorial ¶ 128 n.200 and cases cited therein. In *Stabil v. Russian Federation*, Russia attempted to argue that Crimea was not Russian territory for purposes of the relevant treaty, whereas it had publicly proclaimed the opposite on numerous occasions. *Stabil LLC and others v. Russian Federation*, PCA Case No. 2015-35, Award on Jurisdiction ¶ 170 (June 26, 2017) **(CL-174)**. In *Chevron v. Ecuador (II)*, the Ecuadorian courts had unequivocally found that Chevron had been an investor in Ecuador as a successor to Texaco, while Ecuador asserted in the investor-state dispute that Chevron was not an "investor" for purposes of the relevant treaty. *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II ¶ 7.112 (Aug. 30, 2018) **(CL-171)**. In *Mobil v. Argentina*, the government of Argentina had consistently treated Mobil's investment as legally-made and valid, while claiming in the arbitration that the investment was illegal. *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability ¶¶ 217-30 (Apr. 10, 2013) **(CL-179)**. In each of these cases, the previous statements were manifestly inconsistent with the respondent's jurisdictional objection, in sharp contrast to this case.

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

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

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

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

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

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

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

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

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

> In short, as President Trump himself conceded, Claimants' original 2016 NAFTA Claims were strong. Respondent induced Claimants to release those claims with the promise of a permit. Claimants upheld their part of the bargain by terminating the 2016 NAFTA Claims. Respondent then reneged on its promise, breached its obligations under NAFTA—based on the same reasoning that gave rise to the 2016 NAFTA Claims—and now asserts that Claimants have no recourse to arbitration.[221]

142. In a footnote, Claimants state further that:

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

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

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

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

IV. Conclusion

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

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

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

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

Respectfully submitted,

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Summary of Redacted Pages

The summary of pages that have been redacted in their entirety from the U.S. Reply on its Preliminary Objection pursuant to paragraph 13 of the Confidentiality Order is below:

Document	Number of Redacted Pages
Annex A	9
Annex B	17