Public Version

UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES AND THE ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES,
ANNEX 14-C OF THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA
AND
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT 1994

TC Energy Corporation,
TransCanada PipeLines Limited

Claimants,

v.

The United States of America

Respondent.

ICSID Case No. ARB/21/63

CLAIMANTS' REJOINDER ON RESPONDENT'S PRELIMINARY OBJECTION

February 9, 2024

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I. Executive Summary

1. Claimants have shown in their earlier submissions that the Tribunal has jurisdiction over Claimants' claims. Specifically:

- Through Annex 14-C ("Annex 14-C" or the "legacy investment annex") of the United States-Mexico-Canada Agreement ("USMCA"), Respondent consented to the arbitration of claims, with respect to legacy investments, alleging that it has breached the obligations of Section A of Chapter 11 of the North American Free Trade Agreement ("NAFTA") ("Section A obligations"). Respondent's consent extended for three years after the termination of NAFTA ("transition period").
- While Respondent asserts that claims may be asserted under Annex 14-C only in relation to measures taken before the termination of NAFTA, there is no such temporal limitation in the text of USMCA or by implication. Respondent has consented to all claims submitted during the transition period, regardless of whether such claims arise out of measures taken before the termination of NAFTA or during the transition period.
- Respondent asserts that it was not bound by the Section A obligations during the transition period. However, through Annex 14-C and the Protocol Replacing the North American Free Trade Agreement with USMCA ("USMCA Protocol"), and in the context of dispute settlement, the USMCA Parties extended the Section A obligations for the duration of the transition period. Such extension is clear from the ordinary meaning of Annex 14-C and the USMCA Protocol.
- The extension of the Section A obligations is also clear from the selection of NAFTA as the governing law for this dispute. Annex 14-C specifies that the applicable substantive law with respect to claims asserted under paragraph 1 of Annex 14-C is NAFTA. The Tribunal must apply that substantive law to resolve all issues in dispute, including issues regarding the scope and applicability of any "obligations" of the USMCA Parties. It does not matter whether NAFTA was otherwise in force, as the USMCA Parties were free to, and did, agree that NAFTA would continue to be the governing law for any disputes submitted under Annex 14-C.
- Claimants own and control legacy investments and, within the three-year transition period, asserted claims with respect to those legacy investments alleging that Respondent's revocation of the Presidential permit for the Keystone XL pipeline ("KXL Pipeline") breached the applicable law, *i.e.*, Section A of Chapter 11 of NAFTA.

All of the above points result from the ordinary meaning and application of paragraphs 1 and 3 of Annex 14-C.

2. Respondent does not contest that Claimants own legacy investments, that the revocation of the Presidential permit for the KXL Pipeline relates to Claimants' legacy investments, or that

Claimants asserted their claims within the three-year transition period. Furthermore, in its Reply on its Preliminary Objection ("Reply"), Respondent agrees that:

- when parties consent to arbitration, they may choose the law that applies to resolve any claims that might arise between them;
- parties can choose a terminated treaty as the applicable law; and
- in Annex 14-C, the USMCA Parties chose NAFTA as the applicable law to govern claims asserted during the three-year transition period.

Given that Respondent has accepted these points, there should be no further debate that the Tribunal has jurisdiction over Claimants' claims. Nevertheless, Respondent continues to insist upon its preliminary objection ("Preliminary Objection"). Respondent makes the unfounded (and frankly, nonsensical) assertion that the applicable law does not, in fact, apply for resolving the issues in dispute regarding a claim asserted under Annex 14-C. Instead, it asserts that the temporal scope of NAFTA as a free-standing agreement defines the temporal scope of Annex 14-C of USMCA, which is part of an entirely separate agreement. According to Respondent, the USMCA Parties could not have chosen to apply NAFTA to any disputes related to measures taken after NAFTA terminated, even though (as noted) Respondent elsewhere concedes that parties are free to choose a treaty not in force as the applicable law. Respondent's arguments are internally inconsistent and circular, and they contradict basic principles of international arbitration and the ICSID Convention.

3. At this point, Respondent has run out of excuses. Apart from its plea for the Tribunal to ignore the applicable law, Respondent offers virtually nothing new in its Reply. It simply reiterates arguments that Claimants have already refuted. The lack of anything new in Respondent's Reply is particularly striking given that, after Claimants submitted their Counter-Memorial on Respondent's Preliminary Objection ("Counter-Memorial"), Respondent has (reluctantly, and only at the order of the Tribunal) produced the negotiating history of Annex 14-C, including numerous documents showing Respondent's understanding of the temporal scope of Annex 14-C at the time the legacy investment annex was negotiated. Respondent has also produced to Claimants documents showing the U.S. understanding of the legacy investment

annex in the years before Respondent lodged its Preliminary Objection. We shall refer to all of these documents as the "Produced Documents."

4. Respondent submitted a number of the Produced Documents with its Reply but provided virtually no argumentation regarding them. Instead, Respondent has simply dismissed them as irrelevant. Respondent's tactic is not surprising, given that the Produced Documents show that, among other things:

- During the negotiation of USMCA, the United States drafted and advocated for the legacy investment annex. From the first time the United States conceived of the legacy investment annex, it did so with the intention of protecting the reliance interest of investors by allowing claims arising out of measures taken against legacy investments during the transition period.
- The interagency group within the U.S. Government that approved proposing the legacy investment annex to Canada and Mexico did so with the understanding that it would allow claims arising out of measures taken during the transition period.
- Multiple U.S. Government officials (including the lead U.S. negotiators of the investment chapter of USMCA) explicitly recognized in internal U.S. Government documents and other documents that the legacy investment annex would allow claims arising out of measures taken during the transition period.
- The U.S. negotiators explained to their Canadian and Mexican counterparts that the legacy investment annex would grandfather the right to assert claims in connection with legacy investments for a period of three years after the termination of NAFTA.
- Mexico and Canada both understood that the legacy investment annex would grandfather the right to assert claims alleging a breach of the Section A obligations for a period of three years after the termination of NAFTA.
- Internal U.S. Government memoranda analyzing certain potential U.S. and Mexican measures recognized that Annex 14-C allows claims arising out of measures taken during the transition period.

5. Respondent, of course, was aware of the above facts long before it lodged its Preliminary Objection in this arbitration. Yet, it disingenuously asserted its Preliminary Objection anyway, apparently hoping that it could hide the evidence behind a screen of privilege. Now that the evidence has come to light, Respondent urges the Tribunal to ignore it. Respondent's position is directly at odds with the plain text of Annex 14-C, as well as the reality of what the USMCA

Parties understood and agreed in relation to Annex 14-C. Respondent's Preliminary Objection has not been put forward in good faith and must therefore be rejected.

6. Claimants will address the relevant Produced Documents throughout this submission, including in their discussion of the specific provisions of Annex 14-C that are in issue. In order to place the Produced Documents in context, Section II provides an overview of the negotiating history of USMCA, and in particular, the legacy investment annex. In Section III, Claimants rebut each of Respondent's assertions with respect to the interpretation of particular terms and provisions in Annex 14-C. In Section IV, Claimants show that the USMCA Parties' public explanations of Annex 14-C do not support Respondent's position. In Section V, Claimants show that Respondent carries the burden of proof with respect to its Preliminary Objection. In Section VI, Claimants show that equity requires rejection of Respondent's Preliminary Objection. In Section VII, Claimants conclude.

II. General Comments with Respect to the Produced Documents

7. Respondent's main assertion is that Annex 14-C does not allow claims arising out of measures taken during the three-year transition period. Before proceeding with a more detailed refutation of Respondent's specific legal assertions, it is important to set the context with an explanation of how the negotiation of the legacy investment annex unfolded, as evidenced by the Produced Documents.

8. The Produced Documents establish conclusively that the legacy investment annex was intended to allow claims arising out of measures taken during the transition period. In Section II.A, Claimants show that the Tribunal is entitled to and should consider the Produced Documents when interpreting Annex 14-C. In Section II.B, Claimants highlight three examples from the Produced Documents that constitute direct evidence that Respondent is putting forward its Preliminary Objection in bad faith and that, prior to lodging its Preliminary Objection, Respondent interpreted Annex 14-C to allow claims arising out of measures taken during the transition period. In Section II.C, Claimants provide a high-level overview of the negotiation of Annex 14-C based on the Produced Documents.

A. Contrary to Respondent's Assertions, the Produced Documents Are Relevant to the Interpretation of Annex 14-C

9. The Produced Documents are supplementary means of interpretation that the Tribunal may and should consider under Article 32 of the Vienna Convention on the Law of Treaties ("VCLT"). Article 32 of the VCLT provides as follows:

> *Article 32*
>
> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable.[1]

10. There is no exclusive list of the types of material that constitute "supplementary means of interpretation." As the Commentary to the VCLT ("VCLT Commentary") states, "The Commission did not think that anything would be gained by trying to define *travaux préparatoires*; indeed, to do so might only lead to the possible exclusion of relevant evidence."[2] Further, as Respondent's expert, Mr. Richard Gardiner, states in his treatise, "[t]he supplementary means of interpretation indicated in the Vienna rules are not an exclusive list."[3] Indeed, Mr. Gardiner refers to case authority in his Supplementary Report that makes the same point.[4]

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[1] Exhibit RL-16, Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series*, vol. 1155 ("VCLT"), at Art. 32.

[2] Exhibit CL-32, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II ("VCLT Commentary"), at p. 223.

[3] Exhibit CL-163, Richard Gardiner, *Treaty Interpretation* (2015) (excerpts) ("Gardiner, *Treaty Interpretation*"), at p. 409.

[4] Supplementary Report of Professor Richard Gardiner, Dec. 22, 2023 ("Second Gardiner Report"), at para. 36 (quoting Exhibit RG-25, *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction (Jan. 28, 2008), at paras. 49-50 (". . . Article 32 VCLT permits, as supplementary means of interpretation, not only *preparatory work* and *circumstances of conclusion* of the treaty, but indicates by the word

11. As Article 32 of the VCLT states, even the "circumstances of [a treaty's] conclusion" are relevant supplementary means of interpretation. This point is particularly important, given the evidence (addressed further below) that the USMCA Parties were seeking to protect legacy investments that had been made in reliance on the protections afforded under Chapter 11 of NAFTA. As Mr. Gardiner states in his treatise, "What is meant by the circumstances of conclusion is not indicated in the Vienna Convention. The circumstances which cause a treaty to be drawn up, affect its content, and attach to its conclusion, are all factors which are in practice taken into account."[5] Similarly, the circumstances of the conclusion of USMCA—and in particular, the desire to provide heightened levels of protection for certain energy and other investors—are relevant when considering the interaction between Annexes 14-C and 14-E, and the significance of Footnote 21 of Annex 14-C when interpreting the scope of paragraph 1 of Annex 14-C.

12. The Produced Documents include, *inter alia*, documents and negotiating proposals shared among the USMCA Parties, preparatory materials such as talking points that were used to explain the meaning and purpose of the negotiating proposals, evidence of internal deliberations regarding the position of the United States, and internal U.S. Government materials interpreting Annex 14-C after the text had been negotiated. The Tribunal may consider all of these materials in interpreting Annex 14-C.

13. In assessing these materials, and as will be shown in the discussion below, it is important to recognize that the United States was the drafter and advocate for the legacy investment annex during the negotiation of USMCA. The documents pertaining to its internal deliberations are thus singularly important in assessing what the legacy investment annex was intended to do.[6] To

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'including' that, beyond these two means expressly mentioned, other supplementary means may be applied." (emphasis in original)).

[5] Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 398. Mr. Gardiner then refers to a state-state arbitration decision under NAFTA, in which the panel considered the interrelationships among three treaties. In Mr. Gardiner's words, the panel "examined the sequence of negotiations of [three treaties] and considered statements and documents which did not strictly form part of the preparatory work of the NAFTA. . . . The panel joined together its examination of the preparatory work and the circumstances of conclusion to justify use of some material whose admissibility might otherwise have been uncertain." Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 400.

[6] *See* Exhibit CL-208, *Case Concerning the Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1976 (Netherlands v. France)*, Arbitral Award, Mar. 12, 2004 (Unofficial English Translation), at paras. 73-74 (stating that Article 32 of the VCLT "has its origins in a

ignore those materials would be to ignore reality. The Produced Documents are relevant to both the proper interpretation of Annex 14-C under the VCLT and Claimants' equitable arguments, including that Respondent has acted in bad faith and violated the principle of consistency. As the Tribunal has already noted in addressing Claimants' requests for document production, "there is no definition in international law of what the *travaux préparatoires* should include and therefore no reason to exclude as a matter of principle that internal documents may be *prima facie* relevant."[7]

14. Respondent argues that Annex 14-C is clear on its face, and so there is no need to resort to supplementary means of interpretation.[8] Claimants agree that the ordinary meaning of Annex 14-C is clear, but Claimants' interpretation is directly contrary to Respondent's interpretation. Consideration of supplementary means of interpretation is <u>always</u> permissible under the VCLT in order to confirm the meaning of the provisions in dispute,[9] regardless of whether the text is ambiguous or obscure, or whether the interpretation would lead to a result which is manifestly absurd or unreasonable. In any case, Respondent has sought to create ambiguity, absurdity, and unreasonableness by seeking to insert a temporal limitation into paragraph 1 of Annex 14-C that is not there. If there is any ambiguity, absurdity, and unreasonableness in the text of the disputed provisions, resort to the supplementary means of interpretation is not only permissible, but necessary.

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wealth of long-standing and consistent arbitral jurisprudence that rejects any interpretation that leads to unreasonable results," and citing as an example *Georges Pinson (France) v. United Mexican States*, in which the Franco-Mexican Claims Commission found that, if a treaty text is ambiguous, "interpretation must be sought which, in the framework of the text, corresponds most closely either to a reasonable solution to the dispute, or to the impression that the offer by the party who took the initiative must reasonably and in good faith have made on the other party."). Mr. Gardiner wrote in his treatise that this approach "require[s] the interpreter, in the case of uncertainty or divergent texts, to look to the proposal that led to the text and the good faith of the parties in negotiating on that basis." Exhibit CL-163, Gardiner, *Treaty Interpretation* at pp. 174-75.

[7] Procedural Order No. 3, Nov. 6, 2023, Annex, at p. 35.

[8] The United States of America's Reply on Its Preliminary Objection, Dec. 27, 2023 ("Respondent's Reply on Preliminary Objection"), at para. 8. *See also* the United States of America's Memorial on Preliminary Objection, June 12, 2023 ("Respondent's Memorial on Preliminary Objection"), at para. 65.

[9] *See, e.g.*, Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 354 ("Recourse to preparatory work is always permissible under the Vienna rules to 'confirm' the meaning reached by application of the general rule in article 31. Where the qualifying conditions (ambiguity or obscurity or meaning, or manifest absurdity or unreasonableness of result) are met for use of preparatory work to 'determine' the meaning, the Vienna rules appear to envisage what is in effect replacement of an unsatisfactory interpretation produced by the general rule with one yielded up by the preparatory work.").

15. In approaching treaty interpretation, the overarching principle is that the treaty should be interpreted in good faith. Indeed, the opening words of Article 31(1) of the VCLT are that "[a] treaty shall be interpreted in good faith . . . ."[10] As the VCLT Commentary states:

> [T]he interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning . . . . [A] number of articles adopted by the [International Law] Commission contain clauses which distinguish between matters expressly provided in the treaty and matters to be implied in it by reference to the intention of the parties; and clearly, the operation of such clauses can be fully appreciated and determined only in the light of the means of interpretation admissible for ascertaining the intention of the parties.[11]

16. As the tribunal in *ESPF Beteiligungs v. Italy* explained:

> The preamble to the VCLT confirms that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized" and States' desire "to establish conditions under which justice and respect for the obligations arising from treaties can be maintained." . . .
>
> [I]t is important that international law as expressed in treaties is capable of being known and is certain. This is of fundamental importance to States, as well as all international actors affected by such treaties. State sovereignty is guarded by this, as States negotiate and choose how to express their agreed limits to their sovereignty. It is also important for other international actors who rely on treaties that the terms of such treaties be clear and the obligations assumed to be certain. These principles are of fundamental importance to the rule of law.[12]

Saying that a treaty means one thing when it is negotiated, and something entirely different when a treaty party is called to account for breaching its obligations, is not consistent with good faith. As Respondent's expert Mr. Gardiner states in his treatise, "[g]ood faith requires that no party

[10] Exhibit RL-16, VCLT at Art. 31(1).

[11] Exhibit CL-32, VCLT Commentary at p. 219. *See also* Exhibit CL-33, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Sept. 25, 1983, at para. 14 ("this is again a general principle of law - any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.").

[12] *See* Exhibit CL-58, *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, Sept. 14, 2020, at paras. 274-75.

has, as it were, its fingers crossed behind its back."[13] Respondent has, in fact, launched its Preliminary Objection with its fingers crossed behind its back.

17. Respondent has urged the Tribunal to disregard the Produced Documents because the documents directly contradict every assertion that Respondent has made with respect to the interpretation of Annex 14-C. Respondent knows this, and thus wants to sweep all of the Produced Documents under the rug. It seeks to hide the truth behind an excessively narrow interpretation of Article 32 of the VCLT. Its assertions regarding the application of the VCLT principles ignore how dispute settlement bodies have interpreted and applied the VCLT principles in practice. Contrary to the impression that Respondent's expert, Mr. Gardiner, has given in his opinions submitted in this arbitration, dispute settlement bodies have taken a pragmatic approach to treaty interpretation and have avoided an overly dogmatic methodology.[14] Again, in his own treatise, Mr. Gardiner has recognized that dispute settlement tribunals seek to find the truth and the best evidence of a good faith interpretation of a treaty.[15] They are not constrained by unduly rigid application of Articles 31 and 32 of the VCLT.[16]

18. Respondent has asserted that unilateral statements not shared among the USMCA Parties must be disregarded, even though arbitral tribunals have routinely resorted to unilateral statements to assist in treaty interpretation, and the United States has in fact advocated for just

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[13] Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 31.

[14] *See infra* para. 18 and n.19-21.

[15] *See* Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 11.

[16] In his Second Opinion, Mr. Gardiner asserts that, for the preparatory work of USMCA "to be considered as supplementary means of interpretation under Article 32 of that Convention, it must either be potentially 'confirming' an interpretation achieved by applying the general rule of interpretation or 'determining' the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable." Second Gardiner Report at para. 46. However, in his treatise, he explains that "[t]he ILC's approach to this [Article 32, which allows consideration of supplementary means of interpretation] suggests that the reality is that if the interpreter finds that the preparatory work suggests a meaning which was not the one which would be the first choice after applying the general rule, and which would not have immediately struck the interpreter as within the obvious range of interpretative options, the interpreter will have to reconsider the position. It would be absurd to think otherwise." Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 354. *See also* Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 11 ("An attempt is also made here to demonstrate that practice in use of preparatory work has, in any event, already shown a marked divergence from a strict reading of the Vienna rules.") and p. 31 (as "generally confirmed throughout the literature on treaty interpretation . . . , application of any rules on treaty interpretation, and in particular the Vienna rules, is not a purely mechanical process . . . .").

that approach in the past.[17] Respondent's expert, Mr. Gardiner, has himself recognized exactly that in his treatise.[18] Dispute settlement bodies have taken into account unilateral statements of one party to a treaty,[19] internal notes of a treaty party,[20] and even internal materials developed after the conclusion of a treaty[21] where such documents provided useful guidance in reaching a good faith interpretation of a treaty.

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[17] *See* Exhibit CL-190, *Oil Platforms (Iran v. United States)*, Preliminary Objection Submitted by the United States of America, Dec. 16, 1993 ("*Oil Platforms*, Preliminary Objection"), at paras. 3.22, 3.37 (referring to the "Treaty of Amity and Economic Relations with Ethiopia: Message from the President of the United States, S. Exec. Doc. F, 82d Cong., 2d Sess., p. 2 (1951)" and "A Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Republic of China: Hearing before a Subcommittee of the Senate Committee on Foreign Relations, 80th Cong. 2d Sess., pp. 29-30 (1948)"); Exhibit CL-209, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Submission of the United States of America on Preliminary Issues, Oct. 6, 2000 ("*Feldman v. Mexico*, U.S. Preliminary Issues Submission"), at para. 16 (referring to the U.S. Statement of Administrative Action concerning NAFTA). *See also infra* n.19-20.

[18] Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 119 ("In some instances, international courts and tribunals have looked to truly unilateral material, such as explanations given to a legislative body when a state is preparing to ratify a treaty.") *See also id.* at p. 120 (explaining that in the *Oil Platforms* case, the ICJ "did admit and consider material of unilateral origin" including "a memorandum sent by the US State Department to the US embassy in China" and a "message of the Secretary of State transmitting several treaties of the same kind to the Senate for Advice and consent to ratification.").

[19] *See* Exhibit CL-197, *HICEE B.V. v. Slovak Republic*, PCA Case No. 2009-11, Final Award, May 23, 2011, at para. 135 (taking into account unilateral statements of a treaty party even if they "do not fit within any of the categories of extraneous material specified in Article 31 or Article 32 of the Vienna Convention"); Exhibit CL-31, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, at paras. 111-12 (taking into account the Canadian Statement on Implementation of NAFTA, as well as the transmittal statements submitted to the U.S. Senate during the ratification of several U.S. BITs containing language similar to that of NAFTA); Exhibit CL-210, *Ethyl Corporation v. Government of Canada*, UNCITRAL (NAFTA), Award on Jurisdiction, June 24, 1998, at para. 84 (referring to Canada's Statement on the Implementation of NAFTA); Exhibit CL-137, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002, at para. 181 (referring to the U.S. Statement of Administrative Action concerning NAFTA); Exhibit CL-211, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, Mar. 31, 2010, at para. 191 (referring to Canada's Statement of Implementation of NAFTA); Exhibit CL-212, *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, at para. 362 (referring to the letter of submission of the US-Argentina BIT to the Argentine Congress and the Report of the pertinent Congressional Committee); Exhibit CL-213, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, Sept. 16, 2003, at paras. 15.4-15.6 (referring to a Letter of Submittal from the U.S. Department of State, which provided an article-by-article commentary to the applicable 1994 US–Ukraine BIT). Mr. Gardiner discusses *HICEE* in his treatise. *See* Exhibit CL-163, Gardiner, *Treaty Interpretation* at pp. 407-08.

[20] Exhibit CL-34, *Churchill Mining Plc v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, Feb. 24, 2014, at para. 212 ("The British materials contain four folders from the Foreign and Commonwealth Office archives. They are mainly composed of internal notes and drafts of British officials and counter-drafts submitted by Indonesia. With respect to Article 7 of the BIT, the materials contain no exchanges of notes or similar documents clearly depicting a common understanding. The Tribunal nevertheless believes that it may draw some useful indications from these materials, both of the intentions of the British negotiators and of Indonesia. With these considerations in mind, the Tribunal now embarks upon a closer analysis of these *travaux*.").

[21] Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 120 (explaining that in *US-UK Heathrow Airport User Charges Arbitration* "a commentary prepared by a British government lawyer for restricted circulation immediately after a bilateral negotiation was disclosed in the course of discovery of documents," which "the USA referred to . . .

19. The Produced Documents establish clearly and conclusively that the interpretation that Respondent now advocates is not rooted in a good faith interpretation of Annex 14-C. Respondent's interpretation is a *post hoc* construct that does not reflect what the USMCA Parties intended and agreed. It is nothing more than an effort to change the rules now that Respondent faces a significant damages claim as a result of its arbitrary, unfair, discriminatory, and expropriatory actions against Claimants. Respondent's bad faith attempt at obstructing Claimants from seeking redress afforded by Annex 14-C through its Preliminary Objection must be rejected.

B. The Produced Documents Show that Respondent Has Asserted Its Preliminary Objection in Bad Faith

20. From the first time Respondent presented its Preliminary Objection, Claimants have maintained that Respondent was acting in bad faith.[22] Respondent knows full well that it negotiated paragraph 1 of Annex 14-C to allow claims arising out of measures taken during the transition period. As Claimants showed in their earlier submissions, that fact is evident not only from the ordinary meaning of the text but also from the contemporaneous public statements of all three USMCA Parties.[23] Presumably, Respondent resisted document production so vigorously precisely because it knew that its internal documents would confirm Claimants' position. The Produced Documents do exactly that. In fact, the Produced Documents are entirely one sided. They show the truth of Claimants' position, while not a single Produced Document supports Respondent's position.

21. Respondent submitted many Produced Documents with its Reply (albeit with virtually no argumentation about their meaning). However, there are many other Produced Documents that Respondent did not enter into the record, which Claimants introduce with this submission. We

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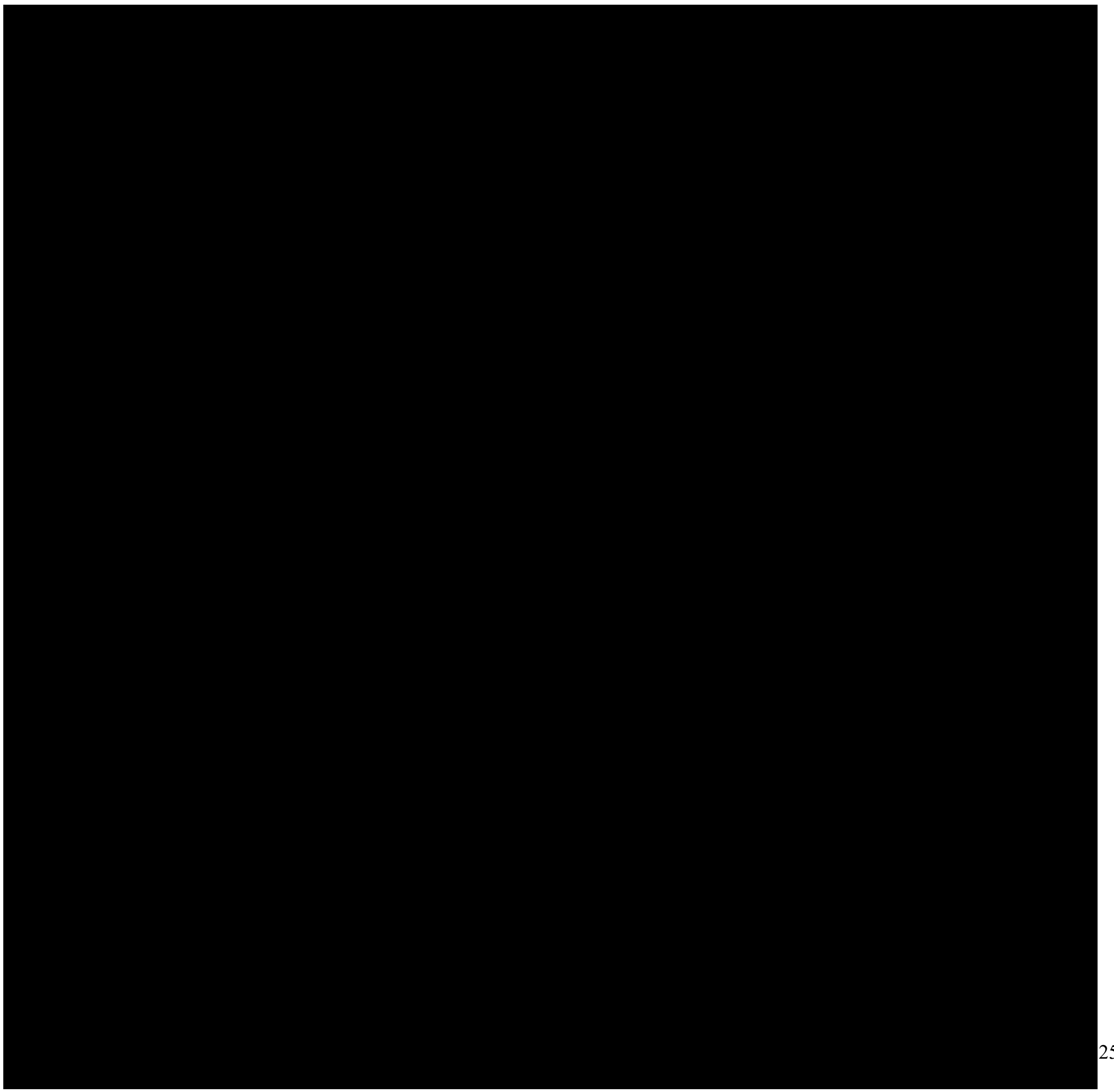
and the Tribunal quoted . . . in its award."). With respect to the *Heathrow Airport* decision, Mr. Gardiner wrote that "[a]dmission of such material is not always on the basis that it is preparatory work, or not solely on that basis." *See id.* at p. 120.

[22] *See* Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection, Feb. 10, 2023 ("Claimants' Observations on Bifurcation"), at Section III.B; Claimants' Rejoinder Regarding Respondent's Request for Bifurcation, Mar. 22, 2023 ("Claimants' Rejoinder on Bifurcation"), at Section III.A; Claimants' Counter-Memorial on Respondent's Preliminary Objection, Aug. 11, 2023 ("Claimants' Counter-Memorial on Preliminary Objection"), at Section VIII.A.

[23] *See* Claimants' Observations on Bifurcation at Section III.B; Claimants' Rejoinder on Bifurcation at Section III; Claimants' Counter-Memorial on Preliminary Objection at Sections IV and VII.B.

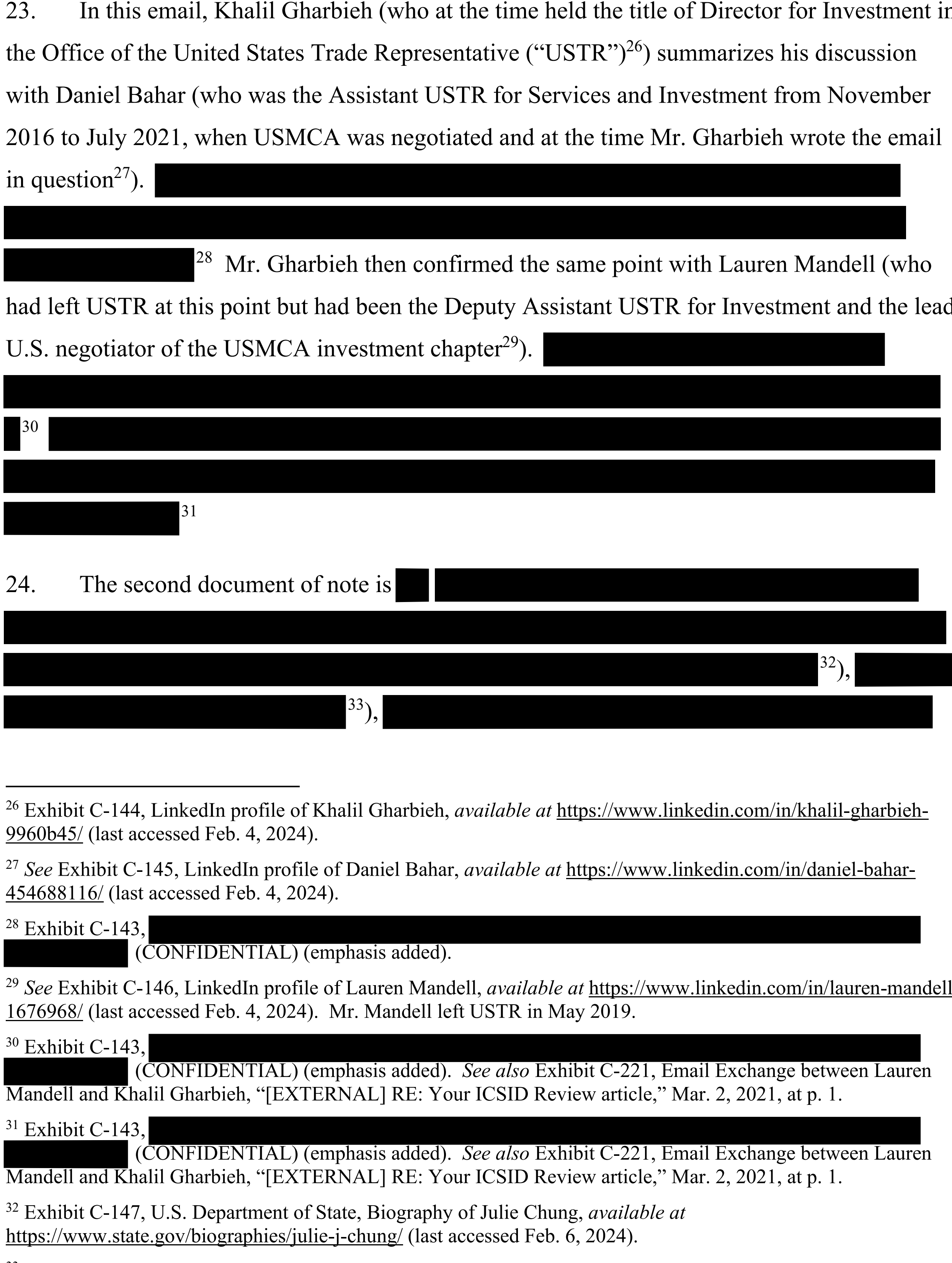
highlight three such documents at the outset, each of which shows that Respondent fabricated its Preliminary Objection solely for the purpose of obstructing and delaying this arbitration.

22. The first document of note is a U.S. Government internal email dated March 2, 2021.[24] We reproduce that email in full below:


[25]

[24] Exhibit C-143, (CONFIDENTIAL) (emphasis added).

[25] Exhibit C-143, (CONFIDENTIAL) (emphasis added). *See also* Exhibit C-221, Email Exchange between Lauren Mandell and Khalil Gharbieh, "[EXTERNAL] RE: Your ICSID Review article," Mar. 2, 2021, at p. 1.



23. In this email, Khalil Gharbieh (who at the time held the title of Director for Investment in the Office of the United States Trade Representative ("USTR")[26]) summarizes his discussion with Daniel Bahar (who was the Assistant USTR for Services and Investment from November 2016 to July 2021, when USMCA was negotiated and at the time Mr. Gharbieh wrote the email in question[27]). [28] Mr. Gharbieh then confirmed the same point with Lauren Mandell (who had left USTR at this point but had been the Deputy Assistant USTR for Investment and the lead U.S. negotiator of the USMCA investment chapter[29]). [30] [31]

24. The second document of note is [32]), [33]),

[26] Exhibit C-144, LinkedIn profile of Khalil Gharbieh, *available at* https://www.linkedin.com/in/khalil-gharbieh-9960b45/ (last accessed Feb. 4, 2024).

[27] *See* Exhibit C-145, LinkedIn profile of Daniel Bahar, *available at* https://www.linkedin.com/in/daniel-bahar-454688116/ (last accessed Feb. 4, 2024).

[28] Exhibit C-143, (CONFIDENTIAL) (emphasis added).

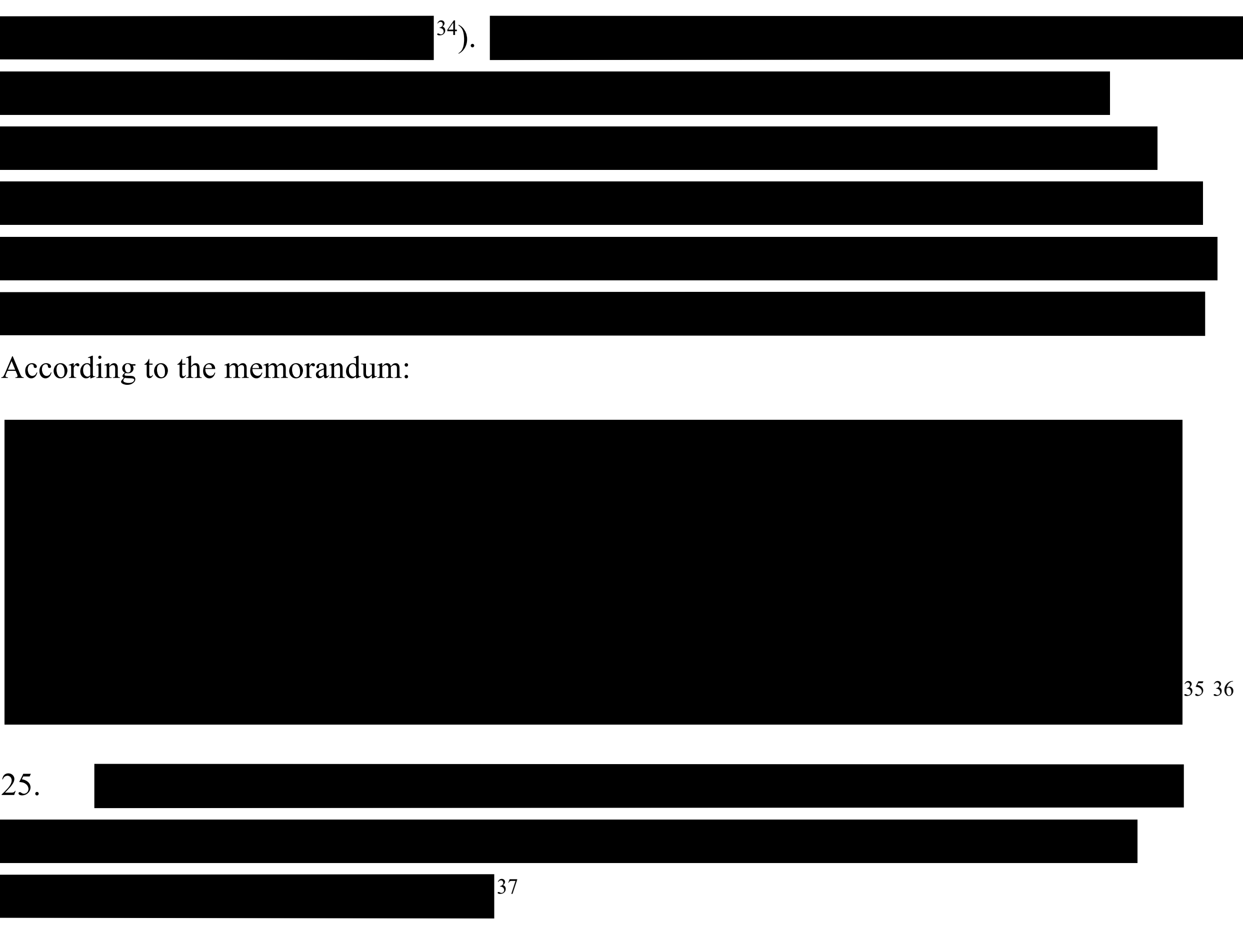
[29] *See* Exhibit C-146, LinkedIn profile of Lauren Mandell, *available at* https://www.linkedin.com/in/lauren-mandell-1676968/ (last accessed Feb. 4, 2024). Mr. Mandell left USTR in May 2019.

[30] Exhibit C-143, (CONFIDENTIAL) (emphasis added). *See also* Exhibit C-221, Email Exchange between Lauren Mandell and Khalil Gharbieh, "[EXTERNAL] RE: Your ICSID Review article," Mar. 2, 2021, at p. 1.

[31] Exhibit C-143, (CONFIDENTIAL) (emphasis added). *See also* Exhibit C-221, Email Exchange between Lauren Mandell and Khalil Gharbieh, "[EXTERNAL] RE: Your ICSID Review article," Mar. 2, 2021, at p. 1.

[32] Exhibit C-147, U.S. Department of State, Biography of Julie Chung, *available at* https://www.state.gov/biographies/julie-j-chung/ (last accessed Feb. 6, 2024).

[33] Exhibit C-148, U.S. Department of State, Biography of Richard Visek, *available at* https://www.state.gov/biographies/richard-c-visek/ (last accessed Feb. 6, 2024).

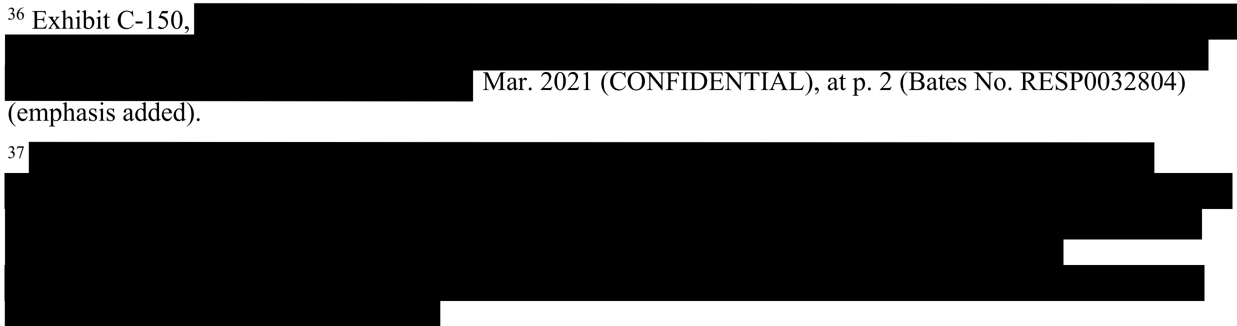


[34]).

According to the memorandum:

[35] [36]

25. [37]



[34] Exhibit C-149, U.S. Department of State, Biography of Ambassador Virginia Palmer, *available at* https://www.state.gov/biographies/virginia-e-palmer/ (last accessed Feb. 6, 2024).

[35] In this Rejoinder, information designated as confidential by Respondent pursuant to the Tribunal's Confidentiality Order of February 2, 2023 has been enclosed in square brackets (**[[ ]]**). Such information is not subject to the special confidentiality agreement reached between Claimants and Respondent, dated November 20, 2023, regarding handling of information that is confidential until July 1, 2024, pursuant to the agreement reached between the United States, Canada, and Mexico ("Special Confidentiality Agreement"). Information subject to the Special Confidentiality Agreement has been enclosed in braces ({{ }}).

[36] Exhibit C-150, Mar. 2021 (CONFIDENTIAL), at p. 2 (Bates No. RESP0032804) (emphasis added).

[37]

26. The third document of note is a [38] This document was prepared on or after November 1, 2021.[39] [40]

[38] Exhibit C-151, (CONFIDENTIAL).

[39] Respondent produced this document as Bates No. RESP0032801 on January 26, 2024. The Produced Documents also include a draft version of the document (Bates No. RESP0022500). *See* Exhibit C-152, (CONFIDENTIAL). The draft version appears on Respondent's revised privilege log of January 3, 2024. The date and author of the draft document are not listed in the document; however, Respondent's privilege log lists only one document after March 24, 2021, which was document 1615. The privilege log identifies Mr. Khalil Gharbieh as the author, indicates that the draft document is dated "1-Nov-21 (approx.)," and describes the draft document as "[i]nternal draft USTR comments reflecting predecisional deliberations on draft internal USG document concerning energy issues in Mexico and discussing USMCA investment provisions." Exhibit C-153, Respondent's Privilege Log (revised), Jan. 3, 2024, at entry 1615. . *See supra* n.26. *See* Exhibit C-154, United States Department of State, Telephone Directory, *available at* https://www.state.gov/wp-content/uploads/2019/10/Org-Directory.pdf (updated Jan. 29, 2024), at pp. OD-39–OD-40.

[40] USTR's 2022 National Estimate Report summarizes the issue as follows: "On September 30, 2021, the Mexican Government sent to the Chamber of Deputies a constitutional amendment to retake state control of the electricity sector and significantly roll back Mexico's historic 2013 through 2014 energy reforms. If approved, the amendment would transform CFE [*i.e.*, Comisión Federal de Electricidad, Mexico's state-owned electricity utility] into a vertically integrated monopoly that controls access to Mexico's grid, abolish independent regulators, and guarantee that CFE generates at least 54 percent of the energy required by Mexico. The amendment would also cancel all private power generation permits and power purchase contracts selling to CFE, as well as self-supply power purchase agreements granted since 2014." Exhibit C-219, United States Trade Representative, 2022 National Trade Estimate Report on Foreign Trade Barriers, *available at* https://ustr.gov/sites/default/files/2022%20National%20Trade%20Estimate%20Report%20on%20Foreign%20Trade%20Barriers.pdf, at p. 354.

[41]

The document indicates that the analysis was drafted by [42] The document [43]

[41] Exhibit C-151, (CONFIDENTIAL), at Bates No. RESP0032801 (emphasis added).

[42] Exhibit C-151, (CONFIDENTIAL), at Bates No. RESP0032802. .

[43] Ms. Thornton was also a part of Respondent's legal team in this arbitration, appearing on Respondent's Request for Bifurcation.

[44]

27. These are only three documents, and there are many others that similarly show Respondent's Preliminary Objection is directly contrary to the intentions and understanding of the U.S. Government at the time it negotiated the legacy investment annex and during the time before it submitted its Preliminary Objection. We shall address those additional documents later in this submission. It is important to assess all of Respondent's allegations regarding its Preliminary Objection against this undeniable reality. Respondent knows its position is incorrect. Its insistence on pressing its meritless objection has accomplished nothing except to delay these proceedings by over a year and a half and to add significant legal costs associated with the additional briefing, document production, and hearing precipitated by this bifurcated stage of the arbitration.

C. The Legacy Investment Annex Was Designed to Allow Claims Arising Out of Measures Taken During the Transition Period

28. In this subsection, Claimants provide an overview of the negotiation of the legacy investment annex based on the Produced Documents. As this overview will show, the legacy investment annex was a U.S. creation. The United States drafted and proposed the annex for the purpose of allowing claims arising out of measures taken during the transition period. In Respondent's own words, [45] so the original purpose of the annex is critical to understanding the final text. At no point during the negotiation was there any indication that the purpose of the annex was to allow claims only in relation to measures that pre-dated the entry into force of USMCA. Similarly, there is no indication at any point during the negotiation that

[44] Exhibit C-151, (CONFIDENTIAL), at Bates No. RESP0032802.

[45] Respondent's Reply on Preliminary Objection at para. 80 (USMCA CONFIDENTIAL).

the three-year transition period was intended to correspond with the three-year NAFTA limitations period, as Respondent now contends.

29. To frame the discussion that follows, the negotiations took place over a period of a little more than one year. In 2017, the United States, Canada, and Mexico undertook (in the words of the USMCA Protocol) "negotiations to amend the NAFTA pursuant to Article 2202 of the NAFTA."[46] The first round of negotiations took place on August 16-20, 2017.[47] Six more formal rounds of negotiations followed, with the last round in March 2018.[48] However, discussions continued among the three governments on an *ad hoc* basis for several months thereafter until the USMCA Parties signed the agreement on November 30, 2018.[49]

30. The term "USMCA" was not adopted until the latter part of the negotiation, but we will use that term throughout this discussion for convenience. The negotiating documents frequently refer to NAFTA as "NAFTA 1.0" and the agreement that would later be called USMCA as "NAFTA 2.0."

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[46] Exhibit R-1, Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada. Article 2202 of the NAFTA, titled "Amendments," provides as follows: "1. The Parties may agree on any modification of or addition to this Agreement. 2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement." Exhibit C-1, North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, signed Dec. 17, 1992, entered into force Jan. 1, 1994 ("NAFTA 1994"), at Art. 2202.

[47] Exhibit C-155, Office of the United States Trade Representative, "USTR Announces First Round of NAFTA Negotiations," July 19, 2017, *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-announces-first-round-nafta.

[48] The dates of the seven rounds were as follows: Round One (August 16-20, 2017); Round Two (September 1-5, 2017); Round Three (September 23-27, 2017); Round Four (October 11-17, 2017); Round Five (November 21, 2017); Round Six (January 23-29, 2018); and Round Seven (March 5, 2018). Exhibit C-156, SICE - OAS, "Canada-Mexico-United States (USMCA): Renegotiation of the Agreement," *available at* http://www.sice.oas.org/tpd/USMCA/USMCA_e.ASP (last accessed Jan. 31, 2024).

[49] The United States and Mexico reached an agreement in principle on August 27, 2018, and the United States and Canada reached an agreement in principle on September 30, 2018. Exhibit C-156, SICE - OAS, "Canada-Mexico-United States (USMCA): Renegotiation of the Agreement," *available at* http://www.sice.oas.org/tpd/USMCA/USMCA_e.ASP (last accessed Jan. 31, 2024). The agreement was signed on November 30, 2018. *Id*.

31. In this subsection, we will describe these negotiations at a high level. Claimants will provide a more in-depth analysis in the discussion of specific provisions of USMCA in later sections of this submission.

1. Original Internal U.S. Draft Proposal on Investor-State Dispute Settlement

32. [50]

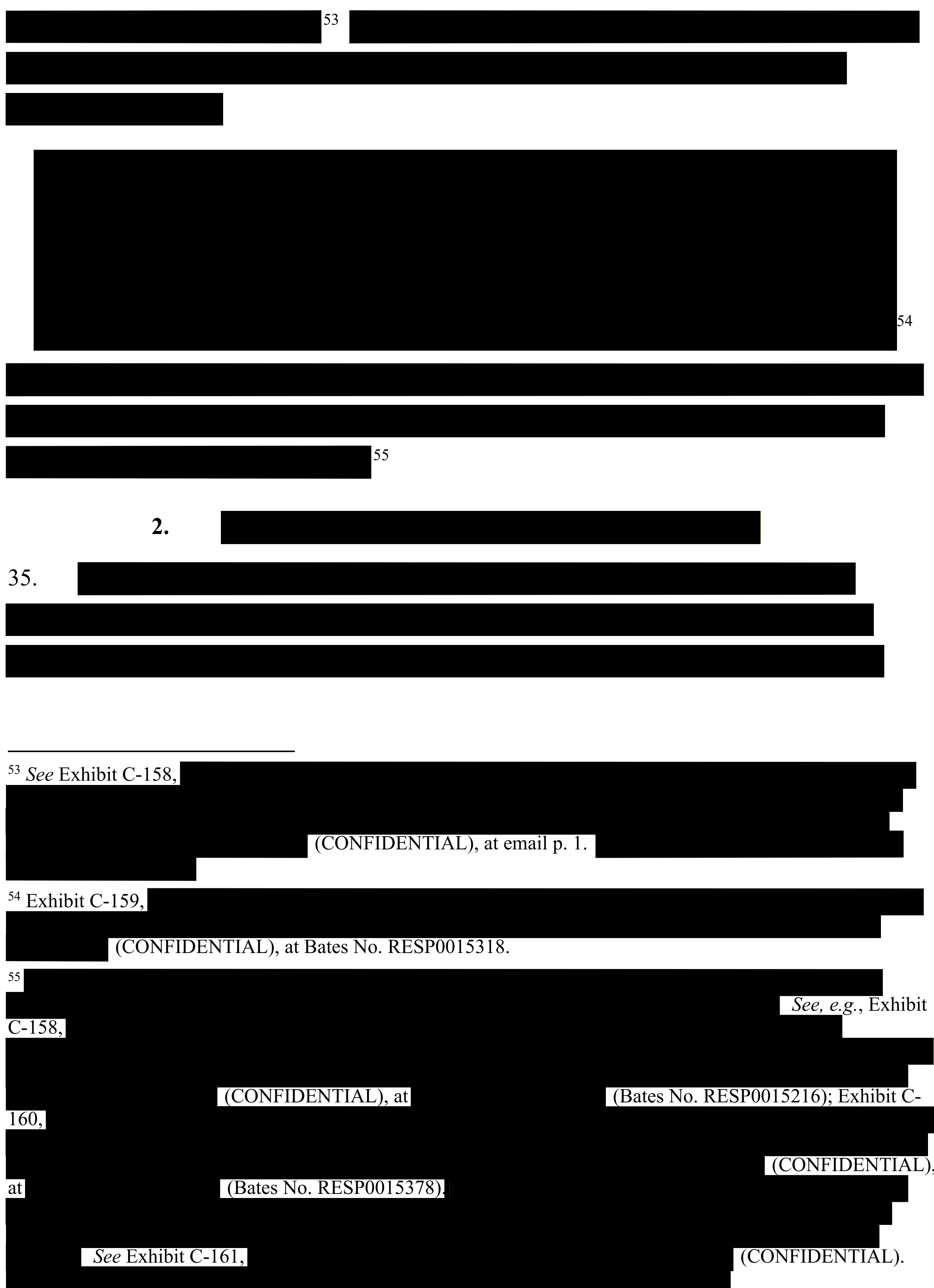
33. [51] [52]

34.

[50] *See* Exhibit C-157, (CONFIDENTIAL).

[51] *See* Exhibit C-157, (CONFIDENTIAL), at (Bates No. RESP0015074–RESP0015077).

[52] Exhibit C-157, (CONFIDENTIAL), at email p. 1 (Bates No. RESP0015034).



[53]

[54]

[55]

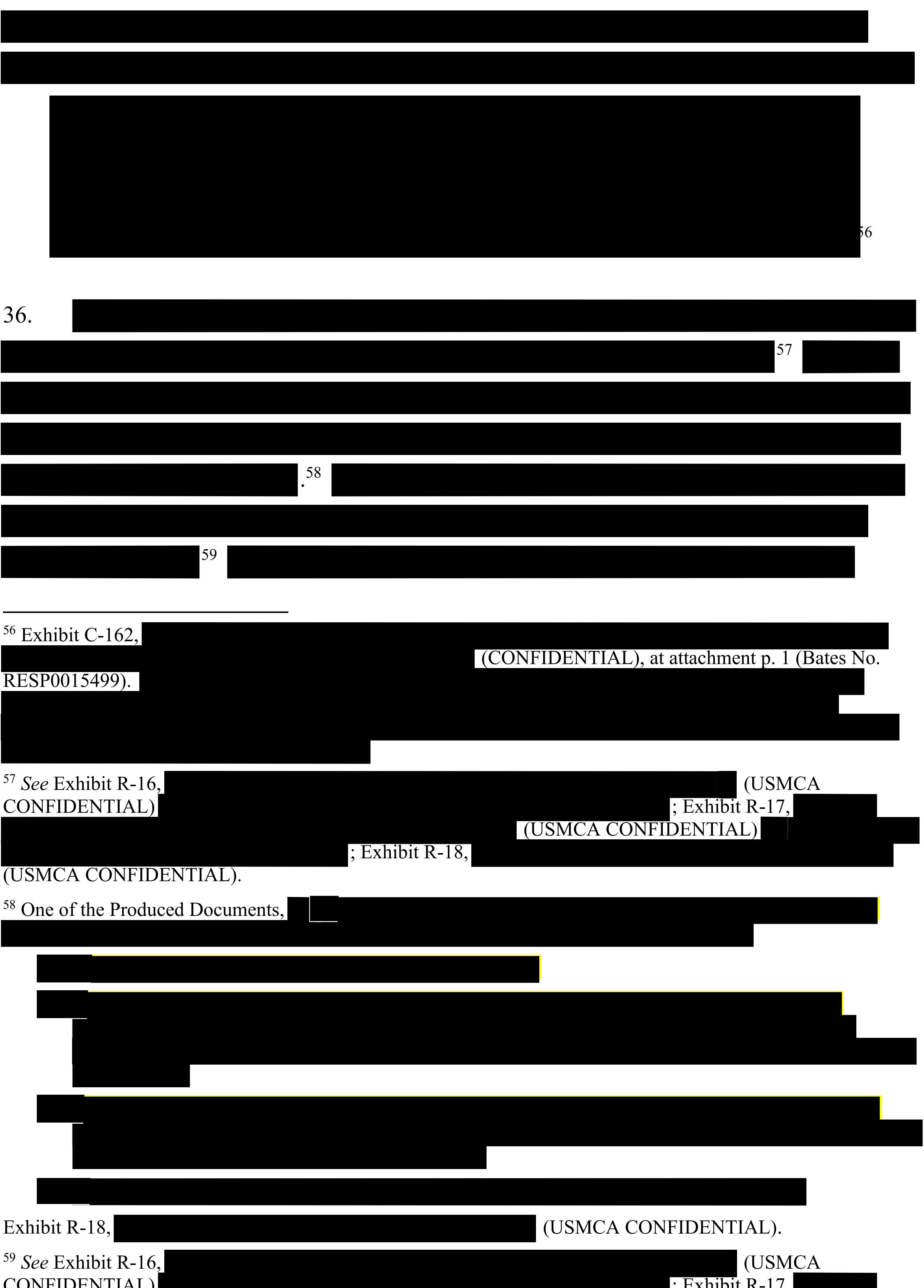
2.

35.

[53] *See* Exhibit C-158, (CONFIDENTIAL), at email p. 1.

[54] Exhibit C-159, (CONFIDENTIAL), at Bates No. RESP0015318.

[55] *See, e.g.*, Exhibit C-158, (CONFIDENTIAL), at (Bates No. RESP0015216); Exhibit C-160, (CONFIDENTIAL), at (Bates No. RESP0015378). *See* Exhibit C-161, (CONFIDENTIAL).



[56]

36. [57] . [58] [59]

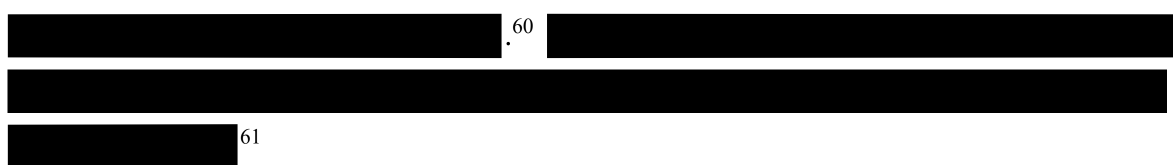
[56] Exhibit C-162, (CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0015499).

[57] *See* Exhibit R-16, (USMCA CONFIDENTIAL) ; Exhibit R-17, (USMCA CONFIDENTIAL) ; Exhibit R-18, (USMCA CONFIDENTIAL).

[58] One of the Produced Documents,

Exhibit R-18, (USMCA CONFIDENTIAL).

[59] *See* Exhibit R-16, (USMCA CONFIDENTIAL) ; Exhibit R-17,



.[60]

[61]

3. The United States Develops a Legacy Investment Annex

37. Several weeks later, in early September 2017, USTR staff began to develop a two-track approach. One track would apply to all investments (and would allow claims only with respect to a narrow range of substantive obligations), while a separate annex would deal specifically with claims associated with legacy or "grandfather" investments and would allow claims under NAFTA's substantive obligations.

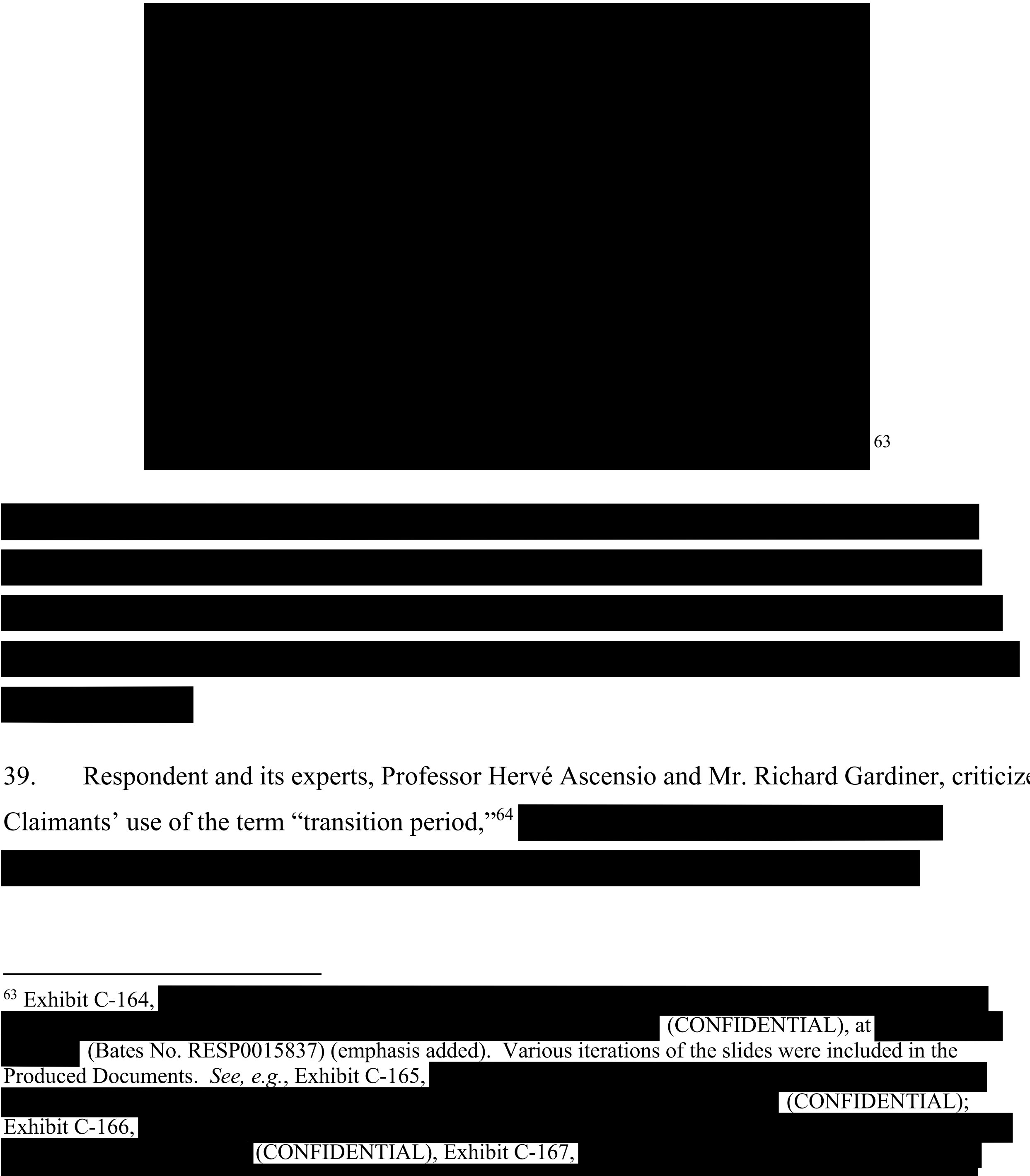
38. On September 8, 2017, [62]

(USMCA CONFIDENTIAL) .

[60] *See* Exhibit R-16, (USMCA CONFIDENTIAL) ; Exhibit R-17, (USMCA CONFIDENTIAL) .

[61] Exhibit R-18, (USMCA CONFIDENTIAL).

[62] *See* Exhibit C-163, (CONFIDENTIAL).


[63]

39. Respondent and its experts, Professor Hervé Ascensio and Mr. Richard Gardiner, criticize Claimants' use of the term "transition period,"[64]

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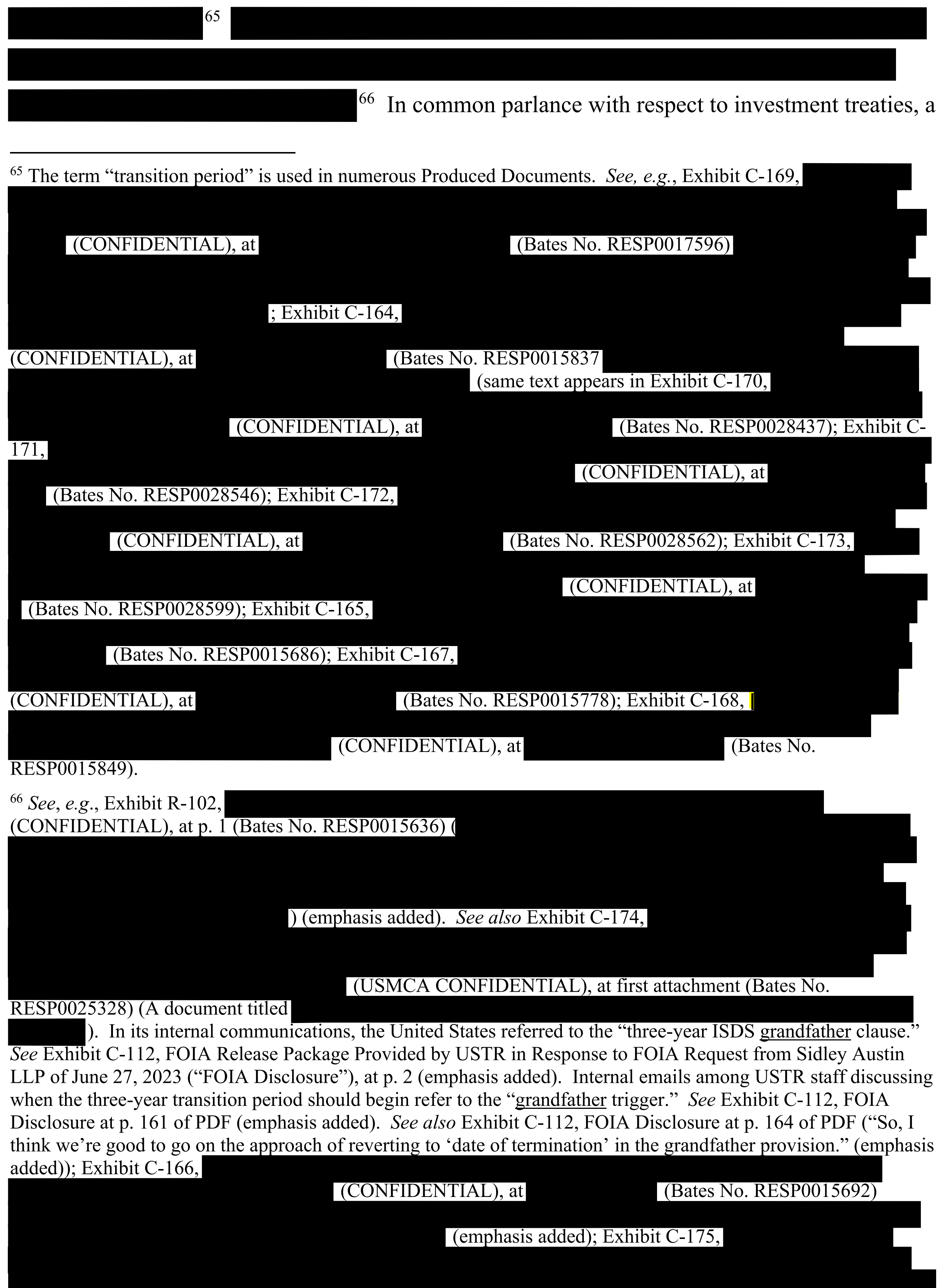
[63] Exhibit C-164, (CONFIDENTIAL), at (Bates No. RESP0015837) (emphasis added). Various iterations of the slides were included in the Produced Documents. *See, e.g.*, Exhibit C-165, (CONFIDENTIAL); Exhibit C-166, (CONFIDENTIAL), Exhibit C-167, (CONFIDENTIAL); Exhibit C-168, (CONFIDENTIAL).

[64] *See, e.g.*, Respondent's Reply on Preliminary Objection at para. 25 ("[W]hile Annex 14-C contains references to the NAFTA, it does *not* contain any reference to a 'transition period' . . . ." (emphasis in original)); Second Expert Report of Professor Herve Ascensio, Dec. 22, 2023 ("Second Ascensio Report"), at para. 8 ("Annex 14-C does not set out a 'transition period' . . . ."), and n.7 ("Annex 14-C . . . did not create any transitional regime . . . ."); Second Gardiner Report at para. 7 (" . . . paragraph 1 of the Annex nor any other provisions of the Annex or USMCA . . . do not specify any 'transitional period' . . . .") and paras. 25, 28-30.



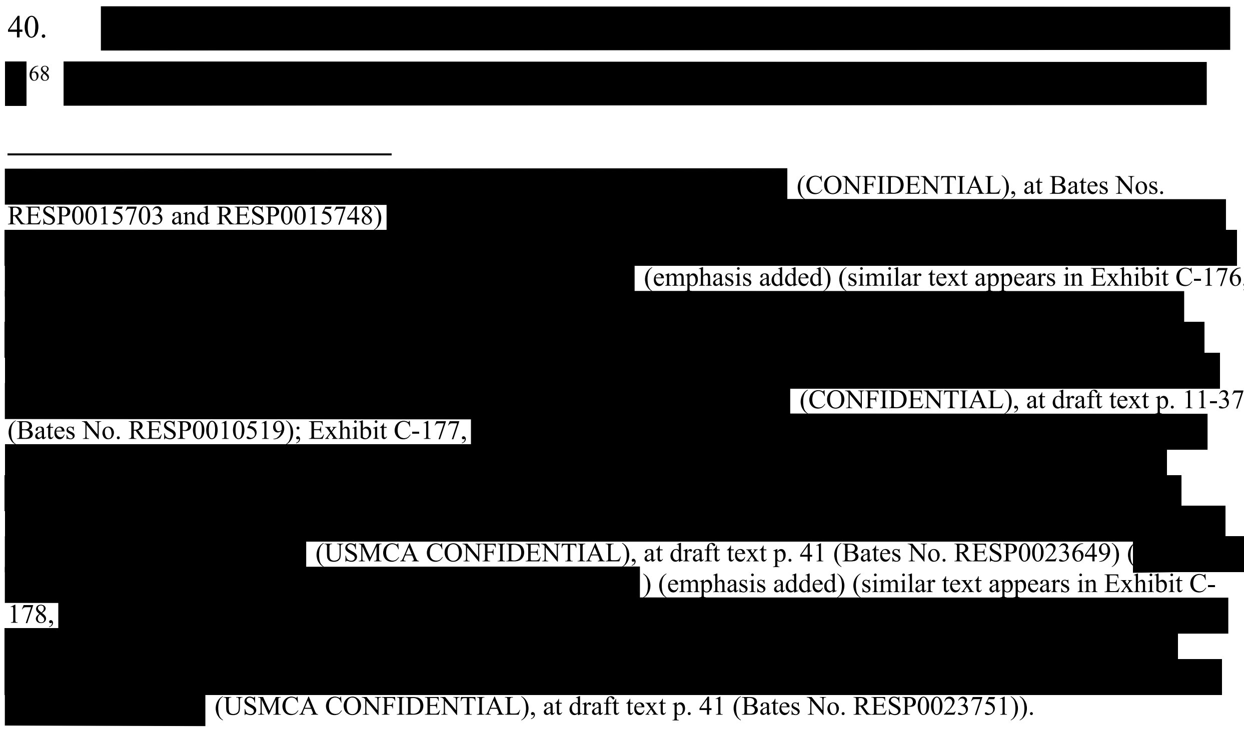
[65] [66] In common parlance with respect to investment treaties, a

[65] The term "transition period" is used in numerous Produced Documents. *See, e.g.*, Exhibit C-169, (CONFIDENTIAL), at (Bates No. RESP0017596) ; Exhibit C-164, (CONFIDENTIAL), at (Bates No. RESP0015837 (same text appears in Exhibit C-170, (CONFIDENTIAL), at (Bates No. RESP0028437); Exhibit C-171, (CONFIDENTIAL), at (Bates No. RESP0028546); Exhibit C-172, (CONFIDENTIAL), at (Bates No. RESP0028562); Exhibit C-173, (CONFIDENTIAL), at (Bates No. RESP0028599); Exhibit C-165, (Bates No. RESP0015686); Exhibit C-167, (CONFIDENTIAL), at (Bates No. RESP0015778); Exhibit C-168, (CONFIDENTIAL), at (Bates No. RESP0015849).

[66] *See*, *e.g.*, Exhibit R-102, (CONFIDENTIAL), at p. 1 (Bates No. RESP0015636) ( ) (emphasis added). *See also* Exhibit C-174, (USMCA CONFIDENTIAL), at first attachment (Bates No. RESP0025328) (A document titled). In its internal communications, the United States referred to the "three-year ISDS grandfather clause." *See* Exhibit C-112, FOIA Release Package Provided by USTR in Response to FOIA Request from Sidley Austin LLP of June 27, 2023 ("FOIA Disclosure"), at p. 2 (emphasis added). Internal emails among USTR staff discussing when the three-year transition period should begin refer to the "grandfather trigger." *See* Exhibit C-112, FOIA Disclosure at p. 161 of PDF (emphasis added). *See also* Exhibit C-112, FOIA Disclosure at p. 164 of PDF ("So, I think we're good to go on the approach of reverting to 'date of termination' in the grandfather provision." (emphasis added)); Exhibit C-166, (CONFIDENTIAL), at (Bates No. RESP0015692) (emphasis added); Exhibit C-175,

"grandfather" provision is a provision that guarantees that investments that exist when an agreement is terminated will continue to be protected by the substantive obligations in the terminated treaty for some additional period of time.[67] The terminology that the negotiators used is thus wholly consistent with the understanding that the legacy investment annex was intended to allow claims to be asserted in relation to measures taken during the transition period.

40.



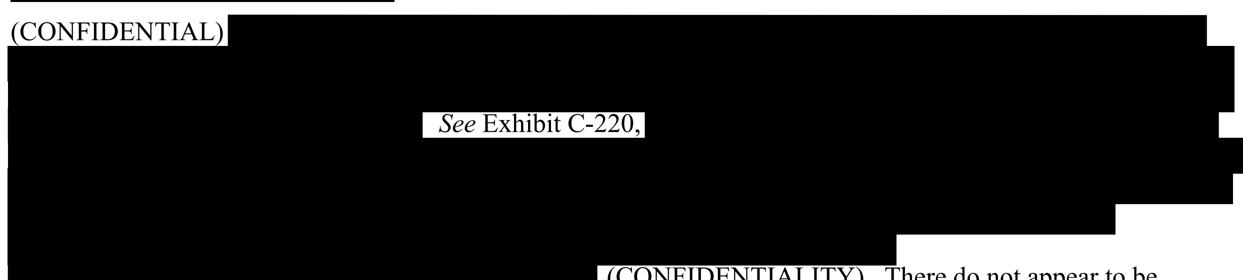
[68]

(CONFIDENTIAL), at Bates Nos. RESP0015703 and RESP0015748) (emphasis added) (similar text appears in Exhibit C-176, (CONFIDENTIAL), at draft text p. 11-37 (Bates No. RESP0010519); Exhibit C-177, (USMCA CONFIDENTIAL), at draft text p. 41 (Bates No. RESP0023649) ( ) (emphasis added) (similar text appears in Exhibit C-178, (USMCA CONFIDENTIAL), at draft text p. 41 (Bates No. RESP0023751)).

[67] *See, e.g.*, Exhibit CL-214, European Union, Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union, Jan. 15, 2019, at p. 1 (referring to "provisions that provide for extended protection of investments made prior to termination for a further period of time (so called sunset or grandfathering clauses)"). *See also* Exhibit CL-215, Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 2012 J.O. (L 351). This regulation is commonly referred to as the "Grandfathering Regulation," and applies to, *inter alia*, certain BITs that the EU member states entered into with Canada, the United States, and Mexico. *See, e.g.,* Exhibit CL-216, European Commission, "Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty" at p. 4; Exhibit C-179, Hallak Issam, "EU international investment policy: Looking ahead," *European Parliamentary Research Service*, Feb. 28, 2022, at n.19 ("Sunset clauses (sometimes also referred to as 'survival' or 'grandfathering' clauses) guarantee that existing investments at the time of termination continue to be protected during a certain period of time, typically between 5 and 20 years."); Exhibit CL-217, List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 2017 J.O. (C 147) (noting that BITs subject to the EU Regulation No 1219/2012 include BITs entered into between EU member states and United States, Canada and Mexico).

[68] *See* Exhibit C-180,

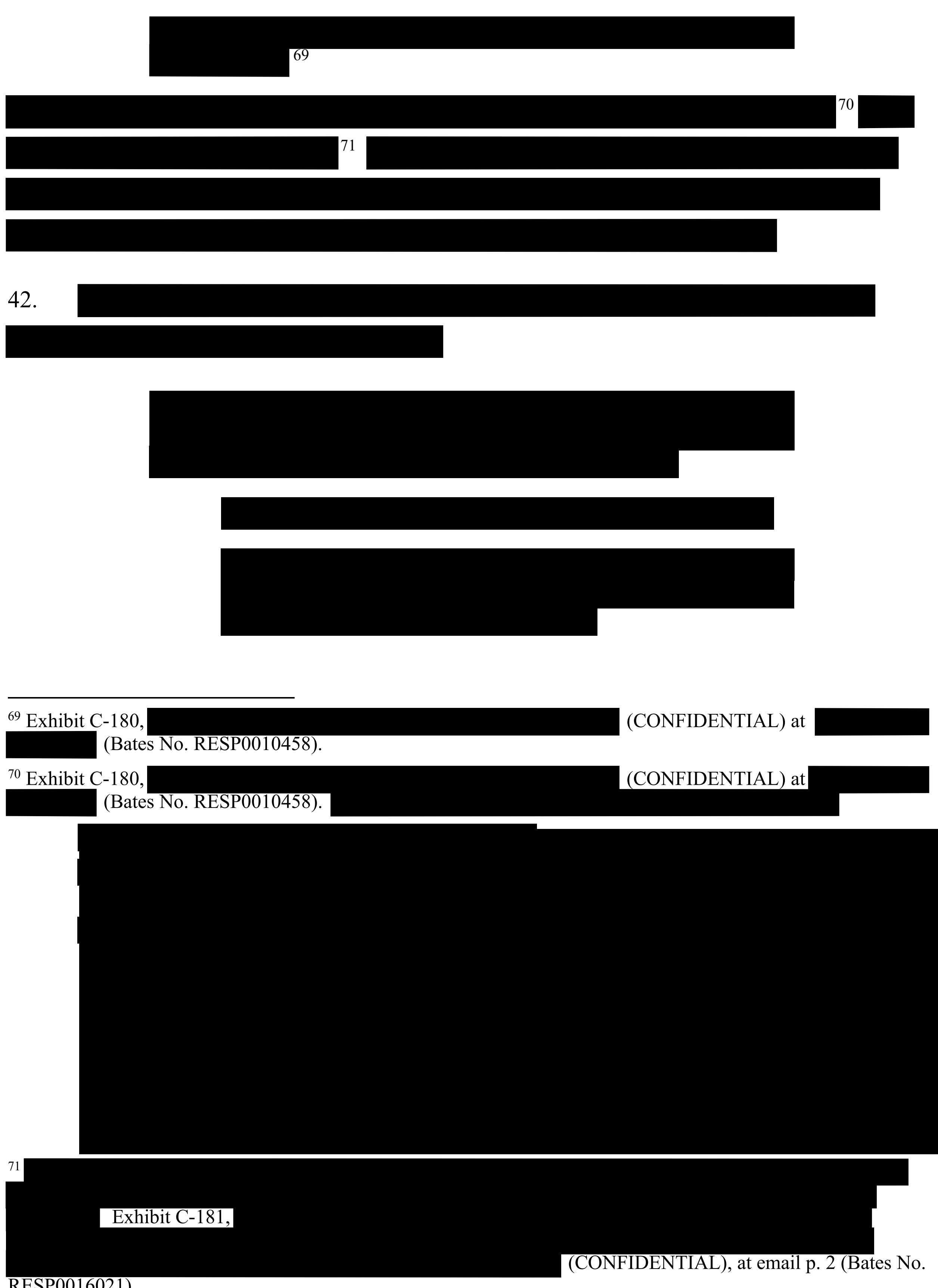
41.



(CONFIDENTIAL) *See* Exhibit C-220, (CONFIDENTIALITY). There do not appear to be substantive changes between these two versions of the draft text of the legacy investment annex. Former U.S. negotiator, Lauren Mandell, explained the proposal as follows:

> In August of 2017, the US is waiting effectively . . . for some sort of position to kind of take form. And so Mexico and Canada in the negotiations moved first. And Mexico proposed an investment chapter that was very similar to what had been negotiated in the TransPacific Partnership Agreement. . . . Canada proposed an approach in the negotiation, in the beginning, that was very close to the model . . . in the CETA . . . Eventually, the U.S. did make a proposal and offer an affirmative vision. It is not what is reflected in the final text in Chapter 14 of USMCA. . . . There was what we referred to as an opt-in approach, that each government under the U.S. proposal could decide on a rolling basis whether to allow ISDS claims from investors of the other parties, from Canada and Mexico. The U.S. at the time made clear that . . . we would not opt in initially, so on day one of USMCA, we would not permit any claims by Mexican or Canadian investors. And we said we would leave it to Canada and Mexico to make their own decisions as to whether to permit claims from investors of the other parties . . . . Again, this was a rolling decision, a rolling basis. So, theoretically, states could change their mind over time and decide, well, we didn't allow claims for this period of time but now we'd like to allow claims.

Exhibit C-101, American University Washington College of Law, *USMCA Chapter 14: Experiences (US Perspective)* (Panel Presentation by Lauren Mandell and others at Expert Panel Series on International Arbitration — Investment Agreements of the 21st Century: USMCA and Beyond, Oct. 25, 2022), *full video available at* https://media.wcl.american.edu/Mediasite/Play/c9b76a5aa39f4b06809d33a6be13414c1d.



[69]

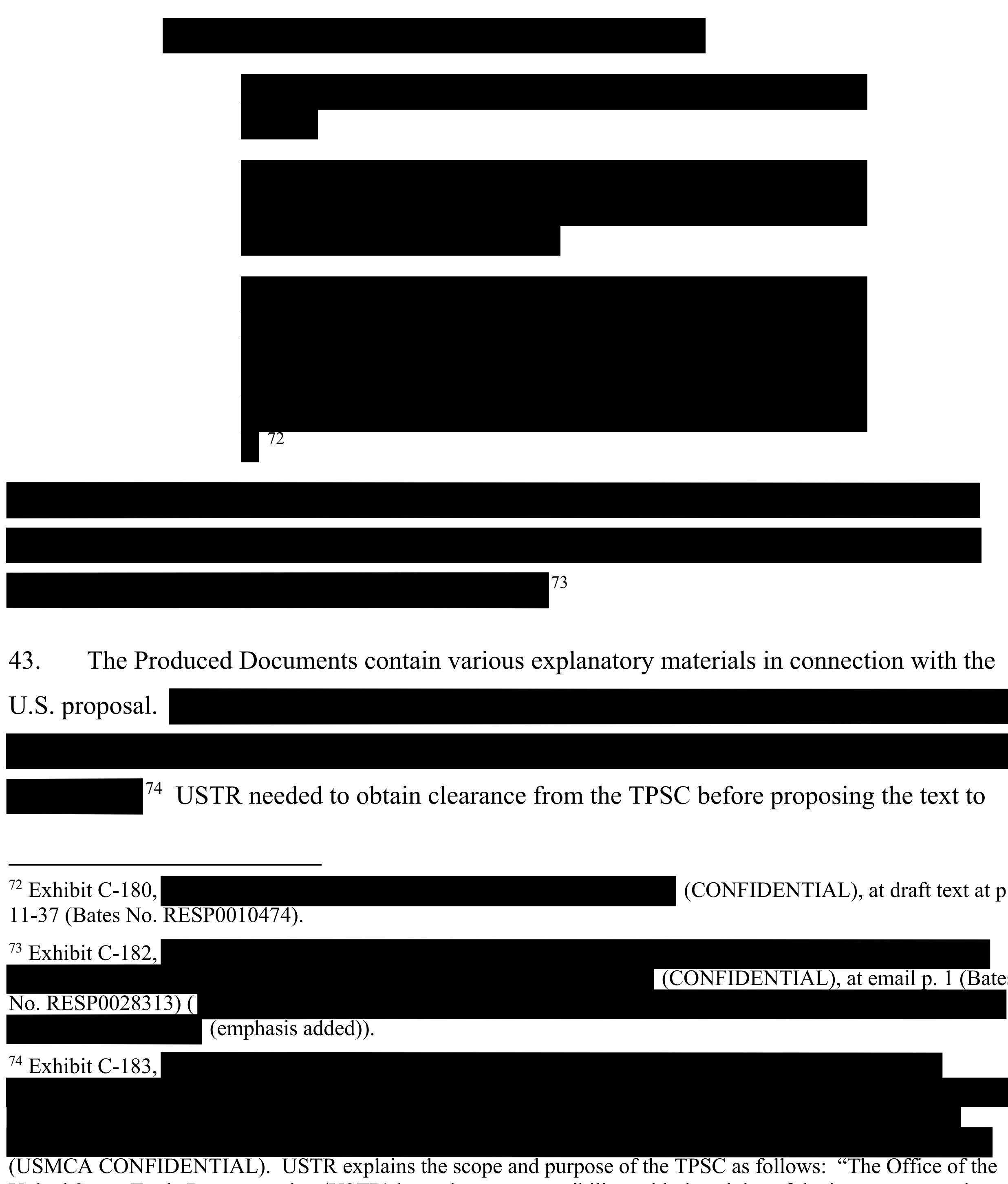
[70] [71]

42.

[69] Exhibit C-180, (CONFIDENTIAL) at (Bates No. RESP0010458).

[70] Exhibit C-180, (CONFIDENTIAL) at (Bates No. RESP0010458).

[71] Exhibit C-181, (CONFIDENTIAL), at email p. 2 (Bates No. RESP0016021).



[72]

[73]

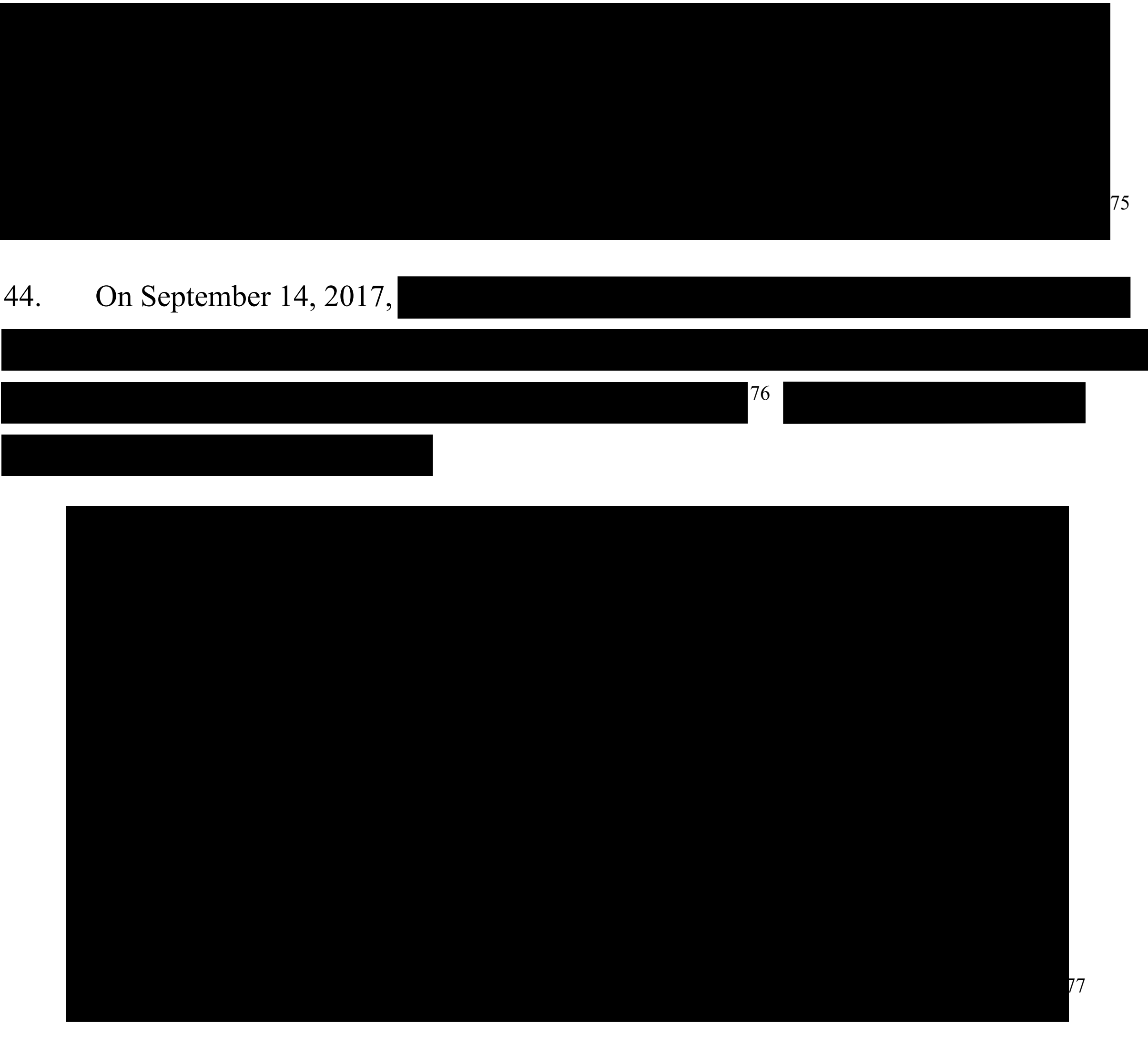
43. The Produced Documents contain various explanatory materials in connection with the U.S. proposal. [74] USTR needed to obtain clearance from the TPSC before proposing the text to

[72] Exhibit C-180, (CONFIDENTIAL), at draft text at p. 11-37 (Bates No. RESP0010474).

[73] Exhibit C-182, (CONFIDENTIAL), at email p. 1 (Bates No. RESP0028313) ((emphasis added)).

[74] Exhibit C-183, (USMCA CONFIDENTIAL). USTR explains the scope and purpose of the TPSC as follows: "The Office of the United States Trade Representative (USTR) has primary responsibility, with the advice of the interagency trade policy organization, for developing and coordinating the implementation of U.S. trade policy, including on commodity matters and, to the extent they are related to trade, direct investment matters. Under the Trade Expansion Act of 1962, the U.S. Congress established an interagency trade policy mechanism to assist with the implementation of these responsibilities. This organization, as it has evolved, consists of tiers of committees that constitute the principal mechanism for advising USTR as it develops and coordinates U.S. Government positions on international trade and trade-related investment issues. USTR chairs and administers both the Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC)." Exhibit C-184, Office of the United States Trade Representative, "Executive Branch Agencies on the Trade Policy Staff Committee and the Trade Policy Review Group" *available at* https://ustr.gov/about-us/executive-branch-agencies-trade-policy-staff-committee-and-trade-

Canada and Mexico. In the summary of the legacy investment annex circulated to the TPSC, USTR provided the following explanation:



[75]

44. On September 14, 2017, [76]

[77]

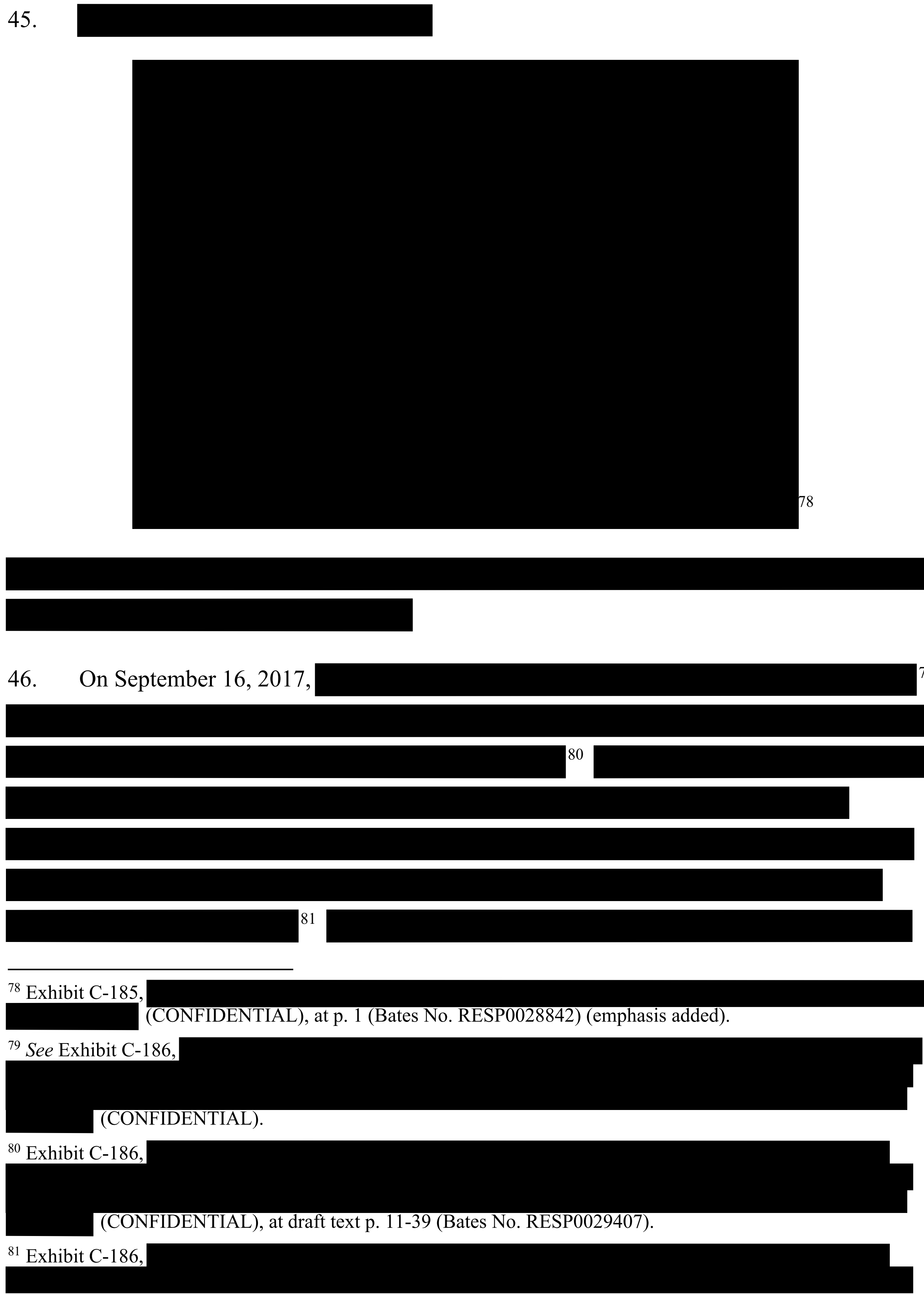
policy-review-group (last accessed Jan. 31, 2024). Members of the TPSC and TPRG include representatives from 20 different executive branch agencies and offices within the Executive Office of the President plus the U.S. International Trade Commission. *See id*.

[75] Exhibit C-183, (USMCA CONFIDENTIAL), at draft text p. 1 (Bates No. RESP0017792) (emphasis added).

[76] *See* Exhibit C-185, (CONFIDENTIAL).

[77] Exhibit C-185, (CONFIDENTIAL), at p. 2 (Bates No. RESP0028843).

45.



[78]

46. On September 16, 2017, [79]

[80]

[81]

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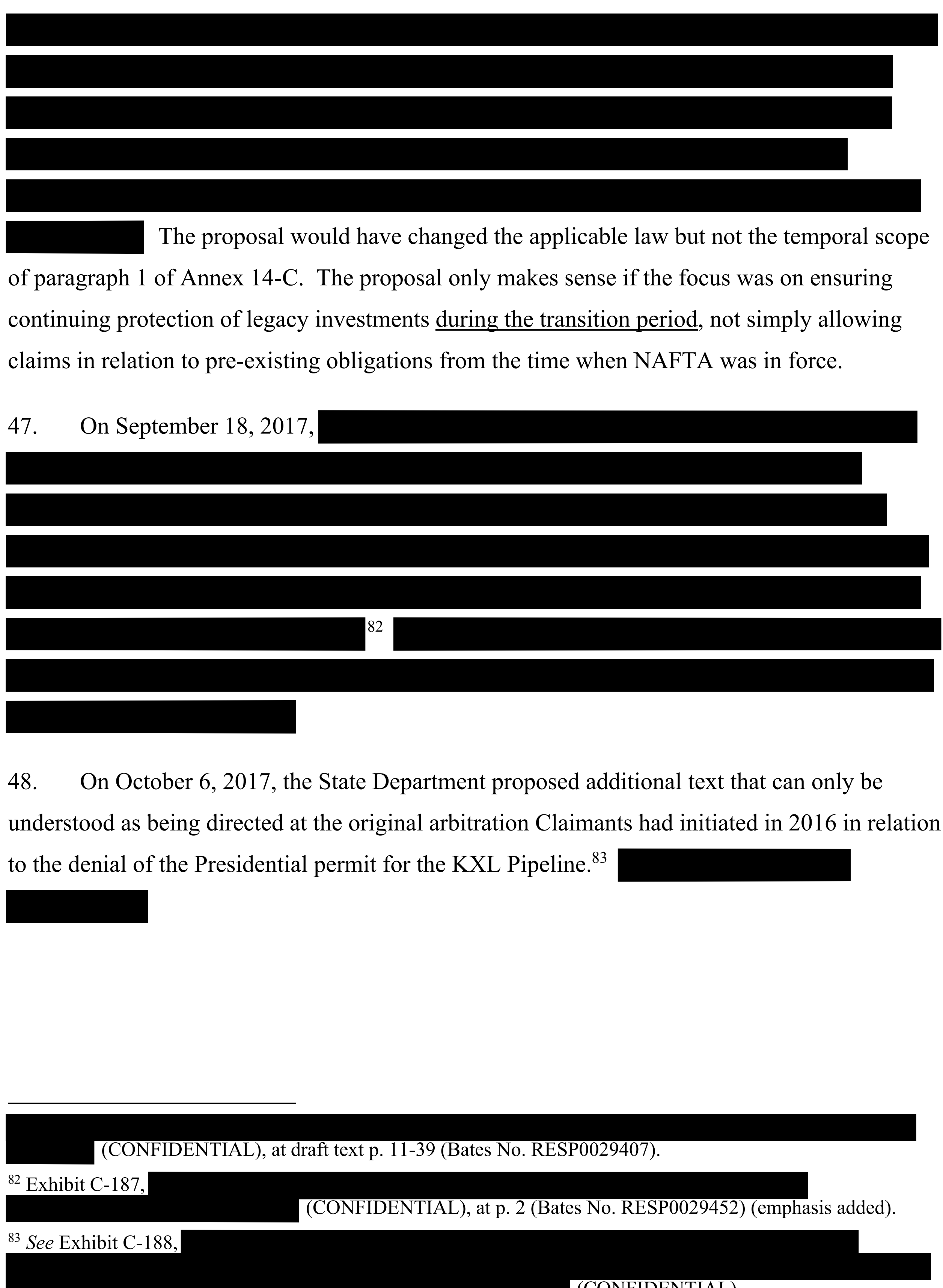
[78] Exhibit C-185, (CONFIDENTIAL), at p. 1 (Bates No. RESP0028842) (emphasis added).

[79] *See* Exhibit C-186, (CONFIDENTIAL).

[80] Exhibit C-186, (CONFIDENTIAL), at draft text p. 11-39 (Bates No. RESP0029407).

[81] Exhibit C-186,



The proposal would have changed the applicable law but not the temporal scope of paragraph 1 of Annex 14-C. The proposal only makes sense if the focus was on ensuring continuing protection of legacy investments <u>during the transition period</u>, not simply allowing claims in relation to pre-existing obligations from the time when NAFTA was in force.

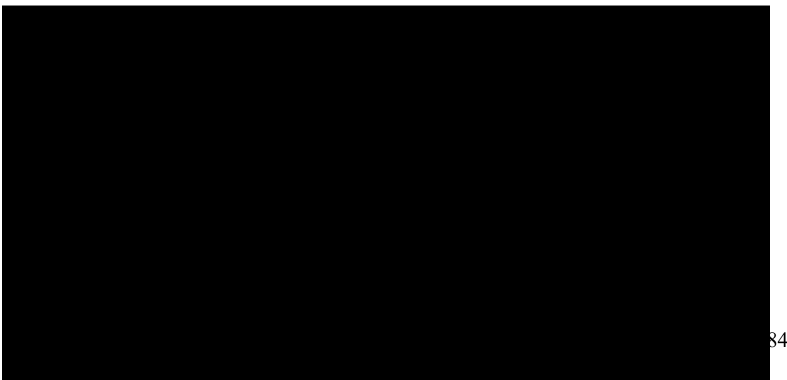
47. On September 18, 2017, [82]

48. On October 6, 2017, the State Department proposed additional text that can only be understood as being directed at the original arbitration Claimants had initiated in 2016 in relation to the denial of the Presidential permit for the KXL Pipeline.[83]

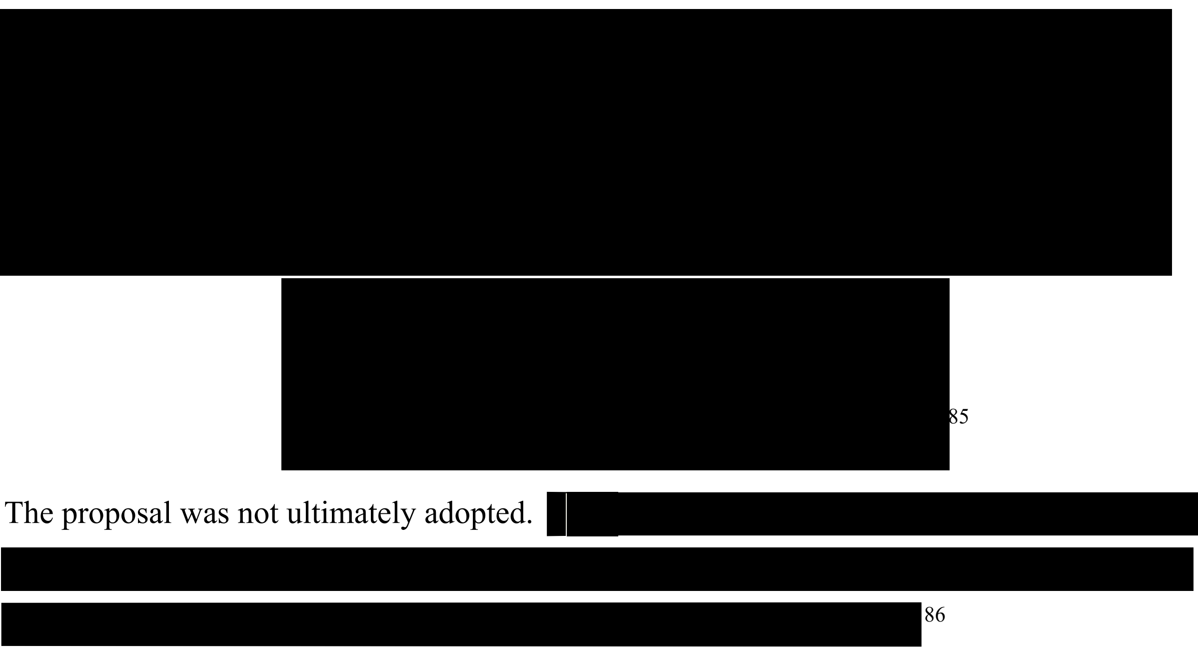
(CONFIDENTIAL), at draft text p. 11-39 (Bates No. RESP0029407).

[82] Exhibit C-187, (CONFIDENTIAL), at p. 2 (Bates No. RESP0029452) (emphasis added).

[83] *See* Exhibit C-188, (CONFIDENTIAL).


[84]

The State Department proposed the following text:

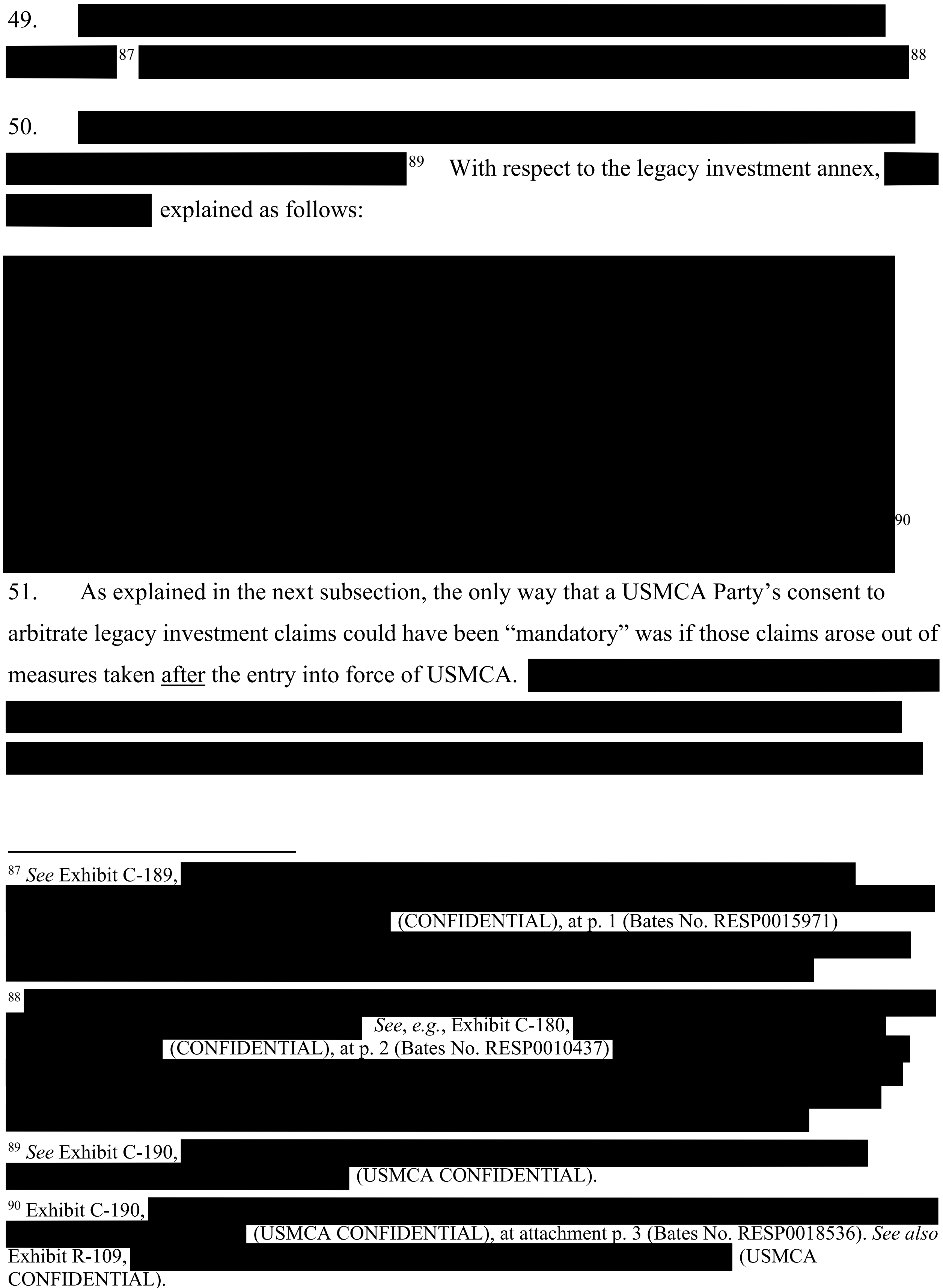

[85]

The proposal was not ultimately adopted. [86]

[84] Exhibit C-188, (CONFIDENTIAL), at draft text p. 11-4 (Bates No. RESP0030717) (emphasis in original).

[85] Exhibit C-188, (CONFIDENTIAL), at draft text p. 11-5 (Bates No. RESP0030718).

[86] Exhibit C-180, (CONFIDENTIAL), at draft text p. 11-37 (Bates No. RESP0010474); *see infra* para. 112.



49. [87] [88]

50. [89] With respect to the legacy investment annex, explained as follows:

[90]

51. As explained in the next subsection, the only way that a USMCA Party's consent to arbitrate legacy investment claims could have been "mandatory" was if those claims arose out of measures taken after the entry into force of USMCA.

[87] *See* Exhibit C-189, (CONFIDENTIAL), at p. 1 (Bates No. RESP0015971)

[88] *See*, *e.g.*, Exhibit C-180, (CONFIDENTIAL), at p. 2 (Bates No. RESP0010437)

[89] *See* Exhibit C-190, (USMCA CONFIDENTIAL).

[90] Exhibit C-190, (USMCA CONFIDENTIAL), at attachment p. 3 (Bates No. RESP0018536). *See also* Exhibit R-109, (USMCA CONFIDENTIAL).

[91]

4. The Only Way Consent to Arbitrate Legacy Investment Claims Could Have Been "Mandatory" Was If Such Claims Arose Out of Measures Taken <u>During</u> the Transition Period

52. In this subsection, we briefly digress from recounting the negotiating history to explain the implications of the "mandatory" nature of the legacy investment annex that the United States had devised. As noted, according to Respondent, [92] If that is correct, then the intended temporal scope of paragraph 1 of Annex 14-C at the time it was first conceived would be the same as the intended temporal scope of the final version of paragraph 1 of Annex 14-C. What Respondent fails to recognize is that the Produced Documents show that the legacy investment annex was conceived (and could only have been conceived, given its mandatory nature) precisely to allow claims arising out of measures taken during the transition period.

53. To briefly recap the original proposal for a legacy investment annex: During the period when the USMCA Party opted-out of USMCA arbitration, the Party would consent to arbitration under paragraph 1 of the legacy investment annex, and a legacy investor would be permitted to assert claims alleging a breach of the Section A obligations. During the period when the USMCA Party opted-in to USMCA arbitration, the USMCA Party would consent to arbitration through Article 11.19.1 of USMCA, and the investor would be permitted to assert claims alleging a breach of the substantive obligations of the USMCA investment chapter. Regardless of whether a USMCA Party opted-in or out of the general USMCA ISDS procedures, the legacy investment annex would operate to allow claims arising out of measures taken throughout the

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[91] Exhibit C-190, (USMCA CONFIDENTIAL), at attachment p. 3 (Bates No. RESP0018536). *See also* Exhibit R-109, (USMCA CONFIDENTIAL).

[92] Respondent states that Respondent's Reply on Preliminary Objection at para. 80 (USMCA CONFIDENTIAL).

three-year transition period. The U.S. proposal was designed to guarantee continuous protection of legacy investments throughout the transition period. Hence, the consent to arbitrate legacy investment claims was "mandatory" and ([redacted]

[redacted]

[redacted][93]).

54. The following example illustrates how the legacy investment annex (as originally proposed) would have operated in practice, under the assumption that the USMCA Party opted-out of USMCA ISDS in Year One, then opted-in during Year Two, and then opted-out again in Year Three.

	Legacy Investor May Assert Claims Relating to Measures Taken After USMCA Enters into Force?
Year One (USMCA Party opts-out)	Yes (may assert claims for breach of NAFTA substantive rules)
Year Two (USMCA Party opts-in)	Yes (may assert claims for breach of USMCA substantive rules)
Year Three (USMCA Party opts-out)	Yes (may assert claims for breach of NAFTA substantive rules)

The proposed legacy investment annex would thus have ensured continuous protection with respect to measures taken throughout the three-year transition period. No USMCA Party could have "opted-out" of providing protection for legacy investments during any part of the three-year transition period. As USTR explained at the time, consent to arbitrate legacy investment claims would thus have been "mandatory."

55. Respondent's Preliminary Objection, however, rests on the allegation that the legacy investment annex allows only claims arising out of measures that pre-dated the entry into force of USMCA. If that were correct, then—in direct contradiction of USTR's contemporaneous explanations of the annex—consent to arbitrate such claims would not have been mandatory. The following example illustrates how the legacy investment annex would have operated in practice, under the assumption that: (a) Respondent's interpretation of paragraph 1 of Annex 14-

[93] Exhibit C-185, [redacted] [redacted], at p. 1 (Bates No. RESP0028842).

C is correct (which it is not); and (b) the USMCA Party opted-out of USMCA arbitration in Year One, then opted-in during Year Two, and then opted-out again in Year Three:

	Legacy Investor May Assert Claims Relating to Measures Taken Before USMCA Enters Into Force?
Year One (USMCA Party opts-out)	Yes
Year Two (USMCA Party opts-in)	No
Year Three (USMCA Party opts-out)	Yes

56. As another example, if a USMCA Party were to opt-in to USMCA dispute settlement during the entire three-year transition period, a legacy investor would never be able to assert a legacy investment claim. The table would be as follows:

	Legacy Investor May Assert Claims Relating to Measures Taken Before USMCA Enters Into Force?
Year One (USMCA Party opts-in)	No
Year Two (USMCA Party opts-in)	No
Year Three (USMCA Party opts-in)	No

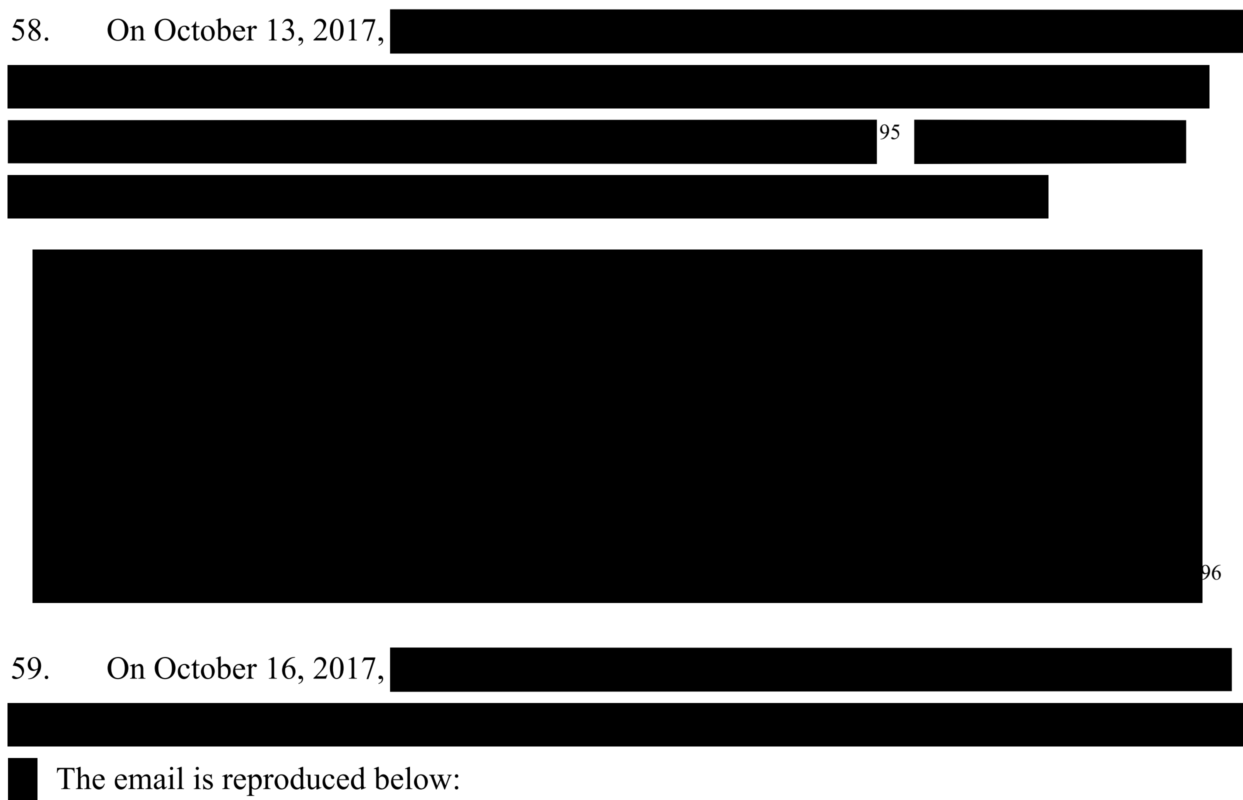
In other words, if the legacy investment annex were restricted to measures that pre-dated the entry into force of USMCA, then a USMCA Party would be permitted to opt-out entirely of the legacy investment mechanism. This result would directly contradict USTR's explanation that consent to legacy investment claims was "mandatory."

5. During the Negotiation, USTR Recognizes the Strength of Claimants' 2016 Arbitration Claims

57. As the Tribunal is aware, Claimants originally filed NAFTA arbitration claims against Respondent in 2016 in connection with Respondent's denial of the Presidential permit for the KXL Pipeline. In 2017, Claimants withdrew those claims on condition that Respondent would grant the Presidential permit.[94]

[94] Exhibit C-53, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America*, ICSID Case No. ARB/16/21, Termination Agreement and Release of NAFTA Claims, Mar. 23, 2017.

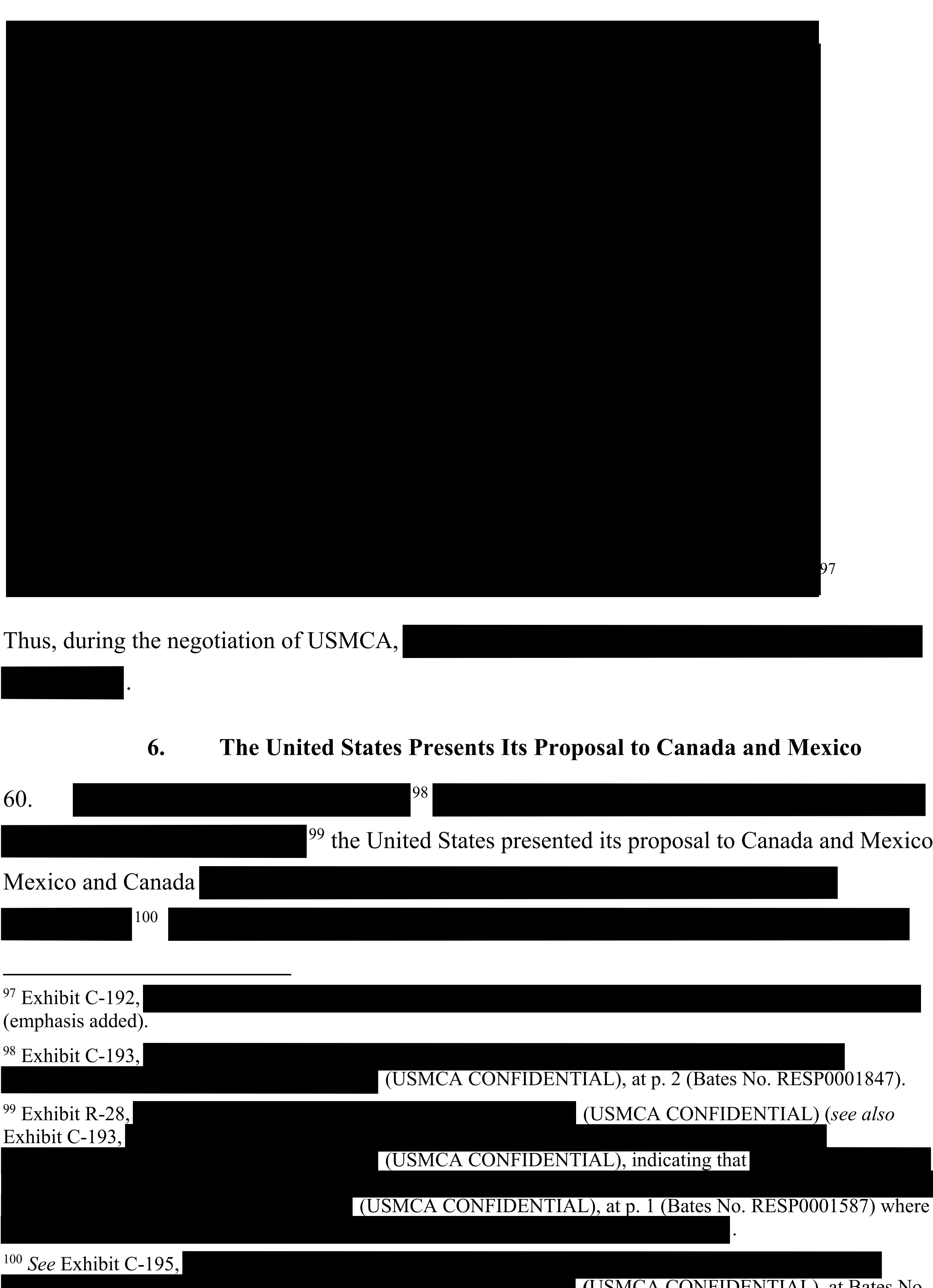
58. On October 13, 2017, [95] [96]



59. On October 16, 2017, The email is reproduced below:

[95] Exhibit C-191, (CONFIDENTIAL), at p. 1 (Bate No. RESP0030901).

[96] Exhibit C-191, (CONFIDENTIAL), at p. 2 (Bates No. RESP0030902).



[97]

Thus, during the negotiation of USMCA, .

6. The United States Presents Its Proposal to Canada and Mexico

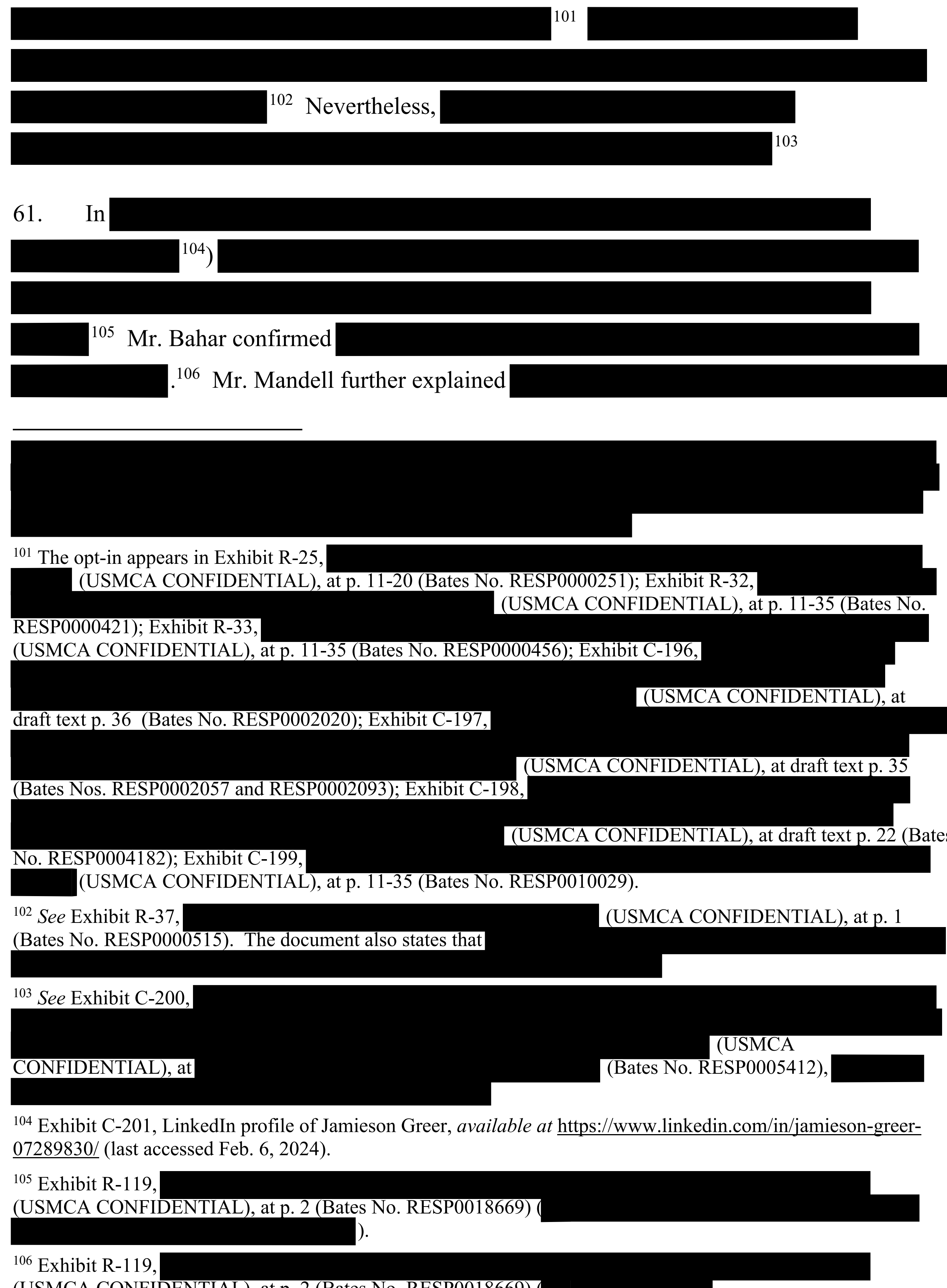
60. [98] [99] the United States presented its proposal to Canada and Mexico. Mexico and Canada [100]

[97] Exhibit C-192, (emphasis added).

[98] Exhibit C-193, (USMCA CONFIDENTIAL), at p. 2 (Bates No. RESP0001847).

[99] Exhibit R-28, (USMCA CONFIDENTIAL) (*see also* Exhibit C-193, (USMCA CONFIDENTIAL), indicating that (USMCA CONFIDENTIAL), at p. 1 (Bates No. RESP0001587) where .

[100] *See* Exhibit C-195, (USMCA CONFIDENTIAL), at Bates No. RESP0024450.



[101] [102] Nevertheless, [103]

61. In [104]) [105] Mr. Bahar confirmed .[106] Mr. Mandell further explained

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[101] The opt-in appears in Exhibit R-25, (USMCA CONFIDENTIAL), at p. 11-20 (Bates No. RESP0000251); Exhibit R-32, (USMCA CONFIDENTIAL), at p. 11-35 (Bates No. RESP0000421); Exhibit R-33, (USMCA CONFIDENTIAL), at p. 11-35 (Bates No. RESP0000456); Exhibit C-196, (USMCA CONFIDENTIAL), at draft text p. 36 (Bates No. RESP0002020); Exhibit C-197, (USMCA CONFIDENTIAL), at draft text p. 35 (Bates Nos. RESP0002057 and RESP0002093); Exhibit C-198, (USMCA CONFIDENTIAL), at draft text p. 22 (Bates No. RESP0004182); Exhibit C-199, (USMCA CONFIDENTIAL), at p. 11-35 (Bates No. RESP0010029).

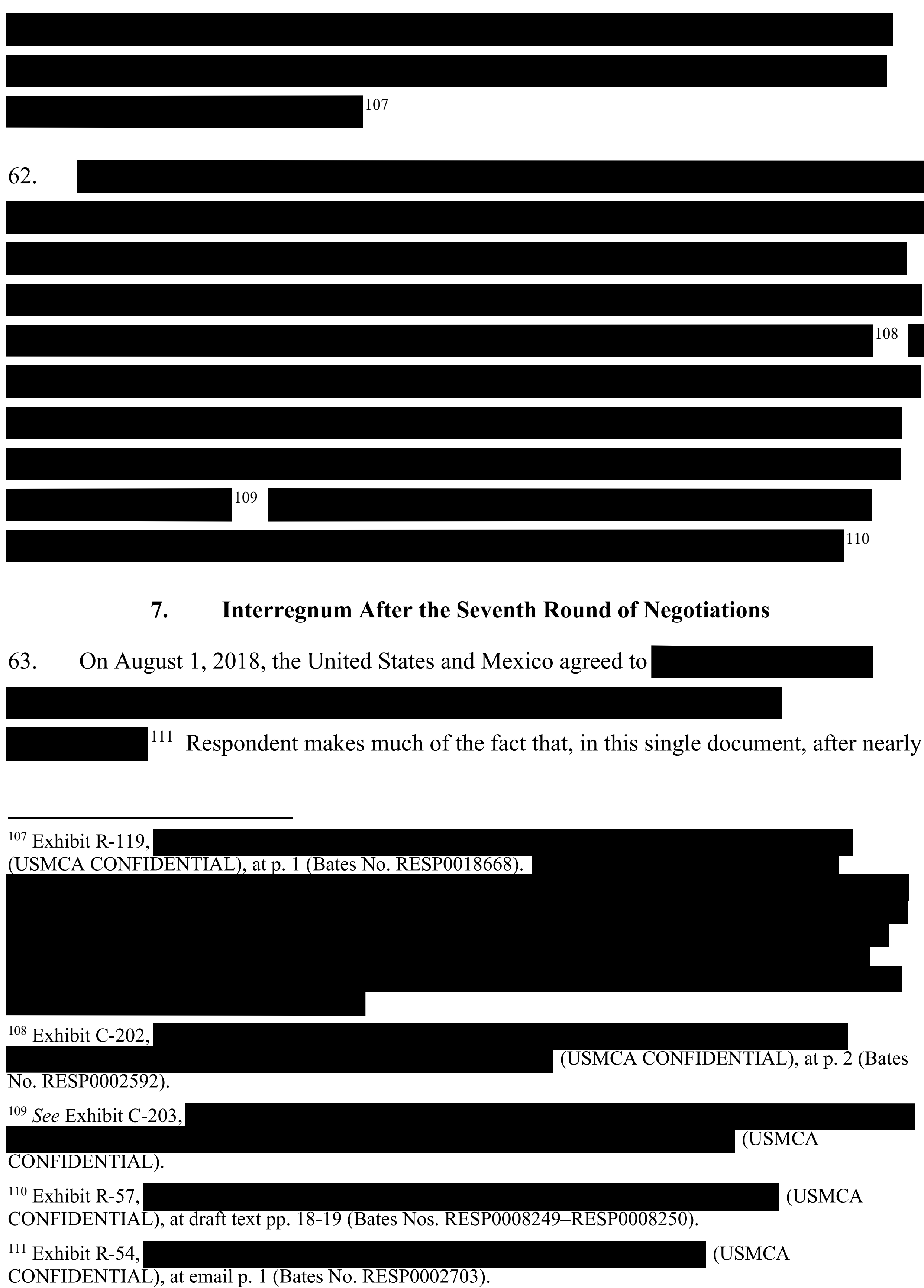
[102] *See* Exhibit R-37, (USMCA CONFIDENTIAL), at p. 1 (Bates No. RESP0000515). The document also states that

[103] *See* Exhibit C-200, (USMCA CONFIDENTIAL), at (Bates No. RESP0005412),

[104] Exhibit C-201, LinkedIn profile of Jamieson Greer, *available at* https://www.linkedin.com/in/jamieson-greer-07289830/ (last accessed Feb. 6, 2024).

[105] Exhibit R-119, (USMCA CONFIDENTIAL), at p. 2 (Bates No. RESP0018669) ( ).

[106] Exhibit R-119, (USMCA CONFIDENTIAL), at p. 2 (Bates No. RESP0018669) (



[107]

62.

[108]

[109]

[110]

7. Interregnum After the Seventh Round of Negotiations

63. On August 1, 2018, the United States and Mexico agreed to

[111] Respondent makes much of the fact that, in this single document, after nearly

[107] Exhibit R-119, (USMCA CONFIDENTIAL), at p. 1 (Bates No. RESP0018668).

[108] Exhibit C-202, (USMCA CONFIDENTIAL), at p. 2 (Bates No. RESP0002592).

[109] *See* Exhibit C-203, (USMCA CONFIDENTIAL).

[110] Exhibit R-57, (USMCA CONFIDENTIAL), at draft text pp. 18-19 (Bates Nos. RESP0008249–RESP0008250).

[111] Exhibit R-54, (USMCA CONFIDENTIAL), at email p. 1 (Bates No. RESP0002703).

a year of negotiations, the United States sent a version of the text to Mexico stating that [redacted][112] [redacted][113] [redacted][114] Respondent's argument is a red herring.

64. First, the fact that a claimant must assert a claim alleging a breach of the Section A obligations is not a point in debate. To establish jurisdiction with respect to claims asserted under paragraph 1 of Annex 14-C, a claimant must allege such a breach. A claimant cannot, for example, assert a breach of customary international law that is not also a breach of the Section A obligations. The issue in debate is the source of the obligation, *i.e.*, whether it arises from an extension of the Section A obligations, including through the applicable law or solely from pre-existing obligations from the time NAFTA was in force.

65. [redacted] Quite likely, it was simply because the United States and Mexico were re-engaging on this matter and were reconstructing a compromise text. [redacted]

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[112] Respondent's Reply on Preliminary Objection at para. 82 (citing Exhibit R-54, [redacted] (USMCA CONFIDENTIAL), at draft text p. 18 (Bates No. RESP0002721)).

[113] Respondent's Reply on Preliminary Objection at para. 83 (citing Exhibit R-57, [redacted] (USMCA CONFIDENTIAL), at draft text p. 18 (Bates No. RESP0008249)).

[114] Respondent's Reply on Preliminary Objection at para. 84 (USMCA CONFIDENTIAL).

[115] Furthermore, [116] and which [117] This days-long blip in the middle of a year-long negotiation thus has no particular relevance.

8. Completion of Negotiations

66. [118] [119] [120]

67.

[115] *See* Exhibit R-54, (USMCA CONFIDENTIAL), at email p. 1 (Bates No. RESP0002703) ( ).

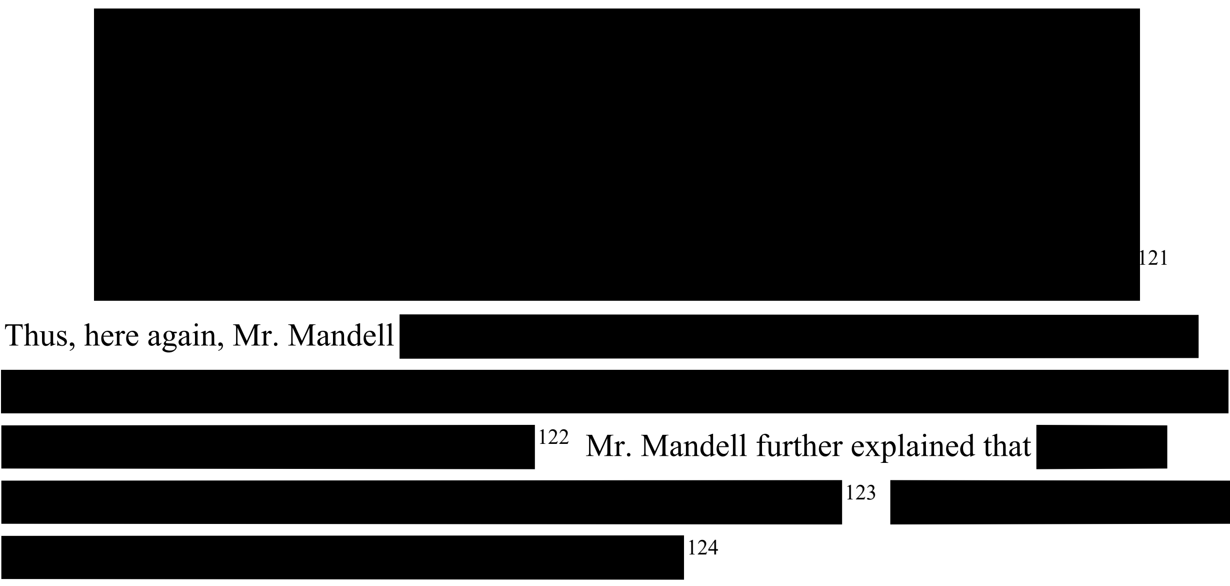
[116] *See* Exhibit R-54, (USMCA CONFIDENTIAL), at draft text p. 18 (Bates No. RESP0002721).

[117] *See* Exhibit R-57, (USMCA CONFIDENTIAL), at draft text p. 18 (Bates No. RESP0008249).

[118] Exhibit C-204, (CONFIDENTIAL).

[119] Exhibit C-204, (CONFIDENTIAL), at email p. 1 (Bates No. RESP0017556) and attachment (Bates No. RESP0017558).

[120] Exhibit C-204, (CONFIDENTIAL), at email p. 2 (Bates No. RESP0017557) and attachment (Bates No. RESP0017558).



Thus, here again, Mr. Mandell [122] Mr. Mandell further explained that [123] [124]

68. The USMCA Parties signed USMCA on November 30, 2018,[125] and it entered into force on July 1, 2020.[126]

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[121] Exhibit R-140, (USMCA CONFIDENTIAL), at p. 1 (Bates No. RESP0019345) (emphasis added). *See also* Exhibit C-205, (USMCA CONFIDENTIAL), at attachment p. 3 (Bates No. RESP19350) ( ).

[122] Exhibit R-140, (USMCA CONFIDENTIAL), at p. 1 (Bates No. RESP0019345).

[123] Exhibit R-140, (USMCA CONFIDENTIAL), at p. 1 (Bates No. RESP0019345).

[124] *See* Exhibit C-206, (USMCA CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0019435) ( ).

[125] Exhibit C-156, SICE - OAS, "Canada-Mexico-United States (USMCA): Renegotiation of the Agreement," *available at* http://www.sice.oas.org/tpd/USMCA/USMCA_e.ASP (last accessed Jan. 31, 2024).

[126] Exhibit C-84, Office of the United States Trade Representative, "United States-Mexico-Canada Agreement," *available at* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last accessed Jan. 27, 2023).

9. The Understanding of the Official Advisors to the USTR Negotiators Confirms Their Understanding that the Legacy Investment Annex Allows Claims Arising Out of Measures Taken During the Transition Period

69. As noted in Claimants' Counter-Memorial, on September 27, 2018, the Industry Trade Advisory Committee for Services ("Services ITAC") submitted its report to USTR on the draft USMCA.[127] This official advisory committee understood that the legacy investment annex would permit claims arising out of measures taken during the transition period.

70. For context, an ITAC is a group of trusted industry advisors that is established by the U.S. Government for the express purpose of providing advice on trade negotiations. The ITAC receives confidential briefings from the U.S. Government throughout the negotiation of a trade agreement about the status of the negotiations and U.S. proposals. At the end of the negotiation, the ITAC is tasked with providing a written report to USTR. In fact, [128]

71. The Services ITAC understood that USMCA would allow claims for breaches of NAFTA arising out of measures taken during the transition period. It viewed Annex 14-C as effectively replicating a traditional bilateral investment treaty ("BIT") sunset clause, albeit for a shorter period. According to the Services ITAC's report:

> [T]he transition period for bringing ISDS claims under the original NAFTA is limited to 3 years from the date of NAFTA termination.

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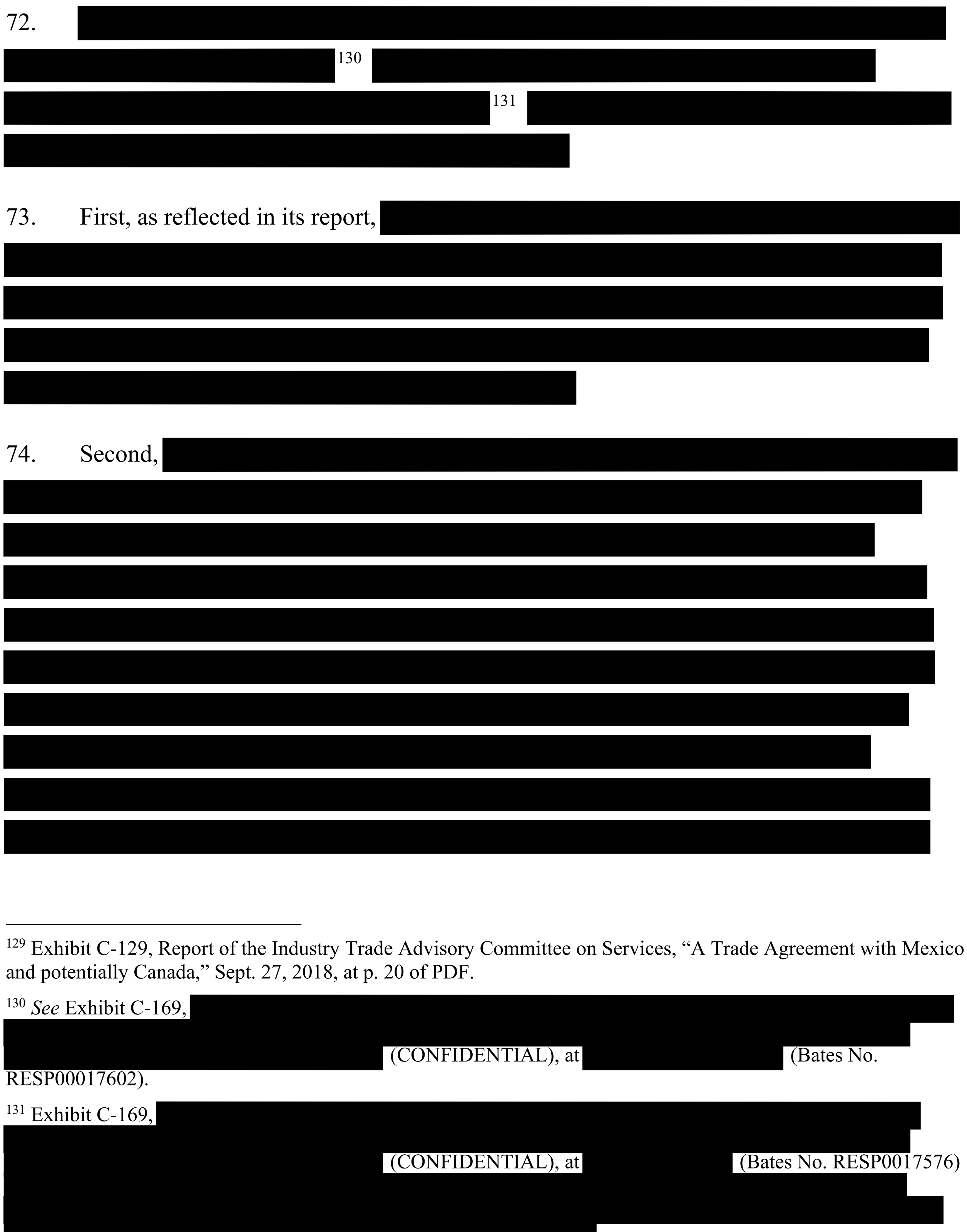
[127] Claimants' Counter-Memorial on Respondent's Preliminary Objection, Aug. 11, 2023, at p. A-5. ITAC members have "direct access to policymakers at Commerce Department and the Office of USTR. In such capacity advisors assist in developing industry positions on U.S. trade policy and negotiating objectives" and "must have a Department of Commerce Security Clearance up to the SECRET level because they will have access to classified trade-related information." *See* Exhibit C-128, U.S. Department of Commerce, International Trade Administration, "Industry Trade Advisory Center: Become an Advisor," *available at* https://legacy.trade.gov/itac/become-an-advisor.asp. In short, the Services ITAC was set up specifically to discuss U.S. positions and strategy with U.S. negotiators throughout the negotiation of trade agreements like USMCA.

[128] Exhibit C-180, (CONFIDENTIAL) at email p. 2 (Bates No. RESP0010437).

> The 3 year window is short compared to the 10 year period typically provided under terminated BITs.[129]



72. [130] [131]

73. First, as reflected in its report,

74. Second,

[129] Exhibit C-129, Report of the Industry Trade Advisory Committee on Services, "A Trade Agreement with Mexico and potentially Canada," Sept. 27, 2018, at p. 20 of PDF.

[130] *See* Exhibit C-169, (CONFIDENTIAL), at (Bates No. RESP00017602).

[131] Exhibit C-169, (CONFIDENTIAL), at (Bates No. RESP0017576)

10. Other Produced Documents Show That Prior to this Arbitration, the U.S. Government Agreed that the Legacy Investment Annex Allowed Claims Arising Out of Measures Taken During the Transition Period

75. In addition to the documents discussed above, other Produced Documents show that prior to raising its Preliminary Objection, the U.S. Government interpreted Annex 14-C to allow claims arising out of measures taken during the transition period. For example, dated June 19, 2019,[132] and described by Respondent ,[133] confirm that

[134]

76. [135] .[136]

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[132] Exhibit R-157, (CONFIDENTIAL).

[133] *See* Respondent's Reply on Preliminary Objection at Annex B (CONFIDENTIAL), pp. B-15–B-16.

[134] Exhibit R-157, (CONFIDENTIAL), at Bates No. RESP0022468 (emphasis added).

[135] Exhibit R-163, (CONFIDENTIAL); Respondent's Reply on Preliminary Objection at Annex B (CONFIDENTIAL), p. B-16.

[136] Exhibit R-163, (CONFIDENTIAL), at Bates No. RESP0022477.

D. Conclusion with Respect to the Overview of the Produced Documents

77. The above discussion provides only an overview of the negotiations based on the Produced Documents. The documents prove that Respondent's Preliminary Objection is meritless and advanced in bad faith. Other Produced Documents are discussed below in connection with Claimants' rebuttal of Respondent's specific legal arguments.

III. Respondent's Interpretation of Paragraph 1 of Annex 14-C Is Not Supported by the Text or International Law

78. Claimants have shown that, through Annex 14-C and the USMCA Protocol, the USMCA Parties extended the obligations of Section A of Chapter 11 of NAFTA for the duration of the transition period. Whether that extension is understood as a continuation of NAFTA Section A obligations or the designation of NAFTA as the applicable law during the transition period, the result in the same: the Tribunal has jurisdiction over Claimants' claims. Respondent has focused its arguments on the applicable law, and so Claimants will rebut Respondent's assertions in that regard in this submission. These arguments are without prejudice to arguments that Claimants have made in their earlier submissions.

79. In the following subsections, we address each of the specific legal points that Respondent has advanced in its Reply. We will seek, where possible, to avoid repeating arguments made in earlier submissions and will instead incorporate those earlier arguments by reference.[137] However, given that Respondent has largely simply restated the assertions it previously made, some repetition is necessary.

80. In Section III.A, Claimants show that the "obligations" referenced in paragraph 1 of Annex 14-C derive from the applicable law and not (as Respondent asserts) from pre-existing NAFTA obligations. In Section III.B, Claimants show that the three-year transition period is not intended to reflect the limitations period specified in Articles 1116 and 1117 of NAFTA. In Section III.C, Claimants show that Footnote 21 in Annex 14-C only makes sense if paragraph 1 of Annex 14-C permits claims arising out of measures taken during the transition period. In

[137] We note that in its Article 1128 submission, Mexico echoes arguments raised by Respondent, which Claimants have already rebutted in their Counter-Memorial. *See generally* Mexico's Submission Pursuant to Article 1128 of NAFTA, Sept. 11, 2023 ("Mexico's 1128 Submission"). For the sake of economy, we will likewise refrain from repeating those arguments here, but refer to our Counter-Memorial.

Section III.D, Claimants show that Respondent's assertion that the placement of Annex 14-C outside of the body of Chapter 14 must mean it does not impose any substantive obligations is unavailing. In Section III.E, Claimants show that the USMCA Protocol was intended (among other things) to reflect the fact that paragraph 1 of Annex 14-C allows claims arising out of measures taken during the transition period. In Section III.F, Claimants show that Respondent's interpretation of Annex 14-C is wholly inconsistent with the object and purpose of USMCA. In Section III.G, Claimants show that Article 14.2(3) of USMCA would only function as intended if paragraph 1 of Annex 14-C allows claims arising out of measures taken during the transition period. In Section III.H, Claimants show that, if the USMCA Parties had intended to allow claims under paragraph 1 of Annex 14-C only in relation to measures taken while NAFTA was in force, they would have said so explicitly. In Section III.I, Claimants show that the definition of "legacy investment" reflects the fact that paragraph 1 of Annex 14-C allows claims arising out of measures taken during the transition period.

A. Respondent's Reliance on the Term "Obligations" in Paragraph 1 of Annex 14-C Is a Diversion

81. Through paragraph 1 of Annex 14-C, Respondent consented, with respect to legacy investments, to the submission of claims "alleging breach of an obligation under . . . Section A of Chapter 11 (Investment) of NAFTA 1994." And through paragraph 3 of Annex 14-C, Respondent's consent "shall expire three years after the termination of NAFTA 1994." In its Reply, Respondent focuses its legal argument on essentially a <u>single</u> assertion, namely that the "obligation[s]" referenced in paragraph 1 of Annex 14-C are pre-existing NAFTA obligations, not obligations that extend for the duration of the transition period or otherwise derive from the applicable substantive law identified in USMCA. As explained below, Respondent's assertion has no basis in the text and conflicts with the purpose of the applicable law as it is used in Annex 14-C.

82. Claimants have shown in their earlier submissions that Annex 14-C, together with the USMCA Protocol, extended the Section A obligations for the duration of the transition period with respect to legacy investments. We will not repeat those arguments here, as the issues have

already been fully briefed.[138] Regardless of whether the obligations have been directly extended, the obligations have been extended in the context of dispute settlement by virtue of the fact that the USMCA Parties have designated NAFTA as the applicable law. As Respondent has focused the arguments in its Reply on this issue, we will address that specific point below.

83. In Section III.A.1, we show that the "obligations" that paragraph 1 of Annex 14-C references are derived from the applicable substantive law. In Section III.A.2, we show that Respondent's assertion that the USMCA Parties could only have selected NAFTA as the applicable law during a period after the termination of NAFTA by using certain magic words is false, and, in any case, USMCA does in fact use the language in question. In Section III.A.3, we show that Respondent has misrepresented the legal authorities upon which it relies.

84. For the reasons set forth below, Claimants have shown that, by virtue of USMCA Annex 14-C and the USMCA Protocol, Respondent was bound by the obligations under Section A of Chapter 11 (Investment) of NAFTA 1994 at the time of Respondent's breach.

1. The Applicable Law Defines Respondent's "Obligations" Regarding Legacy Investments, and In Any Case, the "Obligations" Extended Throughout the Transition Period

85. Under Article 42(1) of the ICSID Convention, the Tribunal "shall decide a dispute in accordance with such rules of law as may be agreed by the parties." Therefore, in deciding claims brought under Annex 14-C, the Tribunal must apply the law chosen by the parties to govern such claims. The starting point for the analysis is, of course, USMCA, not NAFTA.

86. As Claimants demonstrated in their Counter-Memorial, USMCA Annex 14-C paragraph 1 specifies that the applicable law for deciding claims submitted to arbitration under that provision is NAFTA. This point is confirmed by the following:

- The choice of NAFTA as the applicable law is contained in paragraph 1 of Annex 14-C itself, which provides for claims for "breach of an obligation under: . . . Section A of Chapter 11 of (Investment) NAFTA 1994."

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[138] *See* Claimants' Counter-Memorial on Preliminary Objection at Section V.B; Claimants' Observations on Bifurcation at Section III.B.2.(a); Claimants' Rejoinder on Bifurcation at para. 27.

- Footnote 20 of Annex 14-C specifies that "Chapter 11 (Section A) (Investment)," along with certain other provisions of NAFTA, "apply with respect to" a claim asserted under paragraph 1 of Annex 14-C.
- Paragraph 1 of Annex 14-C specifies that claims are to be submitted in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, which includes NAFTA Article 1131 (Governing Law). NAFTA Article 1131, titled "Governing Law," provides that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement [*i.e.*, NAFTA] and applicable rules of international law."

With respect to the last of these points, the U.S. Statement of Administrative Action accompanying the U.S. legislation implementing NAFTA explains that "Articles 1131 and 1132 address the substantive law to be applied in arbitral proceedings. Article 1131(1) provides that arbitral tribunals are to decide questions in accordance with the NAFTA and applicable international law rules."[139]

87. The consequence of NAFTA being the applicable law in this arbitration is that the Tribunal must apply that law to any legacy investment claims asserted during the three-year transition period, including Claimants' claims that Respondent "breache[d] an obligation under . . . Section A of Chapter 11 (Investment) of NAFTA 1994" by arbitrarily revoking the Presidential permit for the KXL Pipeline. The applicable law applies to all claims submitted to arbitration during the transition period, and all issues that are in dispute in the arbitration. Whether Respondent breached the Section A obligations is an issue in dispute that must be resolved by application of the applicable law, *i.e.*, NAFTA. There is nothing in Annex 14-C that indicates that the applicable law applies only to claims arising out of measures that pre-dated the entry into force of USMCA.

88. Respondent does not deny that NAFTA is the applicable law for deciding claims under paragraph 1 of Annex 14-C.[140] However, Respondent tries to escape the consequences of that fact by asserting that the "obligations" referenced in paragraph 1 of Annex 14-C are not

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[139] Exhibit C-115, North American Free Trade Agreement Implementation Act, Statement of Administrative Action, Nov. 4, 1993, at p. 597.

[140] *See* Respondent's Reply on Preliminary Objection at para. 5 ("[The USMCA Parties confirm] in Footnote 20 that the NAFTA is the law applicable to claims under Annex 14-C, ..."). *See also* Mexico's 1128 Submission at para. 12 ("This footnote simply clarifies that a claim brought during the three-year period (based on a breach that occurred while NAFTA was in force) remains governed by all the relevant provisions that otherwise expired on June 30, 2020.").

obligations derived from the applicable law specified in USMCA but are merely pre-existing obligations from the time when NAFTA was in force.

89. According to Respondent, "in order to reach the 'applicable law' provisions . . . 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."[141] Thus, in Respondent's view, it is first necessary to establish the existence of an obligation and only then determine which law applies to determine whether that obligation has been breached.

90. First, Respondent's assertion that the existence of an obligation must be established before applying the applicable law is backwards. In the context of a claim asserted under USMCA Annex 14-C, the applicable law determines the existence and scope of the obligations at issue. Indeed, it is impossible to determine whether a legal obligation exists without first determining which law applies, as the "law applicable to the substance of the dispute" is the "law that applies to determining the content of the rights and obligations that the investor seeks to enforce."[142] As one commentator noted, "[t]he question of the law applicable to the substance of an investment treaty arbitration is a question of applicable law at two levels: (a) the identification, as a matter of choice of law, of the legal system or systems applicable to the issues before the tribunal; and (b) the determination, within any such system so designated as applicable, of the relevant rules necessary to decide the issue."[143] The *Micula v. Romania* tribunal similarly held (in the context of an alleged breach of an umbrella clause in a BIT), "whether an obligation has arisen depends on the law governing that obligation . . . . In other words, to be afforded the protection of the BIT, the obligation must qualify as such under its governing law."[144]

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[141] Respondent's Reply on Preliminary Objection at para. 5.

[142] Exhibit CL-218, "Chapter 2 - Applicable Substantive Law and Interpretation," in Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), at §2.2 (p. 77).

[143] Exhibit CL-219, Campbell McLachlan, "Investment Treaty Arbitration: The Legal Framework," in *50 Years of the New York Convention* (ICCA Congress Series no. 14, A.J. van den Berg, ed., Kluwer Law International, 2009), at p. 108.

[144] Exhibit CL-220, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, at para. 418. The same principle applies in the context of commercial arbitration. For example, under Article 15 of the EC's so-

91. Second, Respondent's argument, echoed by Mexico in its 1128 submission, that a State cannot be found in breach of an obligation unless it is bound by such obligation at the time the relevant act takes place does not answer the necessary preceding question of whether an obligation exists in the first place.[145] Respondent seems to be asserting that disputing parties can

called Rome II Regulation "on the law applicable to non-contractual obligations," the "law applicable to non-contractual obligations under this Regulation shall govern in particular: (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them . . . ." Exhibit CL-221, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 J. O. (L 199). Similarly, U.S. courts routinely apply choice of law clauses in connection with non-contractual claims, including with respect to tort liability, false representation, conspiracy and other bases of liability. The source of the underlying rights and obligations at issue in such cases can derive only from the applicable law chosen by the parties, as the claims in question do not relate to breach of contract. *See*, *e.g.*, Exhibit CL-222, *Quicksilver Res., Inc. v. Eagle Drilling, LLC*, 792 F.Supp.2d 948 (S.D. Tex. 2011), at pp. 952-53 ("The first step in the analysis with regard to Quicksilver is to decide whether the contractual choice-of-law provision is broad enough to cover Quicksilver's fraud and negligence claims and Eagle's tortious interference, false representation, conspiracy, and false light invasion of privacy claims. The 'Governing Law' provision in each of the IADC Contracts states, 'This contract shall be construed, governed, interpreted, enforced and litigated, and the relations between the parties determined in accordance with the laws of County of Cleveland, State of Oklahoma. . . . Quicksilver and Eagle did not limit their selection of Oklahoma law to the construction of the IADC Contracts or to disputes arising in connection with those contracts. Rather, they agreed to litigate all matters arising out of their 'relations' under Oklahoma law. The wording is most akin to what the Fifth Circuit in *Caton* suggested would end the choice-of-law inquiry, *Caton*, 896 F.2d at 943 (intimating that a choice-of-law provision addressing the entirety of the contracting parties' relationship would bind the parties to the selected state's laws for all claims). The court finds that Oklahoma law applies to all of the claims asserted by both Quicksilver and Eagle against the other."); Exhibit CL-223, *El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 344 F.Supp.2d 986 (S.D. Tex. 2004) at p. 989 (holding that a choice of law clause in a dispute resolution provision covering "[a]ll disputes which may arise in connection with the performance of this Agreement" resulted in the choice of Mexican law "appl[ying] to Plaintiff's tort claims, as well as its contract claims, because the tort claims are disputes that are connected 'with the performance of th[e] Agreement'" (the court also noted that "[p]arties may agree that the law of a certain nation shall govern their rights and duties with respect to a transaction . . . ." *Id*. at p. 988); Exhibit CL-224, *Leblanc v. Delta Airlines*, No. CV 19-13598, 2021 WL 1517907 (E.D. La. Apr. 16, 2021), at pp. *2-3 ("[T]he court is tasked with determining the scope of the choice of law clause, that is, whether it applies to plaintiff's tort claim. . . . In this case, the contract governs '[a]ny and all matters arising out of or relating to this Contract of Carriage and/or the subject matter hereof.' Accordingly, the court finds that the choice of law provision, which applies to all matters arising from or relating to the subject matter of the agreement, regardless of the legal theory under which it was asserted, encompasses plaintiff's personal injury claim arising from the execution of the contract of carriage."); Exhibit CL-225, *Axis Oilfield Rentals, LLC v. Mining, Rock, Excavation & Constr., LLC, et al.*, 223 F.Supp.3d 548 (E.D. La. 2016), at p. 555 ("[T]he choice-of-law provision in this case contains sufficiently broad language that encompasses Plaintiff's negligent misrepresentation claim. Specifically, the provision contains the broad language 'all other matters . . . relating to the . . . contract.' The Court finds that such language is intended to be all-encompassing, and that Plaintiff's negligent misrepresentation is a matter included in 'all other matters' that are related to the contract. . . . Accordingly, Colorado law applies to Plaintiff's negligent misrepresentation claim.").

[145] Respondent cites Article 13 of the Articles on Responsibility of States for Internationally Wrongful Acts for the proposition that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs." Respondent's Reply on Preliminary Objection at para. 9. Mexico makes the same contention in its 1128 submission, citing the same authority. Mexico's 1128 Submission at para. 5. Respondent's (and Mexico's) reliance on Article 13 of the Articles on State Responsibility is misplaced. States are free to establish whatever obligations they wish. This why, for example, Article 55 (*Lex Specialis*) of the Articles on State Responsibility provides that "[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law." Exhibit RL-23,

only choose an applicable law that is already in force as between them (because, Respondent alleges, one must identify an existing obligation before reaching the question of applicable law). This is incorrect. Respondent's assertion runs directly contrary to the entire concept of party autonomy in choosing the applicable law, regardless of whether that law is otherwise in force.[146] Furthermore, Respondent elsewhere concedes that parties can choose a treaty that is not otherwise in force as the applicable law.[147]

92. Again, it is the applicable law identified in the relevant instrument that defines the scope of a party's obligations. With respect to claims asserted during the transition period, the USMCA Parties are bound by the applicable substantive law specified in paragraph 1 of Annex 14-C of USMCA. Within the context of dispute settlement, the applicable law defines the standard to which a USMCA Party must adhere, and a breach of the applicable law has

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International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001)), at Art. 55. In the present case, the USMCA Parties' choice of applicable law created binding obligations. At a minimum, the parties' choice of law is *lex specialis*. The parties agreed to special rules of international law when they chose the applicable law governing disputes under paragraph 1 of Annex 14-C. The Commentary to the Articles on State Responsibility further explains that "When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach." Exhibit CL-82, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the Work of its Fifty-Third Session (2008) ("Commentaries to the Articles on State Responsibility"), at p. 140. According to the Commentary "Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State . . . . The *lex specialis* principle (art. 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed." *Id*. at p. 58. *See also* Exhibit CL-226, James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect* (May 4, 2010), at p. 880 ("What is perfectly clear is that there can be many variants on the *lex specialis* option, from rather minor deviations up to the (nearly) closed system. As noted already, whether any particular rule operates in derogation from the default rules in the articles is a matter of interpretation: the articles lay down no presumption in favor of the general at the expense of the particular. According to the commentary, it is for the special rule to determine the extent of exclusion, the test being whether there is 'some actual inconsistency . . . or else a discernible intention that one provision is to exclude the other.' In light of these considerations, it seems to me inaccurate to describe the articles as adopting 'one-size-fits-all' rules. On the contrary, with the qualifications made above, the tailoring seems to me as flexible as the rules of interpretation. No doubt, one cannot specify the results of that process-but at least the relation between the general and the special seems to be right as a matter of principle.").

[146] Claimants' Counter-Memorial on Preliminary Objection at paras. 33-39, 43-48.

[147] *See* Respondent's Reply on Preliminary Objection at para. 37. Respondent quotes Claimants' statement that "disputing parties are free to choose a treaty as the applicable law, even if that treaty is not otherwise in force." Respondent then states that "[t]his is true as far as it goes . . . ." *Id*., quoting Claimants' Counter-Memorial on Preliminary Objection at para. 47.

consequences, *i.e.*, the requirement to compensate for damages caused by that breach. If the applicable substantive law does not establish an obligation, then it serves no function.

93. There is no exhaustive list of types of obligations a State can undertake and no limit on the way in which such obligations are undertaken. Article 12 of the ILC Articles on State Responsibility provides that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[148] As the Commentary on Articles on State Responsibility explains:

> [T]he responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law.[149]

In the present case, Respondent agreed to be bound by the applicable law. The fact that the applicable law is a terminated treaty does not in any way alter the fact that Respondent is, in the context of dispute settlement, obligated to comply with that applicable law.

94. Fourth, Respondent and its expert Mr. Gardiner assert that, if paragraph 1 of Annex 14-C used some other term—for example, if it referred to NAFTA "standards" rather than "obligations"—then paragraph 1 would have required compliance with NAFTA's substantive obligations for the duration of the transition period.[150] Respondent asserts that by using the term "obligations" rather than "standards," the USMCA Parties could only have been referring to pre-existing NAFTA obligations and not obligations deriving from the applicable substantive law

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[148] Exhibit CL-82, Commentaries to the Articles on State Responsibility, at p. 54 (emphasis added).

[149] Exhibit CL-82, Commentaries to the Articles on State Responsibility, at p. 55. The Comment pertains to Article 12 of the Articles on State Responsibility, which provides that "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

[150] *See* Respondent's Reply on Preliminary Objection at para. 36; Second Gardiner Report at paras. 10-11.

identified in USMCA.[151] Respondent cites only its own expert, Mr. Gardiner, for this distinction between obligations and standards,[152] and Mr. Gardiner himself cites nothing.[153]

95. An "obligation" derives from applicable "standards" or "rules." Stated differently, the standards or rules define the scope of a party's obligation. As the early commentary on the Articles on State Responsibility explains, "The rule is law in the objective sense. Its function is to attribute in certain conditions subjective legal situations—rights, faculties, powers and obligations—to those to whom it is addressed."[154] Thus, once an applicable law has been chosen, it is that law which then "attributes" the relevant "obligations" to specific parties.

96. As Professor Schreuer explains in his Second Legal Opinion:

> In the terminology of international investment law, the term "standards of protection" refers to the legal rules governing the obligations of States towards foreign investors. These standards represent binding obligations under the respective treaties. Typical standards are national treatment, most-favored-nation treatment, fair and equitable treatment, full protection and security, and compensation for expropriation.
>
> The breach of one or more of these standards may lead to a claim by an investor against the host State. In terms of NAFTA, Section A of Chapter 11 contains the standards that give rise to the obligations of host States and may lead to claims by investors. Put differently, these types of legal standards are the source of obligations under NAFTA, the USMCA and other investment treaties. Their breach can lead to a claim that may be enforced by arbitration.[155]

97. Furthermore, there is nothing in the negotiating history that indicates that Respondent or the other USMCA Parties attached any special significance to the word "obligations." In fact,

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[151] *See* Respondent's Reply on Preliminary Objection at para. 36.

[152] Respondent's Reply on Preliminary Objection at para. 36.

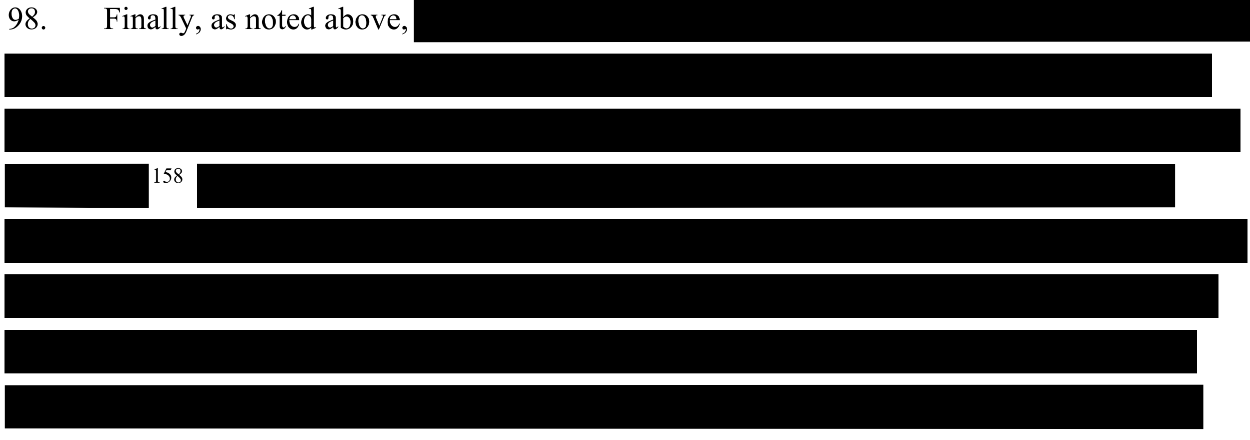
[153] *See* Second Gardiner Report at paras. 10-11.

[154] *See also* Exhibit CL-227, Second report on State responsibility, by Roberto Ago, Special Rapporteur - the origin international responsibility, UN Doc. A/CN.4/233, *Yearbook of the International Law Commission* Vol. II (1970), at p. 192 (emphasis added).

[155] Exhibit CER-2, Second Legal Opinion by Christoph Schreuer, Feb. 8, 2024 ("Second Schreuer Opinion"), at paras. 20-21 (citing Exhibit CL-236, August Reinisch & Christoph Schreuer, *International Protection of Investments - The Substantive Standards* (Cambridge University Press, 2020) (excerpts); Exhibit CL-143, Rudolf Dolzer, Ursula Kriebaum, & Christoph Schreuer, *Principles of International Investment Law* (3d. ed. 2022) (excerpts)).

when explaining the scope of paragraph 1 of Annex 14-C in statements contemporaneous with the negotiation and conclusion of USMCA, Respondent consistently used the word "rules," not "obligations."[156] The word "rules" is a reference to the substantive investment obligations.[157]

98. Finally, as noted above,



[156] In their Counter-Memorial, Claimants referred to talking points written by a USTR official and reviewed by the U.S. Department of State ("State Department") in preparation for OECD investment committee meetings that explain that "investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those 'legacy investments' for three years after the termination of the NAFTA." Claimants' Counter-Memorial on Preliminary Objection at para. 109 (citing Exhibit C-118, 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" (p. 2 of PDF) (emphasis added)). The background document prepared for the OECD Investment Committee meetings repeats the same statement regarding the continued applicability of "NAFTA rules and procedures with respect to . . . 'legacy investments.'" *See* Exhibit C-118, Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," Oct. 19, 2018, at attachment "USMCA Investor-State Dispute Settlement Provisions: Background and Talking Points" (p. 4 of PDF). A November 6, 2019 report from the OECD titled "Freedom of Investment Roundtable 29: Summary of Discussion" reflects these points, stating that "[t]he US noted that for three years following the termination of NAFTA, covered investors with existing investments could continue to bring ISDS claims under NAFTA (known as 'legacy claims')." *See* Exhibit CL-165, OECD, Directorate for Financial and Enterprise Affairs Investment Committee, "Freedom of Investment Roundtable 29: Summary of Discussion," Doc. No. DAF/INV/WD(2019)16/FINAL, Nov. 6, 2019, at para. 22. Claimants characterized these statements as referring to the "continued applicability of NAFTA rules and procedures" during the transition period. Claimants' Counter-Memorial on Preliminary Objection at para. 109. Indeed, there is no other way to understand those statements. In its Reply, Respondent objects that the words "continued applicability" do not appear in the official quotes that Claimants cited, but it then provides its own explanation of the public statements in which it states that the rules and procedures "would apply" for three years with respect to claims submitted pursuant to paragraph 1 of Annex 14-C. Respondent's Reply on Preliminary Objection at para. 136 (emphasis added).

[157] *See infra* at Section VI.A for further discussion of the definition of "rules."

[158] *See supra* at para. 46 (citing Exhibit C-186,

(CONFIDENTIAL), at draft text p. 11-39 (Bates No. RESP0029407)).

2. Respondent's Magic Words Theory Fails

99. Respondent argues that [REDACTED][159] Respondent refers to a document titled [REDACTED][160] Respondent's experts, Mr. Gardiner and Professor Ascensio, make similar assertions regarding the need for express wording.[161] On the basis of these assertions, Respondent concludes that the applicable law could only apply during the transition period if paragraph 1 of Annex 14-C expressly stated that NAFTA "shall apply" during the transition period.[162] Respondent's magic words theory is not a correct statement of the law and, in any case, Annex 14-C expressly states that NAFTA applies to resolve claims submitted under paragraph 1 of Annex 14-C.

100. First, Respondent and its experts have misstated the law. Whether a treaty continues to apply to a particular relationship, or whether it has been designated as the applicable law in an arbitration, depends on the totality of the circumstances, not on the use of any specific semantic formulation. There is no need for an "express statement." Even with respect to the retroactive application of treaties, Article 28 of the VCLT provides that a treaty does not apply retroactively "[u]nless a different intention appears from the treaty <u>or is otherwise established</u>."[163] As the VCLT Commentary explains, "[t]he general phrase 'unless a different intention appears from the treaty or is otherwise established' is used in preference to 'unless the treaty otherwise provides'

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[159] Respondent's Reply on Preliminary Objection at para. 90 (citing Exhibit R-51, [REDACTED] (USMCA CONFIDENTIAL)).

[160] *See* Exhibit R-51, [REDACTED] (USMCA CONFIDENTIAL), at attachment [REDACTED] (Bates No. RESP0006105).

[161] Mr. Gardiner asserts that "[i]f a treaty which is not in force is to be made applicable to a transaction or relationship this must be done expressly." Second Gardiner Report at para. 17. Mr. Ascensio similarly states that "[a] treaty cannot extend the effects of the treaty it terminates beyond what is provided for by customary international law without express wording." Second Ascensio Report at para. 14.

[162] *See* Respondent's Reply on Preliminary Objection at para. 95.

[163] Exhibit RL-16, VCLT at Art. 28 (emphasis added).

in order to allow for cases where the very nature of the treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects."[164]

101. Respondent's assertion that an express agreement is required to apply the terms of a treaty when the treaty is not otherwise in force directly contradicts the assertions it has made in connection with Article 14.2(3) of USMCA, which is discussed in Section III.G below. Article 14.2(3) of USMCA states: "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." Respondent argues that Article 14.2(3) requires retroactive application of paragraph 1 of Annex 14-C,[165] even though Article 14.2(3) makes no specific reference to paragraph 1 of Annex 14-C. Then, directly contradicting the arguments it has made with respect to the applicable law, Respondent asserts that "there is no requirement for an 'express agreement'" in order for a treaty to apply retroactively.[166] Thus, when it suits its purposes, Respondent argues that an express agreement is required to apply a treaty when the treaty is not otherwise in force, but when it does not suit its argument, Respondent argues the exact opposite position.

102. Second, in any case, the application of NAFTA during the transition period is expressly agreed in paragraph 1 of Annex 14-C. Footnote 20 in Annex 14-C specifically states that NAFTA shall "apply" to claims asserted under paragraph 1 of Annex 14-C. Footnote 20 states in full:

> For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions

[164] Exhibit CL-32, VCLT Commentary at pp. 212-13. Respondent also cites the Third Report on the Law of Treaties from Humphrey Waldock, but that report again recognizes that the parties may directly or implicitly extend the term of application of a treaty. Waldock concluded that a disputes clause in "a treaty is not to be considered as having any effects with regard to facts or matters occurring or arising after its termination, unless a contrary intention is expressed in the treaty or is clearly to be implied from its terms."). Exhibit RL-50, Humphrey Waldock, Third Report on the Law of Treaties, U.N. Doc. A/CN.4/167 (1964), at p. 10 (emphasis added).

[165] Respondent's Reply on Preliminary Objection at para. 68.

[166] Respondent's Reply on Preliminary Objection at para. 67.

> to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.[167]

As noted, Article 1131 in Section B of NAFTA Chapter 11 states that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement [*i.e.*, NAFTA] and applicable rules of international law."[168] These statements are clear, direct and express indications that NAFTA shall be the applicable law with respect to claims arising out of measures taken during the transition period. Finally, paragraph 1 of Annex 14-C specifically refers to the NAFTA Section A obligations, and the USMCA Protocol provides that the superseding of NAFTA with USMCA is "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[169]

103. Having no meaningful response to the above, Respondent tries to rewrite the treaty. With respect to Footnote 20, Respondent asserts that, "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."[170] Respondent misstates Footnote 20. If Footnote 20 were intended to clarify paragraph 1 of Annex 14-C in the manner Respondent claims, then it would have said, "for greater certainty, paragraph 1 of Annex 14-C allows only claims arising out of measures predating the entry into force of USMCA." That is not what Footnote 20 states. It states, in line with the text of paragraph 1 itself, that the specified provisions of NAFTA apply to all claims submitted under paragraph 1 of Annex 14-C.

3. Respondent Misrepresents the Legal Authorities It Cites

a. Respondent Mispresents the Findings in the *CSOB v. Slovak Republic* Decision

[167] Exhibit C-2, USMCA at Annex 14-C, n.21 (emphasis added).

[168] Exhibit C-1, NAFTA 1994 at Art. 1131 (emphasis added).

[169] Exhibit R-1, USMCA Protocol.

[170] Respondent's Reply on Preliminary Objection at para. 55.

104. Claimants' Counter-Memorial discussed *CSOB v. Slovak Republic* as an example of a case where the parties to a dispute chose a BIT that was not in force as the applicable law governing the dispute.[171] Respondent agrees with Claimants' explanation of the decision in *CSOB* and struggles to find a way to distinguish it. The best Respondent can do is to assert that the choice of law in *CSOB* was governed by an arbitration agreement, whereas in the present case (Respondent says) there was no arbitration agreement.[172] How Respondent could reach such a conclusion is inexplicable given that it concedes that "[a]n agreement to arbitrate could . . . have been formed if Claimants had accepted the offer contained in Paragraph 1 of Annex 14-C."[173] As Claimants have shown, Claimants have accepted the offer to arbitrate contained in paragraph 1 of Annex 14-C, and that offer includes an express reference to NAFTA as the applicable law.[174]

105. Respondent's expert, Mr. Gardiner, similarly struggles to distinguish *CSOB*. He asserts that "[c]onsent to arbitration is not a means of expressing consent to be bound by a treaty or of establishing treaty relations."[175] Nowhere does he explain why the instrument of consent cannot designate a treaty as "applicable to a transaction or relationship," [176] particularly if the designation of the applicable law in the instrument of consent is explicit (as it is in the present case). Instead, he simply asserts that, in *CSOB*, the choice of applicable law and the instrument of consent were (and, for some unexplained reason, must be) separate.[177] However, the *CSOB* tribunal found the exact opposite.[178]

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[171] Claimants' Counter-Memorial on Preliminary Objection at para. 47.

[172] Respondent's Reply on Preliminary Objection at para. 38.

[173] Respondent's Reply on Preliminary Objection at para. 38.

[174] *See* Claimants' Counter-Memorial on Preliminary Objection at paras. 38-39; Exhibit CER-1, Legal Opinion by Christoph Schreuer, Aug. 11, 2023, at para. 79.

[175] Second Gardiner Report at para. 17.

[176] Second Gardiner Report at para. 17.

[177] Second Gardiner Report at para. 19.

[178] *See* Exhibit CL-124, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, Dec. 29, 2004 ("*CSOB v. Slovak Republic*, Award"), at para. 52.

106. Mr. Gardiner agrees that, in *CSOB*, the parties entered into a Consolidation Agreement that specified the Czech-Slovak BIT as the applicable law.[179] He then notes that Article 8 of the BIT included a consent provision and, on that basis, asserts that "the governing law in that case was established by the Consolidation Agreement, while consent to arbitration was given separately in the bilateral Treaty. This shows well the distinction between specifying the law applicable to a transaction or relationship and the expression of consent to submit to arbitration a dispute relating to that transaction or relationship."[180] Mr. Gardiner's statement directly contradicts the *CSOB* tribunal's conclusions. The Czech-Slovak BIT had not entered into force, so it could not have served as the instrument of consent. According to the *CSOB* tribunal, "the uncertainties relating to the entry into force of the BIT prevent that instrument from providing a sound basis upon which to found the parties' consent to ICSID jurisdiction."[181] Instead, the consent to arbitration was in the separate Consolidation Agreement, and consent was accomplished by designating the BIT as the applicable law. As the *CSOB* tribunal stated:

> <u>the reference contained in [the parties' Consolidation Agreement]</u> to the Treaty on the Promotion and Mutual Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992 (hereinafter the "BIT") . . . <u>had the effect of submitting disputes arising under [the Consolidation Agreement] to settlement by ICSID arbitration</u> . . . .[182]

Thus, in *CSOB*, the consent to arbitration and the designation of the applicable law were both provided by the Consolidation Agreement, not the BIT. In the present case, the consent to arbitration and the designation of the applicable law are both provided in Annex 14-C, both directly and by the incorporation of Article 1131 of Chapter 11 of NAFTA.

107. Mr. Gardiner is, of course, well-aware of what the *CSOB* tribunal actually found. In his treatise, he explained that "[a] provision in the consolidation agreement between the claimant and the Slovak Republic referring to the agreement being governed by the BIT did satisfy the

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[179] Second Gardiner Report at paras. 17-19.

[180] Second Gardiner Report at para. 19.

[181] Exhibit CL-123, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, at para. 43 (emphasis added).

[182] Exhibit CL-124, *CSOB v. Slovak Republic*, Award at para. 52.

requirement for consent (even though the BIT was not in force) as it made the arbitration provision in the BIT part of the contract in the consolidation agreement."[183] He has simply chosen to ignore those findings in his expert opinion in this case.

b. Respondent Mispresents the Statements of Professor Schreuer and the VCLT Commentary

108. Respondent quotes various articles for the proposition that the date of a treaty's entry into force dictates the temporal scope of any consent to arbitrate disputes with respect to breaches of that treaty. However, the authority that Respondent cites deals with an entirely different factual scenario. For example, Respondent cites a book chapter Professor Schreuer authored, in which he stated:

> <u>If the consent to arbitration is limited to claims alleging a violation of the treaty that contains the consent</u>, 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.[184]

Professor Schreuer's statement is explicitly with reference to a situation in which the "consent to arbitration is limited to claims alleging a violation of the treaty that contains the consent." Those are not the facts of the present case.

109. In the present case, the parties' consent is provided in Annex 14-C of USMCA, which adopts as its applicable substantive law the provisions of a different treaty, specifically Section A of Chapter 11 of NAFTA. There is no linkage between, on the one hand, the consent to arbitration and choice of applicable law in USMCA and, on the other hand, the temporal application of NAFTA as a free-standing agreement. And, in any case, as Claimants have shown in their Counter-Memorial, a choice of law clause in an arbitration agreement may adopt an

[183] Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 50.

[184] Respondent's Reply on Preliminary Objection at para. 15 (citing Exhibit RL-14, Christoph Schreuer, "Consent to Arbitration," in *The Oxford Handbook of International Investment Law* 830-867 (Peter Muchlinski *et al.*, *eds.* 2008), at pp. 859-60 (emphasis added)).

expired treaty or even a treaty that never entered into force as the applicable substantive law.[185] As Professor Schreuer explains in his Second Opinion:

> My observations on jurisdiction *ratione temporis* are not at odds with the power of the Parties to agree on the application of treaty provisions to certain claims after the termination of the treaty. In the present case, the Parties agreed that Section A of Chapter 11 of NAFTA would apply to legacy investments. There is no indication that the time of the alleged violation makes any difference in this respect.[186]

110. Respondent repeats the same mistake with respect to its other references to Professor Schreuer's writings.[187] Respondent then compounds its error further when it refers to Humphrey Waldock's commentary on the VCLT, where he addressed situations in which "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."[188] In the present case, the choice of law appears in an arbitration agreement (embodied in Annex 14-C of USMCA and consummated through the parties' reciprocal consent) that is not "attached to the substantive clauses of a treaty as a means of securing their due application."[189] The arbitration agreement is

[185] Claimants' Counter-Memorial on Preliminary Objection at paras. 43-47.

[186] Exhibit CER-2, Second Schreuer Opinion at para. 16. Professor Schreuer goes on to state that, "If consent to jurisdiction is linked to the application of certain rules of law, jurisdiction is circumscribed by this limit to consent. In the present case, under Annex 14-C consent is limited to cases involving an alleged breach of an obligation under Section A of Chapter 11 of NAFTA. But it is not limited by an additional condition that the breach must have occurred at a certain time." *Id*. at para. 17.

[187] *See* Respondent's Reply on Preliminary Objection at para. 15. Respondent cites various other writings of Professor Schreuer but again ignores the fact that he was discussing a very specific factual scenario where the instrument of consent is part of the same treaty containing the substantive obligations. *See, e.g.*, Exhibit RL-88, Christoph Schreuer, "Landmark Investment Cases on State Consent," in *International Investment Law: An Analysis of the Major Decisions* (Hélène Ruiz Fabri and Edoardo Stoppioni, eds., 2022), at p. 265 (referring to situations in which "consent to arbitration contained in a treaty is limited to violations of that treaty"); Exhibit RL-90, Christoph Schreuer, *et al.*, *The ICSID Convention: A Commentary*, Article 25 (2d ed. 2009), at para. 510 (referring to situations in which "consent to arbitration contained in a treaty is limited to violations of that treaty"); Exhibit RL-91, Stephan W. Schill, *et al.*, *Schreuer's Commentary on the ICSID Convention*, Article 25 (3rd ed. 2022) [excerpt], at para. 941 (referring to situations in which "consent to arbitration contained in a treaty is limited to violations of that treaty").

[188] Respondent's Reply on Preliminary Objection at para. 17 (quoting Exhibit RL-50, Humphrey Waldock, Third Report on the Law of Treaties, U.N. Doc. A/CN.4/167 (1964), at p. 11, para. 4). Waldock refers to the European Convention for the Protection of Human Rights and Fundamental Freedoms as an example of a treaty in which the dispute settlement provisions are in the same treaty as the provisions containing the substantive obligations. *See* Exhibit RL-50, Humphrey Waldock, Third Report on the Law of Treaties, U.N. Doc. A/CN.4/167 (1964), at para. 4.

[189] *See* Exhibit RL-50, Humphrey Waldock, Third Report on the Law of Treaties, U.N. Doc. A/CN.4/167 (1964), at p. 11, para. 4.

in one treaty (USMCA), and it adopts as its applicable law the provisions of a different treaty, *i.e.*, Section A of Chapter 11 of NAFTA.[190] There is no indication that the temporal scope of Annex 14-C in USMCA is restricted by the temporal scope of NAFTA. Again, it is well established that disputing parties may choose a treaty that is not in force as the applicable law. That principle would be entirely negated if the temporal application of the expired treaty (*i.e.*, the fact that it was not, and may never have been in force) precluded application of the treaty as the applicable law governing a dispute.

c. Respondent Misrepresents the *Feldman* Decision

111. Respondent asserts that paragraph 1 of Annex 14-C was modeled on Articles 1116 and 1117 of Chapter 11 of NAFTA, which referred to a "breach of an obligation" under Section A of NAFTA Chapter 11.[191] Respondent then asserts that the decision in the *Feldman* arbitration made "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."[192] Finally, from that proposition, Respondent draws the conclusion that paragraph 1 of Annex 14-C must apply only to claims arising out of measures taken while NAFTA was in force.[193] Each step in Respondent's analysis is incorrect.

112. First, the similarity in the language used in paragraph 1 of Annex 14-C and Articles 1116 and 1117 of Chapter 11 of NAFTA does not have the significance that Respondent now suggests.

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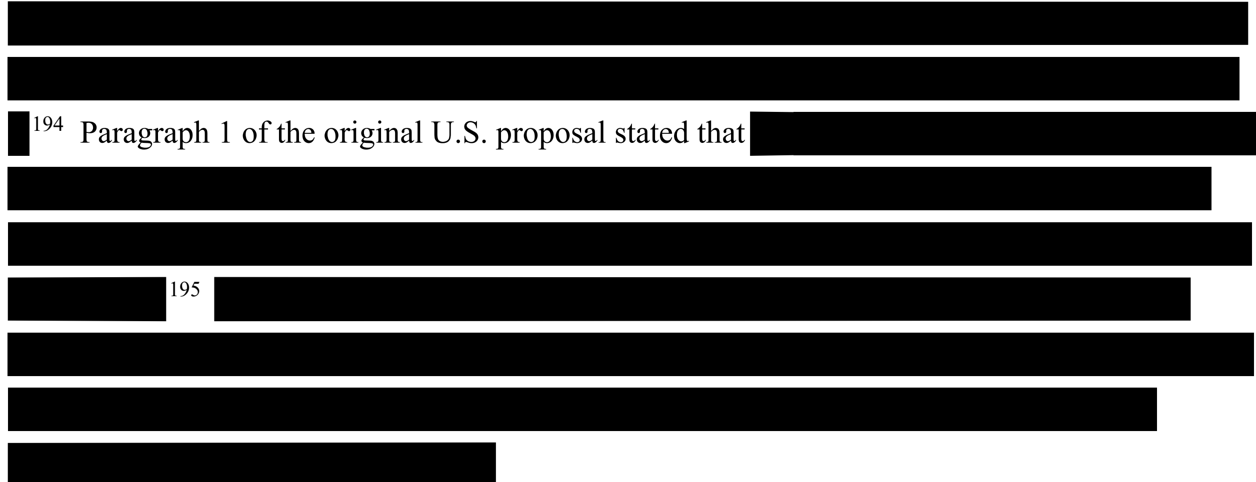
[190] Professor Ascensio refers to certain cases in which tribunals have declined to take jurisdiction over disputes that arose before the entry into force of the treaty containing the dispute settlement clause. Second Ascensio Report at paras. 28-32. These cases are inapposite, as they deal with the retroactive application of a treaty. The present case focuses on acts that took place during the transition period, *i.e.*, after USMCA entered into force. The presumptive prospective application of Annex 14-C confirms that the Tribunal has jurisdiction over Claimants' claims. Furthermore, as Professor Ascensio recognizes, the various decisions that he cites have considered the date of entry into force of a treaty as "a cut-off point in time, in the absence of an explicit provision to the contrary." Second Ascensio Report at para. 29. In the present case, the evidence overwhelmingly shows that the Section A obligations apply throughout the transition period. For the same reason, Professor Ascensio's reliance on the *Ambatielos* case is misplaced. Second Ascensio Report at n.7. He argues that the instrument at issue in *Ambatielos* did not include a transition period applying the substantive obligations of the instrument to a period when the instrument was not otherwise in force. Second Ascensio Report at n.7. He then simply asserts that Annex 14-C is analogous. Second Ascensio Report at n.7. He ignores the evidence showing that Annex 14-C provides for the application of the Section A obligations during the transition period.

[191] Respondent's Reply on Preliminary Objection at paras. 5, 10, 21.

[192] Respondent's Reply on Preliminary Objection at para 12.

[193] Respondent's Reply on Preliminary Objection at para. 21.



[194] Paragraph 1 of the original U.S. proposal stated that

[195]

113. Second, Respondent misconstrues the *Feldman* tribunal's conclusions. The issue in *Feldman* was the extent to which the tribunal had jurisdiction to consider acts that took place before NAFTA entered into force. The claimant in *Feldman* never alleged that Mexico could have breached, or did breach, NAFTA at a time before NAFTA entered into force. In fact, the claimant expressly stated that it was "not seeking the retroactive application of NAFTA to measures that were completed prior to its entry into force."[196] The claimant instead alleged a breach of general principles of international law before NAFTA entered into force.[197] The tribunal found that it "does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law."[198] This statement is correct, in that an allegation of a breach of general international law or domestic law is not an allegation of breach of the obligations in Section A of Chapter 11 of NAFTA. The latter is required in order to assert a claim under Article 1116 and 1117 of NAFTA. Claimants in

[194] *See* Exhibit C-180, (CONFIDENTIAL), at draft text p. 11-37 (Bates No. RESP0010474).

[195] Exhibit C-180, (CONFIDENTIAL), at draft text p. 11-37 (Bates No. RESP0010474).

[196] Exhibit CL-228, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Claimant's Memorial on Preliminary Issues (Aug. 21, 2000) ("*Feldman v. Mexico*, Claimant's Memorial"), at para. 71.

[197] Exhibit CL-228, *Feldman v. Mexico*, Claimant's Memorial at para. 72.

[198] Exhibit RL-80, *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 6, 2000) ("*Feldman v. Mexico*, Interim Decision"), at para. 61.

the present case have, of course, alleged a breach of Respondent's obligations in Section A of Chapter 11 of NAFTA.

114. Despite the fact that the claimant did not assert a breach of the obligations in Section A of Chapter 11 of NAFTA in relation to acts taken before NAFTA entered into force, the *Feldman* tribunal concluded that NAFTA did not apply retroactively.[199] Consequently, the tribunal did not have jurisdiction to apply NAFTA to acts that took place before NAFTA entered into force. Applying this reasoning to the present case would lead to the conclusion that Annex 14-C similarly applies only prospectively, *i.e.*, only to measures taken during the transition period, and not to measures that pre-date the entry into force of USMCA. Thus, the logic of the *Feldman* tribunal leads to the exact opposite conclusion that Respondent asserts.

115. Third, Respondent hides the most important aspect of the *Feldman* decision. According to Respondent, "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."[200] While Respondent quotes extensively from the *Feldman* decision, it makes strategic use of an ellipsis to avoid quoting the critical part of the decision, and thereby provides a highly misleading picture of what the tribunal actually said. According to the *Feldman* tribunal, "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. <u>NAFTA itself did not purport to have any retroactive effect</u>."[201] Respondent omitted the underlined portion of the quote, which is the very passage in which the *Feldman* tribunal recognized that the parties could have given NAFTA retroactive effect had they chosen to do so.[202]

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[199] Exhibit RL-80, *Feldman v. Mexico*, Interim Decision at para. 62.

[200] Respondent's Reply on Preliminary Objection at para. 12.

[201] Exhibit RL-80, *Feldman v. Mexico*, Interim Decision at para. 62 (emphasis added).

[202] Respondent quoted the *Feldman* tribunal as stating "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.'" Respondent's Reply on Preliminary Objection at para. 11 (citing Exhibit RL-80, *Feldman v. Mexico*, Interim Decision at para. 62). The ellipsis in the middle of this quote hides the *Feldman* tribunal's statement that "NAFTA itself did not purport to have any retroactive effect." Exhibit RL-80, *Feldman v. Mexico*, Interim Decision at para. 62.

116. The *Feldman* tribunal did not answer, and was not asked to answer, the question of how the parties to a treaty could have given NAFTA retroactive effect had they so chosen. Certainly, there are ways for treaty parties to do that. For example, if the parties had extended their consent to a period starting three years before NAFTA entered into force, then the substantive obligations of NAFTA would have extended for that period.[203] Or, as Professor Schreuer explains, "the Vienna Convention on the law of Treaties ("VCLT") in its Article 25 provides that a treaty is applied provisionally pending its entry into force if the treaty itself so provides or the negotiating States have so agreed in some other manner. In addition, the rule on non-retroactivity of treaties in Article 28 of the VCLT applies '[u]nless a different intention appears from the treaty or is otherwise established.'"[204] In the present case, of course, there is ample evidence that the USMCA Parties intended to apply NAFTA as the applicable law throughout the transition period.

B. The Length of the Transition Period Was Not Intended to Reflect the NAFTA Limitations Period

117. Respondent continues to assert that the three-year transition period in Annex 14-C was intended to mirror the three-year limitations period in NAFTA Articles 1116(2) and 1117(2).[205] Respondent's argument appears to be as follows: Under NAFTA, claims must be asserted within

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[203] If consent had extended to a period three years before entry into force of NAFTA, then the applicable law would be directly relevant. For example, Article XV, paragraph 6 of the Canada-Slovakia BIT provides that "this Agreement shall apply to any dispute which has arisen not more than three years prior to its entry into force." Exhibit RL-43, Agreement between the Slovak Republic and Canada for the Promotion and Protection of Investments, Can.-Slovk., July 20, 2010, 2817 U.N.T.S. 57, Article XV, at para. 6. Thus, by virtue of this choice of law provision, the substantive obligations of the BIT would apply to a period that pre-dated the entry into force of the treaty, and a tribunal would be bound to apply that choice of law. This very provision of the Canada-Slovakia BIT was at issue in *EuroGas Inc and Belmont Resources Inc. v Slovak Republic*. *See* Exhibit CL-229, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, Aug. 18, 2017, at Section VI. As explained by Professor Sean Murphy: "Although the *Eurogas* Tribunal found that the dispute before it preceded that date [*i.e.*, the date three years before entry into force of the treaty], had it found otherwise the Tribunal would have needed to address the applicable law. Given the 2010 BIT's language that it 'shall apply' to certain disputes concerning pre-2010 BIT acts, it appears that the States parties intended the substantive protections of the 2010 BIT to operate retroactively for such disputes." *See* Exhibit CL-141, Sean D. Murphy, "Temporal Issues Relating to BIT Dispute Resolution," 37 *ICSID Review* 51 (2022), at p. 12 of PDF. Article XVIII, paragraph 6 of the Canada-Romania BIT similarly states that the BIT "shall apply to any dispute which has arisen not more than three years prior to its entry into force." Exhibit RL-42, Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, Can.-Rom., signed May 9, 2009, entered into force Nov. 23, 2011, U.N.T.S. No. 53574, Article XVIII, at para. 6.

[204] Exhibit CER-2, Second Schreuer Opinion at para. 12.

[205] *See* Respondent's Reply on Preliminary Objection at Section II.E(3).

three years of the time when the claimant first acquired knowledge of the alleged breach and knowledge that it has incurred loss or damage. The transition period under Annex 14-C also happens to be three years. Based solely on that correlation, Respondent asserts that the two periods were intended to coincide and, therefore, the USMCA Parties must have intended that paragraph 1 of Annex 14-C relates exclusively to measures that pre-dated the entry into force of USMCA. However, correlation does not prove causation, and there is ample evidence that any correlation was coincidental and not by design. As the lead U.S. negotiator of the investment chapter, Mr. Mandell, stated that [REDACTED][206]

118. Claimants have rebutted Respondent's assertion multiple times before. We will not re-state the entirety of Claimants' arguments but incorporate them here by reference.[207] In summary, the correlation between the three-year limitations period in NAFTA and the three-year transition period in Annex 14-C of USMCA is loose at best, as the conditions for establishing a claim (including knowledge of the damage caused by an alleged breach) might have occurred well into the three-year transition period, thus leaving less than three years to assert a claim. Respondent, in fact, admits that the correlation between the limitations period and the transition period is not exact, but argues that the correlation is close enough.[208] Furthermore, Claimants provided numerous examples of successor treaties that provided a three-year transition period for asserting claims when the underlying treaties had limitations periods of different lengths.[209]

[206] Exhibit C-143, [REDACTED] (CONFIDENTIAL). *See also* Exhibit C-221, Email Exchange between Lauren Mandell and Khalil Gharbieh, "[EXTERNAL] RE: Your ICSID Review article," Mar. 2, 2021, at p. 1.

[207] *See* Claimants' Counter-Memorial on Preliminary Objection at Section VII.A.

[208] *See* Respondent's Reply on Preliminary Objection at para. 107.

[209] *See* Claimants' Counter-Memorial on Preliminary Objection at para. 106; Claimants' Rejoinder on Bifurcation at para. 30 (discussing the Australia-Mexico Side Letter, the Australia-Chile Free Trade Agreement, the EU-Mexico Free Trade Agreement, CETA, the Trade Agreement between Argentina and Chile, the Free Trade Agreement between Mauritius and China, the Investment Protection Agreement between the European Union and Singapore, and the Investment Protection Agreement between the European Union and Viet Nam).

There is, thus, no reason to assume that a correlation between the limitations period and the length of the transition period was intended.

119. In its discussion of this point, Respondent ignores the Produced Documents entirely, for the obvious reason that not a single Produced Document supports Respondent's position. In fact, the Produced Documents provide conclusive evidence that the three-year transition period had nothing to do with the three-year NAFTA limitations period.

120. To frame the discussion of the Produced Documents, it is important to note that, if the transition period were longer than three years, then that fact would, by itself, immediately negate Respondent's position. Respondent argues that the USMCA Parties were attempting to precisely calibrate the transition period to be no longer than three years after any act that took place while NAFTA was in force.[210] Under this logic, extending the transition period beyond three years would imply that claims could be asserted in relation to acts that post-dated the entry into force of USMCA. Therefore, it is essential to Respondent's Preliminary Objection that the transition period was only three years.

121. Given the importance that Respondent places on this point, one would have expected that this issue would have been discussed in the Produced Documents. Yet, not one Produced Document references the need to align the transition period with the NAFTA limitations period. That point was never discussed, and at multiple times during the negotiation, longer periods were considered.

122. First, [211] If USMCA entered into force after the termination of NAFTA, the transition period would have been longer than three years after the termination of NAFTA.

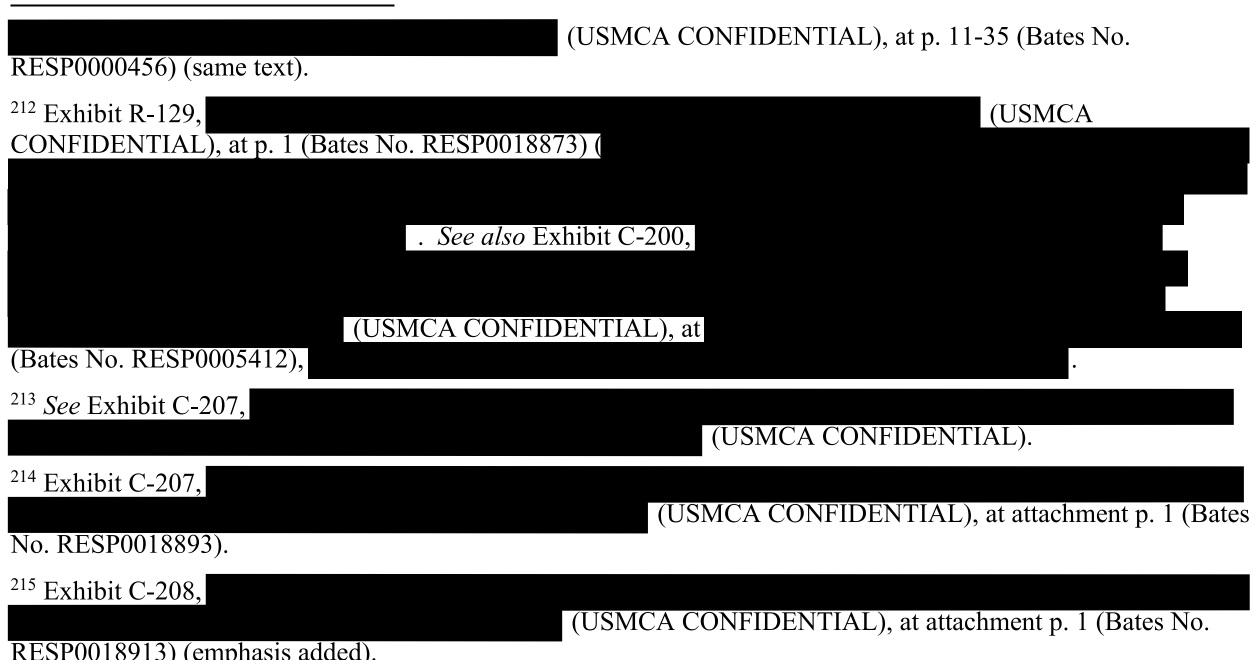
[210] Respondent's Reply on Preliminary Objection at para. 105.

[211] *See, e.g.*, Exhibit C-180, (CONFIDENTIAL) at p. 11-37 (Bates No. RESP0010474) ; Exhibit R-25, (USMCA CONFIDENTIAL), at p. 11-20 (Bates No. RESP0000251) ( ), Exhibit R-32, (USMCA CONFIDENTIAL), at p. 11-35 (Bates No. RESP0000421) (same text); Exhibit R-33,

123. Second, there were numerous instances where the USMCA negotiators were considering transition periods longer than three years. [212] However, the United States continued to explore various options. In June 2018, USTR staff prepared a summary of outstanding investment-related issues.[213] The document [214] There are several iterations of this document in the Produced Documents, but they each provide as follows:

[215]

124. On September 29, 2018, two months before USMCA was signed, Mr. Bahar sent Mr. Mandell the following proposal



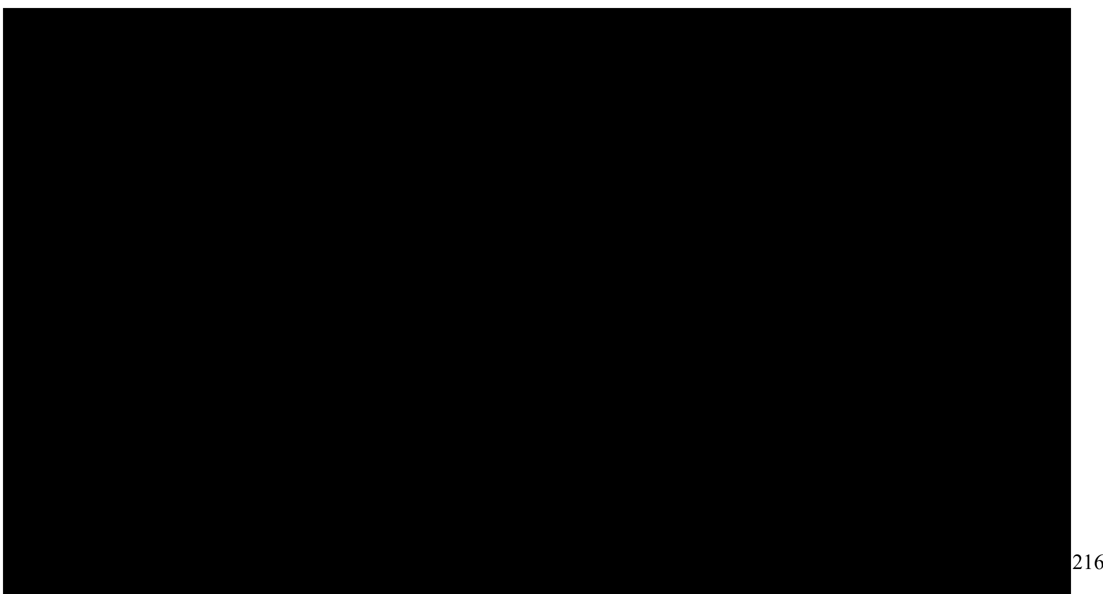
(USMCA CONFIDENTIAL), at p. 11-35 (Bates No. RESP0000456) (same text).

[212] Exhibit R-129, (USMCA CONFIDENTIAL), at p. 1 (Bates No. RESP0018873) (. *See also* Exhibit C-200, (USMCA CONFIDENTIAL), at (Bates No. RESP0005412), .

[213] *See* Exhibit C-207, (USMCA CONFIDENTIAL).

[214] Exhibit C-207, (USMCA CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0018893).

[215] Exhibit C-208, (USMCA CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0018913) (emphasis added).

[216]

125. This document is described in Respondent's Privilege Log as "Email among USTR staff regarding predecisional deliberations on draft text for investment chapter under consideration."[217]

126. As discussed in Claimants' Counter-Memorial, on November 27, 2018, three days before USMCA was signed, USTR staff debated various lengths for the transition period—5-6 years from signature, a "4-year safeguard," three years from ratification of USMCA, or three years from entry into force of USMCA (as opposed to three years from termination of NAFTA).[218] Respondent cannot explain away this telling contemporaneous evidence. It simply asserts that the discussion "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

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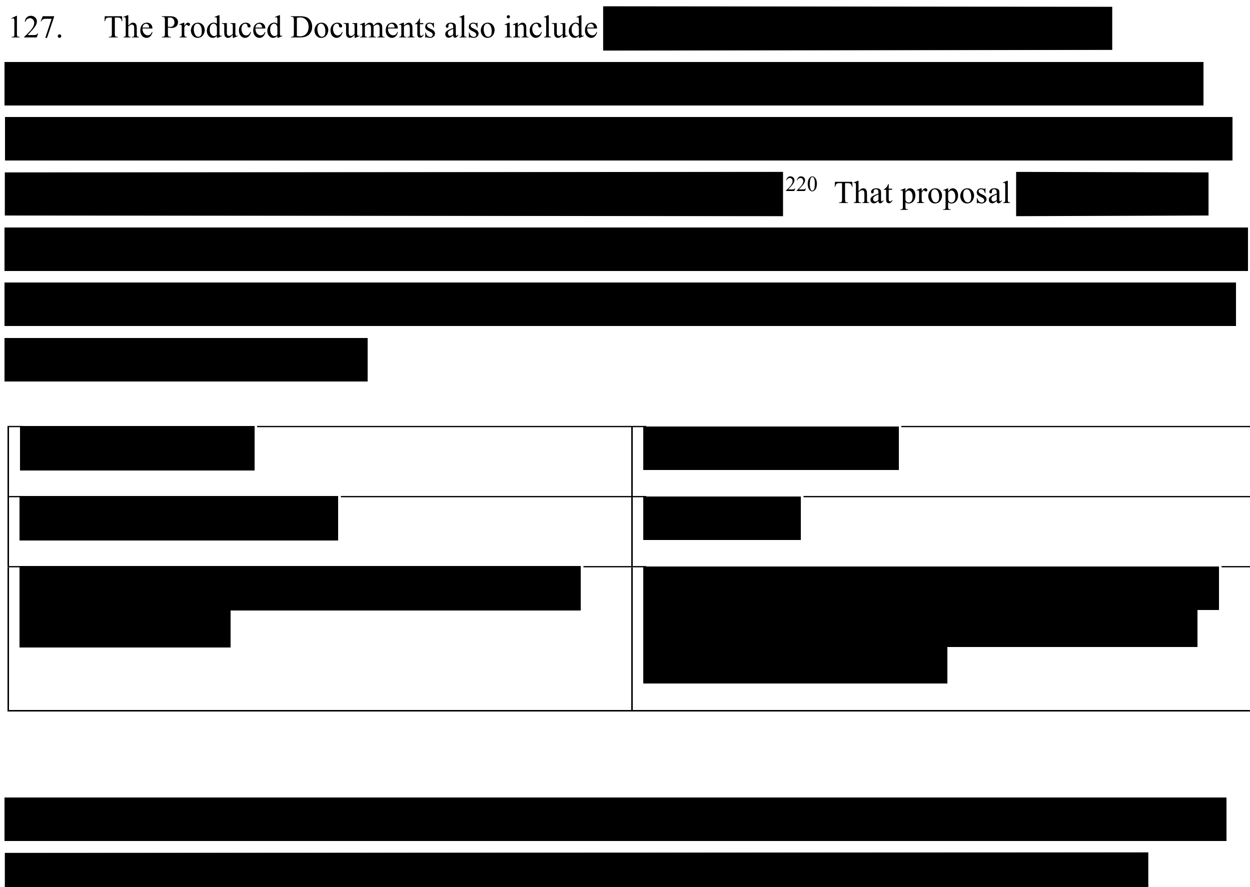
[216] Exhibit R-144, (USMCA CONFIDENTIAL) (emphasis added).

[217] Exhibit C-153, Respondent's Privilege Log (revised), Jan. 3, 2024, at entry 1376.

[218] Claimants' Counter-Memorial on Preliminary Objection at paras. 104-05.

measured from the date of signature, instead of entry into force."[219] Yet, adopting any of those proposals would "change the effective length of Annex 14-C's coverage." The discussion would make no sense if the transition period were intended to mirror the three-year limitations period in NAFTA. Indeed, there is not a single reference to the NAFTA limitations period during the discussion.

127. The Produced Documents also include



128. If the USMCA Parties chose a three-year transition period to align with the NAFTA limitations period, surely there would have been some discussion of this issue, and any suggestion of extending the length of the transition period for a longer period would have been immediately rejected. That is not what happened. The negotiators repeatedly considered a

[219] Respondent's Reply on Preliminary Objection at para. 108.

[220] Exhibit R-148, (USMCA CONFIDENTIAL).

longer period, and not once did they indicate that the transition period was tied to the NAFTA limitations period.

C. Respondent's Interpretation of Footnote 21 Produces Absurd Results and Directly Conflicts with the Understanding Reflected in the Produced Documents

1. There Is No Basis for Respondent's Assertion that the USMCA Parties Intended the Absurd Results that Claimants Have Shown Respondent's Interpretation Would Produce

129. Footnote 21 of Annex 14-C states that "Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)." In previous submissions, Claimants have shown that Footnote 21 is a carveout from the scope of paragraph 1 of Annex 14-C, and a carveout makes sense only if Annex 14-C and Annex 14-E overlap in terms of time, damages, and the measures giving rise to the claims.[221] Given that Annex 14-E permits claims only arising out of measures that post-date the entry into force of USMCA, paragraph 1 of Annex 14-C must similarly permit claims arising out of measures that post-date the entry into force of USMCA.

[222]

130. Respondent asserts that the claims that can be submitted under Annex 14-E and paragraph 1 of Annex 14-C need not overlap.[223] Instead, according to Respondent, if an investor is eligible to submit a claim under paragraph 2 of Annex 14-E arising out of a measure that post-

[221] *See* Claimants' Counter-Memorial on Preliminary Objection at Section V.A.1; Claimants' Observations on Bifurcation at para. 31; Claimants' Rejoinder on Bifurcation at para. 36.

[222] Exhibit C-143, (CONFIDENTIAL). *See also* Exhibit C-221, Email Exchange between Lauren Mandell and Khalil Gharbieh, "[EXTERNAL] RE: Your ICSID Review article," Mar. 2, 2021, at p. 1.

[223] *See* Respondent's Memorial on Preliminary Objection at para. 53. Mexico makes a similar contention in its 1128 submission. Mexico's 1128 Submission at para. 14.

dates the entry into force of USMCA, then it cannot submit a claim under paragraph 1 of Annex 14-C arising out of a measure that pre-dates the entry into force of USMCA. And, Respondent argues, that prohibition applies even if the claims, investments, challenged measures, and damages at issue in the claim under Annex 14-E are completely different from those that may be asserted under paragraph 1 of Annex 14-C.[224]

131. In previous submissions, Claimants have shown the absurd results of Respondent's interpretation.[225] Respondent does not, and cannot, contest the examples that Claimants have provided. Instead, Respondent simply asserts that those results are exactly what the USMCA Parties intended when they negotiated Annexes 14-C and 14-E.[226] Claimants will not go into the details of those examples again but will reiterate two points.

132. First, unlike other investors, investors who are eligible to submit claims under Annex 14-E may submit claims for the entire range of substantive obligations in the USMCA investment chapter. [227] Yet, under Respondent's interpretation, these most favored investors—and only these investors—would be prohibited from asserting legacy investment claims.

133. Second, an investor would only be "eligible to submit claims to arbitration under paragraph 2 of Annex 14-E" if it could allege damages caused by an alleged breach of Chapter 14 of USMCA. In other words (under Respondent's interpretation), the investor would only be deprived of the right to assert a legacy investment claim if, in addition to whatever damages it

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[224] *See* Respondent's Memorial on Preliminary Objection at para. 53.

[225] *See* Claimants' Counter-Memorial on Preliminary Objection at Section V.A.2; Claimants' Rejoinder on Bifurcation at Section III.C.2. Respondent asserts that Claimants have somehow "abandoned" the arguments that they submitted in their bifurcation submissions. Respondent's Reply on Preliminary Objection at para. 58. Claimants have not abandoned any such arguments. If there is any doubt on the matter, Claimants incorporate those earlier arguments here by reference.

[226] Respondent's Reply on Preliminary Objection at paras. 62-63.

[227] Exhibit R-157, (CONFIDENTIAL), at p. 4 (Bates No. RESP0022469) ().

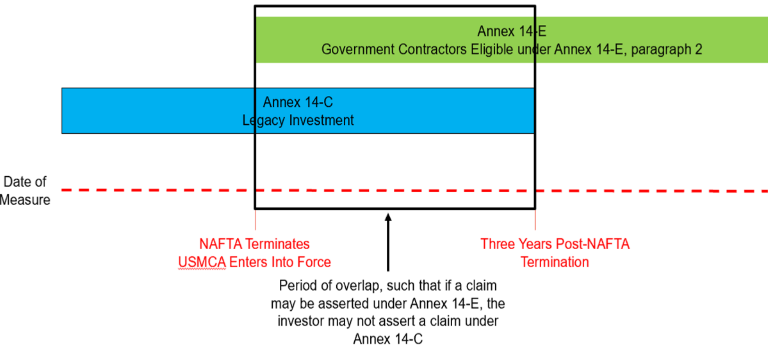
sustained as a result of a Party's breach of NAFTA, it suffered a second injury during the transition period in connection with a breach of USMCA (even if that injury had absolutely nothing to do with the breach of NAFTA that would have given rise to the legacy investment claim). If the investors did not suffer such a second injury, it would not be eligible to assert a claim under paragraph 2 of Annex 14-E, and so would be permitted to assert a legacy investment claim.

134. Despite this absurd outcome, Respondent continues to assert that Footnote 21 disqualifies categories of investors, not categories of claims, and that the claims that could be asserted under Annex 14-C and 14-E need not overlap, even temporally.[228] In other words, once an investor is eligible to assert a claim under Annex 14-E, it loses the right to assert a claim under Annex 14-C, even if the two claims are entirely unrelated.[229] Respondent's position that Footnote 21 relates to categories of investors does not eliminate the absurdity of the outcome its interpretation of Footnote 21 and Annex 14-C would produce.

135. To illustrate why Respondent's interpretation would produce absurd results (even if Footnote 21 were focused on investors, rather than claims), consider the following two diagrams. The first diagram illustrates the situation if Annex 14-C and Annex 14-E overlap, assuming that claims could be asserted under Annex 14-C in relation to measures taken during the transition period:

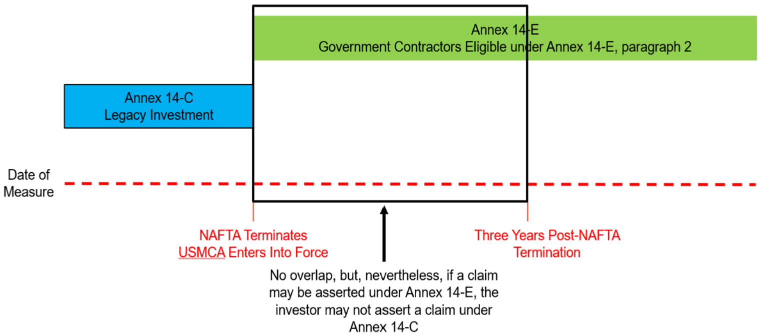
[228] Respondent's Reply on Preliminary Objection at paras. 57-65. The Produced Documents do not support Respondent's assertions. In fact, they show a clear move away from an investor-focused carveout toward a claims-focused carveout. As shown in Attachment B, Exhibit R-59, (USMCA CONFIDENTIAL), at draft text p. 18 (Bates No. RESP0002789). The final text of Footnote 21 states: "Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)." Exhibit C-2, USMCA, at Annex 14-C, n.21.

[229] Respondent's Reply on Preliminary Objection at paras. 57-65; Respondent's Memorial on Preliminary Objection at paras. 50-54.



In the above diagram, during the period of overlap, an investor who is eligible to challenge a measure under Annex 14-E could (absent Footnote 21) challenge the same measure under Annex 14-C. Footnote 21 would prohibit those duplicative claims.

136. The second diagram illustrates the situation if Annex 14-C and Annex 14-E do **not** overlap, *i.e.*, if Respondent's interpretation of Annex 14-C were correct (which it is not).



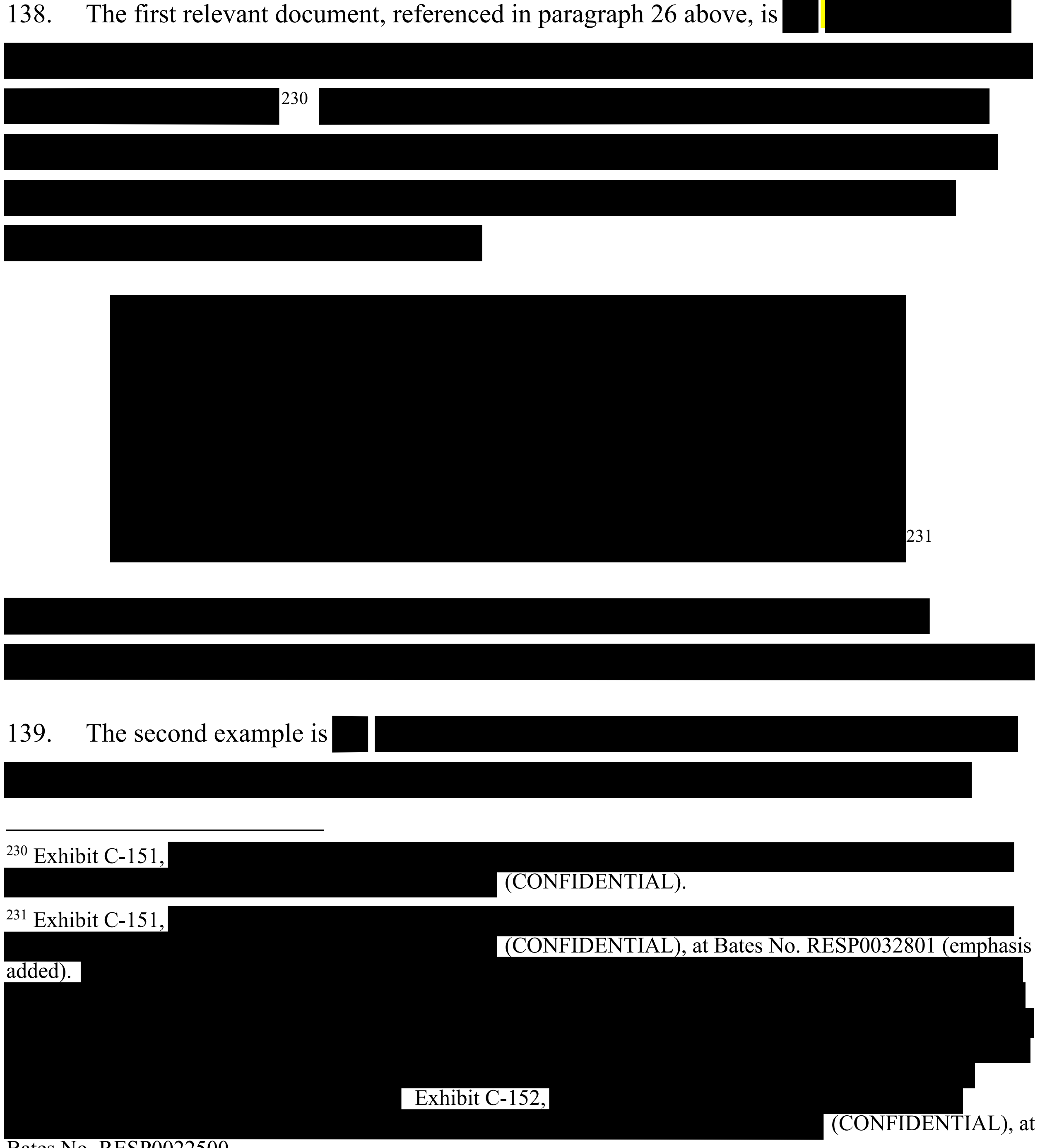
In the above diagram, there is no period of overlap. Nevertheless, Respondent's interpretation of Footnote 21 would prohibit an investor who is eligible to challenge a measure under Annex 14-E from challenging any unrelated measure under Annex 14-C. There is no logic to this outcome.

2. The Produced Documents Confirm Claimants' Interpretation of Footnote 21

137. The Produced Documents directly contradict Respondent's interpretation of Annex 14-C and the operation of Footnote 21. They make clear that Annexes 14-C and 14-E are alternatives. If, for example, an energy investor is eligible to bring a claim under Annex 14-E in the first three

years after NAFTA's termination, it may do so, but if it is not eligible under Annex 14-E, then it may challenge the measure under Annex 14-C during that period. Footnote 21 prevents the investor from asserting two claims under both Annex 14-C and Annex 14-E with respect to the same measure or from choosing NAFTA instead of USMCA based on which option it deems most favorable.

138. The first relevant document, referenced in paragraph 26 above, is



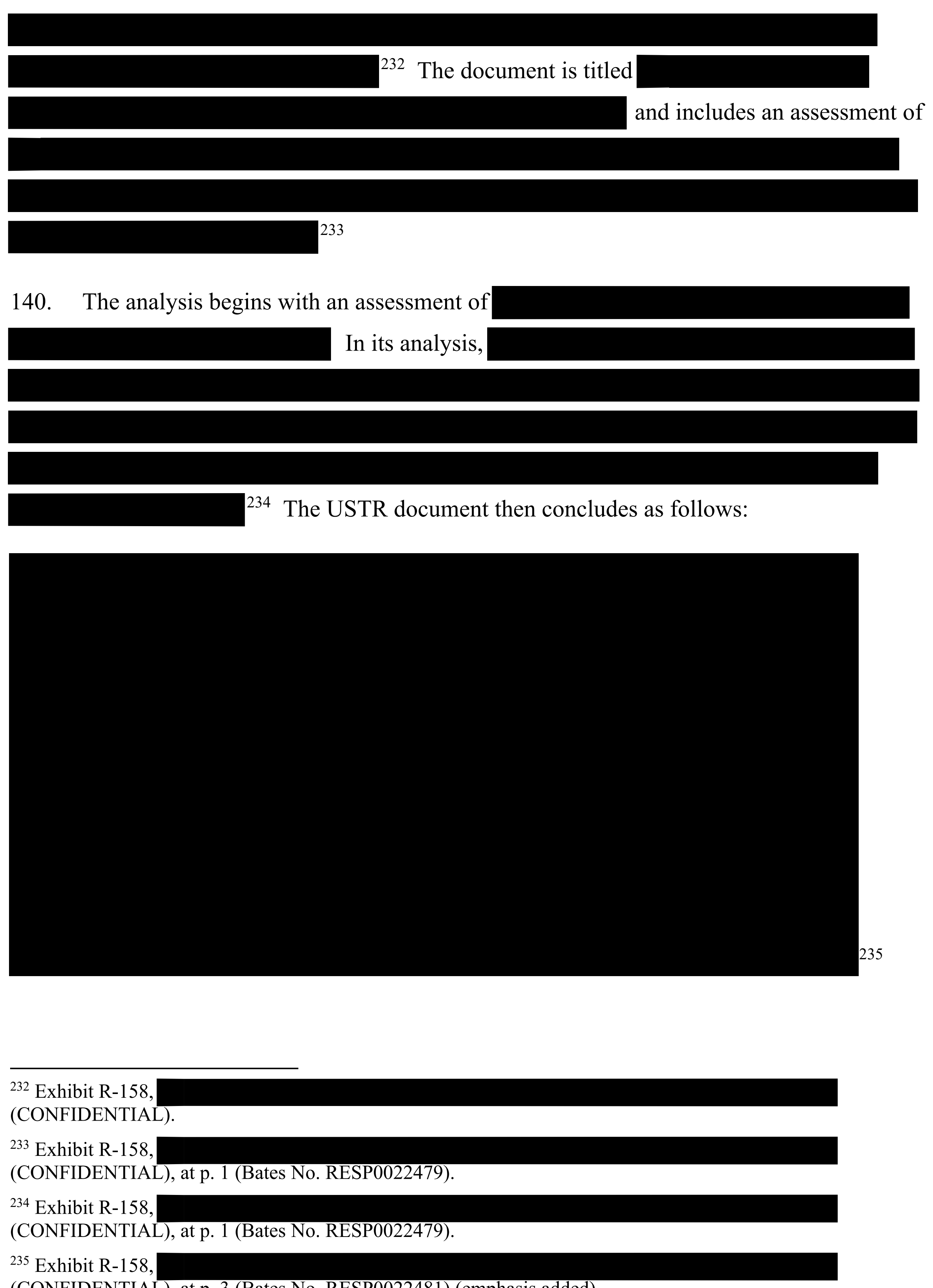
[230]

[231]

139. The second example is

[230] Exhibit C-151, (CONFIDENTIAL).

[231] Exhibit C-151, (CONFIDENTIAL), at Bates No. RESP0032801 (emphasis added). Exhibit C-152, (CONFIDENTIAL), at Bates No. RESP0022500.



[232] The document is titled and includes an assessment of [233]

140. The analysis begins with an assessment of In its analysis, [234] The USTR document then concludes as follows:

[235]

[232] Exhibit R-158, (CONFIDENTIAL).

[233] Exhibit R-158, (CONFIDENTIAL), at p. 1 (Bates No. RESP0022479).

[234] Exhibit R-158, (CONFIDENTIAL), at p. 1 (Bates No. RESP0022479).

[235] Exhibit R-158, (CONFIDENTIAL), at p. 3 (Bates No. RESP0022481) (emphasis added).

141. Again, the USTR document confirms that Annex 14-C and Annex 14-E are alternatives that are available to challenge measures taken during the transition period. If an investor is a "keyhole" investor, then it may assert a claim under Annex 14-E. If the investor is not a "keyhole" investor but a legacy investor, then it may assert a claim under Annex 14-C. Footnote 21 would prevent an investor from asserting claims under both Annex 14-C and Annex 14-E with respect to the same measure and eliminates the choice of which Annex to use.

3. Contrary to Respondent's Assertions, the Scope of Annex 14-E and the Scope of Annex 14-D Are Not Comparable

142. Respondent asserts that, if Footnote 21 were intended to avoid overlapping claims that could otherwise be asserted under Annex 14-E, then a similar carveout should have been included for Annex 14-D.[236] Respondent ignores the differences between Annexes 14-C, 14-D, and 14-E.

143. As a reminder, Annex 14-E allows claims for the entire range of substantive obligations in the investment chapter of USMCA. Consequently, there is almost a complete overlap in the types of claims that could be asserted under Annex 14-C and those that can be asserted under Annex 14-E. By contrast, the scope of substantive protections available under Annex 14-C is substantially different from the scope under Annex 14-D. There is only a very narrow overlap between the types of claims that can be asserted under Annex 14-C and those than can be asserted under Annex 14-D.[237] The following table illustrates the different scopes of the different annexes:

[236] *See* Respondent's Reply on Preliminary Objection at para. 78 ("[I]f 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.").

[237] Indeed, according to data collected by UNCTAD, the vast majority of ISDS claims have historically been in connection with substantive standards that are not protected through Annex 14-D. That is, national treatment claims (including pre- and post-establishment claims, the former of which are not covered by Annex 14-D) only make up approximately 6.6% of ISDS claims, MFN treatment claims (including pre- and post-establishment claims, the former of which are not covered by Annex 14-D) historically only make up approximately 5.53% of ISDS claims, and direct expropriation claims historically only make up approximately 5.79% of ISDS claims. The full data set is as follows: national treatment (approximately 6.6%); most-favoured nation treatment (approximately 5.53%); direct expropriation (approximately 5.79%); indirect expropriation (approximately 20.35%); fair and equitable treatment/minimum standard of treatment (approximately 25.65%); full protection and security (approximately 12.20%); umbrella clause (approximately 7.32%); arbitrary, unreasonable and/or discriminatory measures (approximately 10.59%); performance requirements (approximately 0.57%); customary rules of international law

	Annex 14-C	Annex 14-D	Annex 14-E
Post-Establishment National Treatment and MFN Treatment	✓	✓	✓
Direct Expropriation	✓	✓	✓
Pre-Establishment National Treatment and MFN Treatment	✓		✓
Minimum Standard of Treatment, including Fair and Equitable Treatment	✓		✓
Performance Requirements	✓		✓
Senior Management and Boards of Directors	✓		✓
Transfers	✓		✓
Indirect Expropriation	✓		✓

144. Furthermore, pursuant to Article 14.D.5 of Annex 14-D, a claim may only be submitted to arbitration if, *inter alia*, "(a) the claimant [and, as applicable, the enterprise on whose behalf a claim is asserted] . . . first initiated a proceeding before a competent court or administrative tribunal of the respondent with respect to the measures alleged to constitute a breach referred to in Article 14.D.3; [and] (b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding in subparagraph (a) was initiated . . . ." In addition, pursuant to Article 14.D.3 of Annex 14-D, a claim may only be submitted to arbitration at least 90 days after the investor has submitted a notice of intent to submit a claim to arbitration. By the time these periods have run (roughly 33 months from the point an alleged measure was taken after USMCA entered into force), it is very likely that the 36-month transition period under Annex 14-C would have expired. For a claimant to be able to bring a claim under Annex 14-D within duration of the transition period under Annex 14-C, the breach must occur during the transition period and the claimant must complete all of the prerequisites to submit a claim pursuant to Articles 14.D.5 and 14.D.3 as noted above, all in less than 36 months immediately following USMCA's entry into force. That is a very unlikely scenario.

(approximately 0.38%); transfer of funds (approximately 1.79%); losses sustained due to insurrection, war, or similar events (approximately 0.23%); and others (approximately 3.01%). *See* Exhibit C-222, List of USMCA cases (UNCTAD), *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement (last accessed Feb. 8, 2024).

145. In short, there is a substantial risk of Annex 14-C and Annex 14-E claims overlapping, while there is only a remote chance of Annex 14-C and Annex 14-D claims overlapping. Further proving the limited overlap, Claimants are not aware of a single instance where an investor has asserted a claim under both Annex 14-C and Annex 14-D.

D. Respondent's Argument Regarding the Placement of Annex 14-C Outside the Body of Chapter 14 is Unavailing

146. Respondent contends that the structure of USMCA confirms that Annexes 14-C, 14-D, and 14-E are purely procedural in nature and do not themselves "impose substantive investment obligations,"[238] which (Respondent says) only the body of Chapter 14 does. Respondent misses the point. Each of those annexes specifies the applicable law and, in doing so, specifies the law that determines the relevant obligations in the context of dispute settlement. As Claimants have discussed at length, paragraph 1 and Footnote 20 of Annex 14-C specify that the applicable substantive law is NAFTA Chapter 11 Section A, and Article 1131 of Chapter 11 of NAFTA (which is effectively incorporated into paragraph 1 of Annex 14-C) similarly specifies that NAFTA is the applicable law. Annex 14-D likewise specifies at Article 14.D.3 that the applicable substantive law is (with certain limitations) Article 14.4 (National Treatment) or Article 14.5 (Most-Favored-Nation Treatment), and "Article 14.8 (Expropriation and Compensation)." Article 14.D.9 (Governing Law) further specifies USMCA and "applicable rules of international law" as the applicable law in connection with arbitration initiated under Annex 14-D. That same provision carries over into Annex 14-E, by virtue of paragraph 1 of Annex 14-E.[239] Annex 14-E also specifies in paragraph 2 that the applicable substantive law is "any obligation under this Chapter."

147. Indeed, the Produced Documents describe the three ISDS annexes in terms of the substantive rules they apply. For example, [redacted]

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[238] Respondent's Reply on Preliminary Objection at paras. 47-49. Mexico alludes to a similar point in its 1128 submission, arguing Annex 14-C "is focused exclusively on claims to arbitration, not substantive protections." Mexico's 1128 Submission at para. 9. Claimants have rebutted this point in full in their Counter-Memorial and do so again here. *See, e.g.*, Claimants' Counter-Memorial on Preliminary Objection at Section VII.B (showing that Annex 14-C applies NAFTA "rules and procedures" during the transition period).

[239] Paragraph 1 of Annex 14-E states, "Annex 14-D (Mexico-United States Investment Disputes) applies as modified by this Annex to the settlement of a qualifying investment dispute under this Chapter in the circumstances set out in paragraph 2." Exhibit C-2, USMCA at Annex 14-E, para. 1 (footnote omitted).

state as follows:

[240]

148. Claimants' interpretation of Annex 14-C is wholly consistent with the structure of the USMCA investment chapter; it is Respondent's that is not.

E. The USMCA Protocol Supports Claimants' Position

1. The Ordinary Meaning of the USMCA Protocol Shows that the Section A Obligations Remain in Force for the Duration of the Transition Period with Respect to Legacy Investments

149. Paragraph 1 of the USMCA Protocol states that, "[u]pon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[241] Paragraph 1 of Annex 14-C allows claims to be submitted "in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994" alleging a breach of an obligation under "Section A of Chapter 11 (Investment) of NAFTA 1994." Respondent consented to allow such claims for

[240] Exhibit R-150, (CONFIDENTIAL). *See also* Respondent's Reply on Preliminary Objection at Annex B (CONFIDENTIAL), at p. B-14 (describing Exhibit R-150).

[241] Exhibit R-1, USMCA Protocol at para. 1.

the duration of the transition period. Therefore, under the ordinary meaning of the USMCA Protocol, the termination of NAFTA was "without prejudice" to the continued application of Sections A and B of Chapter 11 of NAFTA for the duration of the transition period. Claimants have fully addressed this point in their earlier submissions.[242] Whether giving effect to the Section A obligations is accomplished through a direct continuation of the Section A obligations or through applying the Section A obligations as the applicable law, the result in the same: the obligations continue throughout the transition period.

150. Respondent has no meaningful response to this point. It asserts that "[t]he 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."[243] However, that is exactly the point. The USMCA Protocol ensured that the referenced NAFTA provisions would continue to apply for the duration of the transition period, despite the fact that USMCA superseded NAFTA.

151. While Respondent seems to agree that the Protocol recognizes that the USMCA Parties intended to keep certain NAFTA provisions in place, Respondent cherry picks which NAFTA obligations were to continue. Respondent seems to say that only Section B of Chapter 11 of NAFTA continues to apply, but not Section A of Chapter 11 of NAFTA,[244] even though both are referenced in Annex 14-C and Annex 14-C makes no distinction between the two. At other times, Respondent asserts that a NAFTA provision can continue if a USMCA provision states expressly that such NAFTA provisions "shall apply."[245] As noted above, this assertion gets Respondent nowhere, given that Footnote 20 specifically states that NAFTA shall apply to claims asserted under paragraph 1 of Annex 14-C. Respondent also implies that only those NAFTA provisions referenced in Article 34.1 of USMCA shall continue to apply.[246] Respondent

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[242] Claimants' Counter-Memorial on Preliminary Objection at paras. 81-84; Claimants' Observations on Bifurcation at paras. 27-28.

[243] Respondent's Reply on Preliminary Objection at para. 25.

[244] *See* Respondent's Reply on Preliminary Objection at paras. 20, 27.

[245] *See* Respondent's Reply on Preliminary Objection at paras. 25, 50, 95, 103.

[246] In its Memorial, Respondent asserted that, "Unlike Annex 14-C, in Article 34.1 (Transitional Provision from NAFTA 1994) the USMCA Parties expressly agreed that certain provisions of the NAFTA, namely Chapter 19, 'shall continue to apply' in certain circumstances despite the NAFTA's termination. This language confirms that the USMCA Parties did not intend to extend any other NAFTA obligations, including the substantive investment

grudgingly concedes that it is wrong on that point, but then complains that Claimants somehow did not point to enough examples of the continued application of NAFTA outside of the provisions of NAFTA referenced in Article 34.1.[247] It is not clear why the sheer number of examples is relevant, when paragraph 1 of Annex 14-C is one such example.

152. With respect to Article 34.1 of USMCA itself, as Claimants have previously explained, Article 34.1.1 "recognize[s] the importance of a smooth transition from NAFTA to this Agreement." Claimants' interpretation of Annex 14-C helps to fulfill that objective, as it avoids an abrupt termination of the protections that NAFTA provided. [248]

153. Respondent notes that the panel in *United States - Crystalline Silicon Photovoltaic Cells Safeguard Measure* stated that Article 34.1.1 does not imply a continuity of obligations.[249] However, context is critical. In the *Crystalline Silicon* case, the complaining party (Canada) could not point to a specific provision in USMCA that carried over the obligations at issue in that dispute. Indeed, the *Crystalline Silicon* panel recognized that, "upon the entry into force of the USMCA, the NAFTA came to an end, 'but without prejudice to those provisions set forth in USMCA that refer to the provisions of NAFTA.' It would have been possible for the Parties to have inserted a provision in the USMCA providing for the continuation of all obligations under the NAFTA as obligations under the USMCA. But they did not do so. . . . "[250] with respect to

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obligations in NAFTA Chapter 11, after the NAFTA's termination." Respondent's Memorial on Preliminary Objection at para. 59.

[247] Respondent's Reply on Preliminary Objection at paras. 76-77.

[248] Exhibit C-190, (USMCA CONFIDENTIAL), at attachment p. 3 (Bates No. RESP0018536). *See also* Exhibit R-109, USMCA CONFIDENTIAL); Exhibit C-187, (CONFIDENTIAL), at p. 2 (Bates No. RESP0029452); Exhibit C-185, (CONFIDENTIAL), at p. 1 (Bates No. RESP0028842).

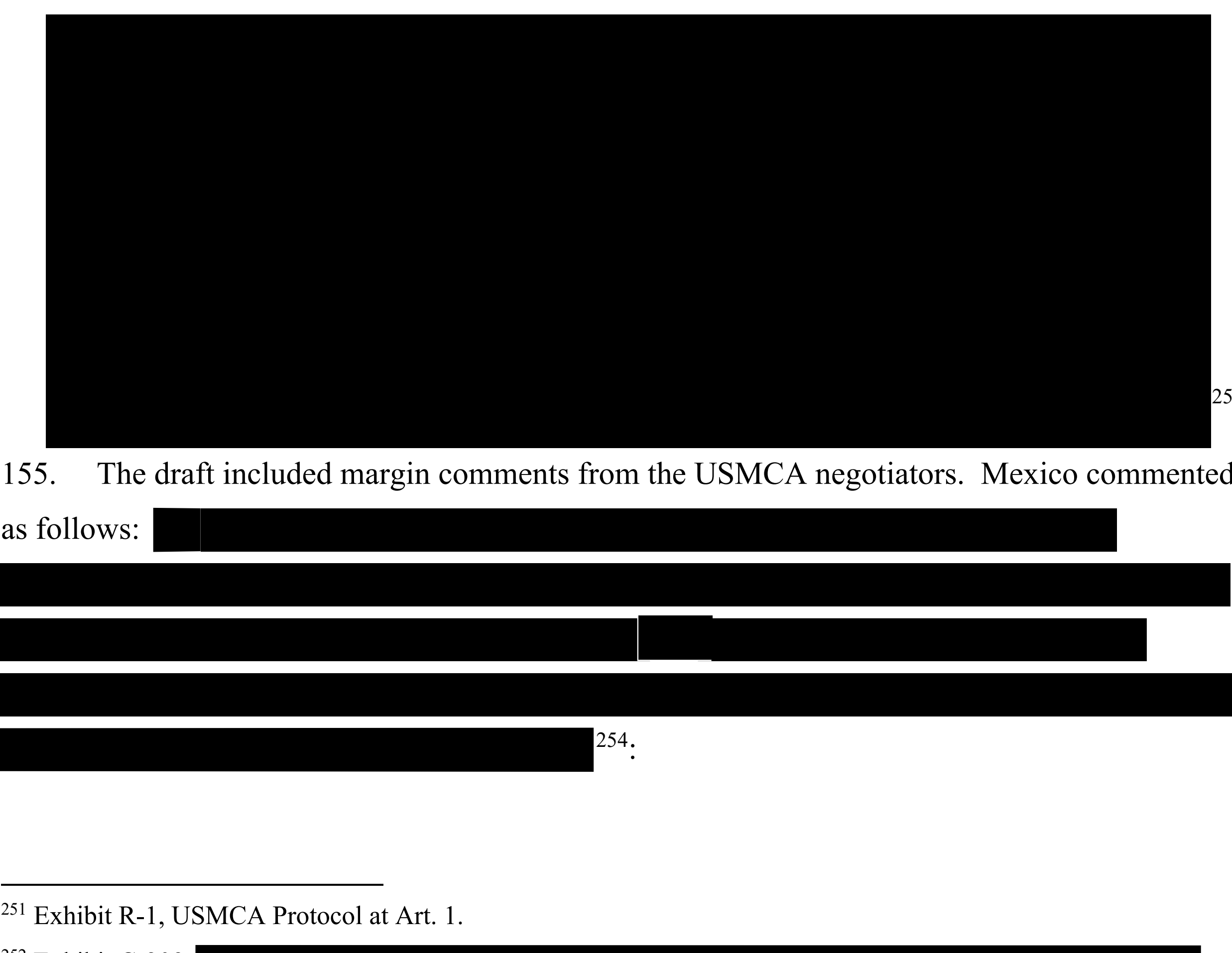
[249] Respondent's Reply on Preliminary Objection at para. 72. Mexico likewise cites to *Crystalline Silicon* in its Article 1128 submission. Mexico's 1128 Submission at para. 8.

[250] Exhibit RL-59, *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report (Feb. 1, 2022), at para. 41.

the particular provisions at issue in that case. By contrast Annex 14-C <u>does</u> carry over the Section A obligations.

2. The Negotiating History of the USMCA Protocol Confirms that Provisions Facilitating the Transition from NAFTA to USMCA Appear Throughout USMCA and Not Only in Article 34.1 of USMCA

154. The Produced Documents make clear that the reference in the Protocol to "those provisions set forth in the USMCA that refer to provisions of the NAFTA" [251] was intended to be inclusive, not restrictive. The Produced Documents include an early iteration of paragraph 1 of the Protocol, which stated as follows:



[252]

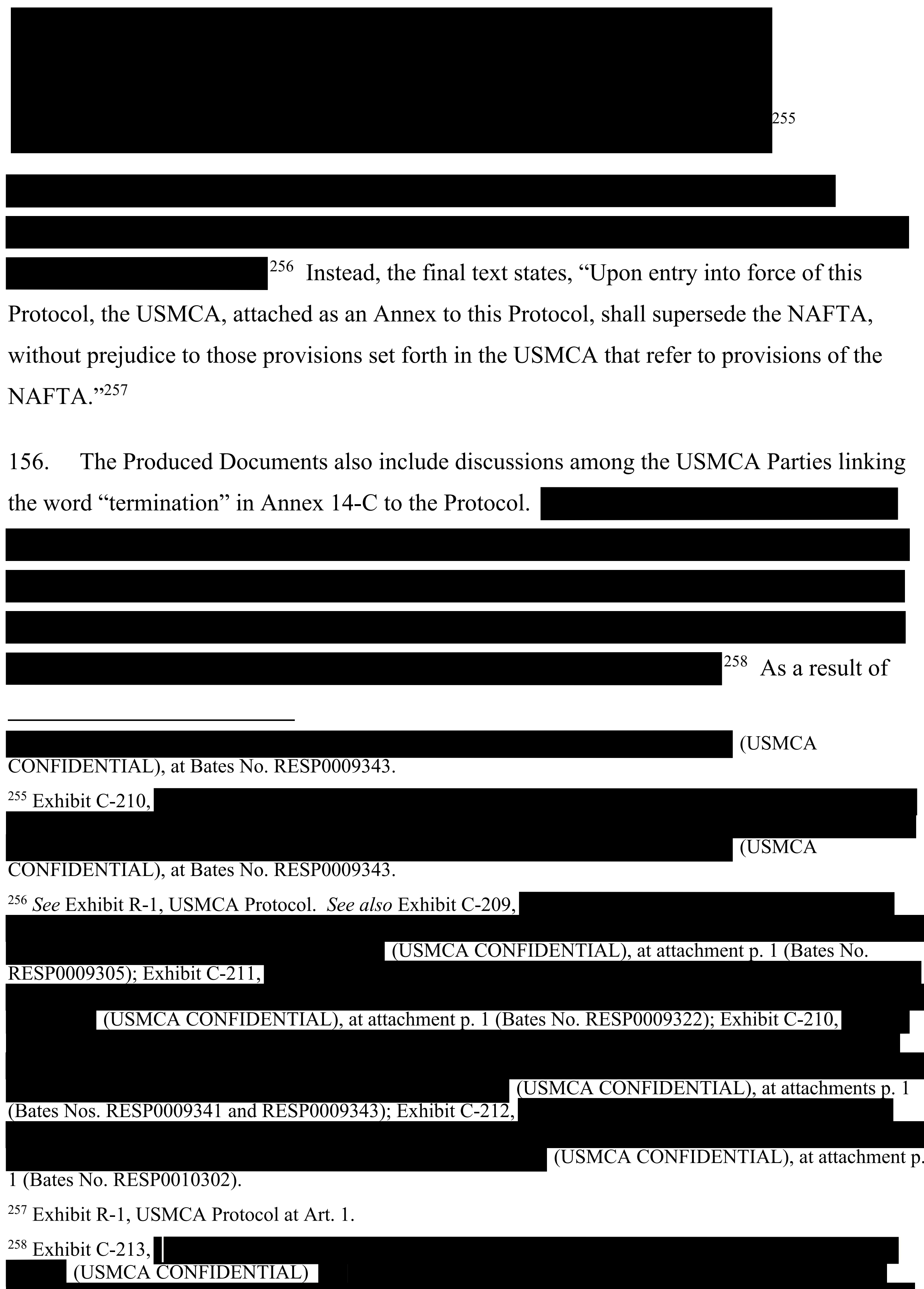
155. The draft included margin comments from the USMCA negotiators. Mexico commented as follows: [254]:

[251] Exhibit R-1, USMCA Protocol at Art. 1.

[252] Exhibit C-209, (USMCA CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0009305).

[253] Exhibit C-209, (USMCA CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0009305).

[254] Exhibit C-210,



[255]

[256] Instead, the final text states, "Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[257]

156. The Produced Documents also include discussions among the USMCA Parties linking the word "termination" in Annex 14-C to the Protocol. [258] As a result of

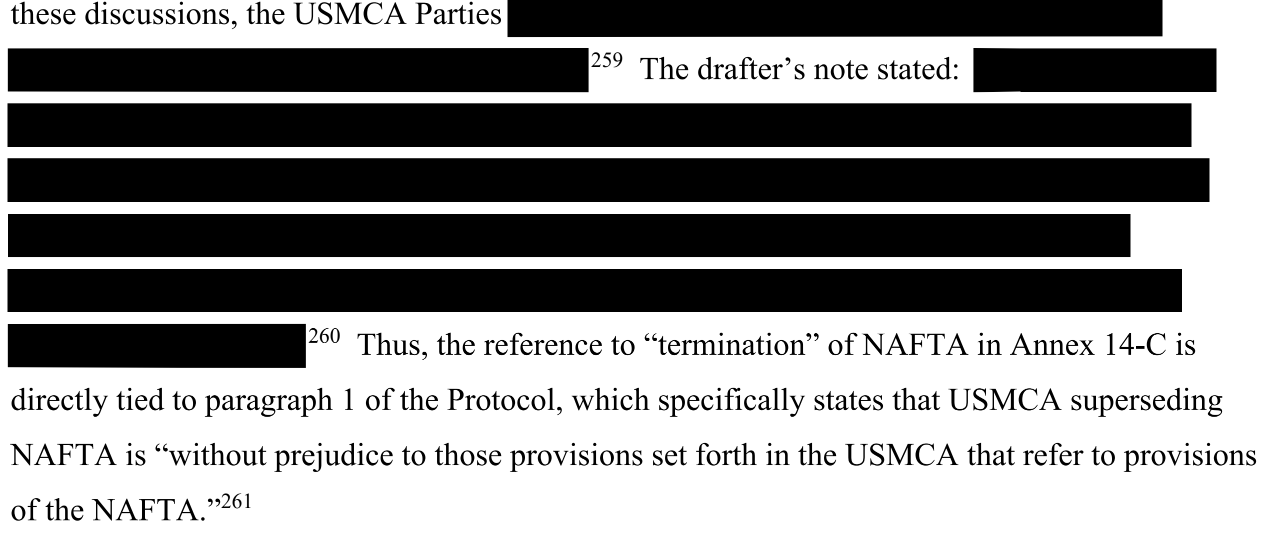
(USMCA CONFIDENTIAL), at Bates No. RESP0009343.

[255] Exhibit C-210, (USMCA CONFIDENTIAL), at Bates No. RESP0009343.

[256] *See* Exhibit R-1, USMCA Protocol. *See also* Exhibit C-209, (USMCA CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0009305); Exhibit C-211, (USMCA CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0009322); Exhibit C-210, (USMCA CONFIDENTIAL), at attachments p. 1 (Bates Nos. RESP0009341 and RESP0009343); Exhibit C-212, (USMCA CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0010302).

[257] Exhibit R-1, USMCA Protocol at Art. 1.

[258] Exhibit C-213, (USMCA CONFIDENTIAL)



these discussions, the USMCA Parties [259] The drafter's note stated: [260] Thus, the reference to "termination" of NAFTA in Annex 14-C is directly tied to paragraph 1 of the Protocol, which specifically states that USMCA superseding NAFTA is "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[261]

F. Respondent's Position Is Not Consistent with the Object and Purpose of USMCA

157. Claimants have shown in earlier submissions that Respondent's interpretation of Annex 14-C is not consistent with the object and purpose of USMCA.[262] Respondent does not say anything new in its Reply that it has not said before. Claimants have already fully refuted those points. We make only two additional points.

158. First, one of the objectives of USMCA, as stated in its Preamble, is to "ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment; . . . ."[263] Allowing holders of legacy investments to assert claims arising out of measures taken during the transition period would advance this objective. Again, as noted above,

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[259] Exhibit R-153, (USMCA CONFIDENTIAL).

[260] Exhibit R-53, (USMCA CONFIDENTIAL), at Bates No. RESP0001561.

[261] Exhibit R-1, USMCA Protocol at Art. 1.

[262] *See* Claimants' Counter-Memorial on Preliminary Objection at Section VI; Claimants' Observations on Bifurcation at Section III.B.3; Claimants' Rejoinder on Bifurcation at Section III.A.

[263] Exhibit C-2, USMCA, at p. 2 PDF.

[264]

159. Second, Claimants' interpretation of Annex 14-C would promote the objective of enhancing transparency, predictability, and "good governance and the rule of law."[265] By contrast, Respondent's Preliminary Objection runs directly contrary to public statements of the USMCA Parties at the time the agreement was concluded and, we now know based on the Produced Documents, directly contrary to Respondent's own understanding of Annex 14-C while it was being negotiated and in the years after USMCA was concluded. To sustain the Preliminary Objection would be to sustain an objection that Respondent has put forward in bad faith and that runs contrary to good governance and the rule of law.

G. Article 14.2(3) of USMCA Does Not Support Respondent's Preliminary Objection

160. Article 14.2(3) of USMCA provides that, except for Annex 14-C, the investment chapter does not apply to any act or fact that took place or ceased to exist before entry into force of USMCA. As explained below, contrary to Respondent's position, nothing in the text of this provision supports the conclusion that Annex 14-C applies only to such pre-existing acts or facts. Instead, properly interpreted, Article 14.2(3) simply confirms that Annex 14-C applies to such pre-existing acts and facts in addition to acts and facts after entry into force of USMCA.

161. Respondent asserts that, through Article 14.2(3) of USMCA, "the USMCA Parties expressly agreed to override the presumption against retroactivity with respect to Annex 14-C" and that "[t]his supports the ordinary meaning of Annex 14-C: that it applies to breaches of

[264] Exhibit C-190, (USMCA CONFIDENTIAL), at attachment p. 3 (Bates No. RESP0018536). *See also* Exhibit R-109, (USMCA CONFIDENTIAL); Exhibit C-187, (CONFIDENTIAL), at p. 2 (Bates No. RESP0029452); Exhibit C-185, (CONFIDENTIAL), at p. 1 (Bates No. RESP0028842).

[265] Another objective of USMCA, stated in the Preamble to the agreement, is to "PROMOTE transparency, good governance and the rule of law . . . ." Exhibit C-2, USMCA at Preamble (p. 3 of PDF).

obligations that were in force before the NAFTA terminated."[266] Respondent misinterprets the import of this provision.

162. According to Respondent's expert Professor Ascensio, Article 14.2(3) "echoes"[267] Article 28 of the VCLT, which is titled "Non-retroactivity of treaties." Indeed, the two provisions closely correspond with each other:

Article 28 of the Vienna Convention on the Law of Treaties	**Article 14.2(3) of USMCA**
Article 28 *Non-retroactivity of treaties* 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.[268]	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.[269]

[270]

163. As will be recalled, Respondent's central assertion is that the "obligations" referenced in paragraph 1 of Annex 14-C are not derived from the applicable law specified in USMCA but are instead a reference to pre-existing NAFTA obligations that were in force before NAFTA terminated. It is not clear that there is anything retroactive about a successor treaty allowing arbitration to resolve disputes over obligations that existed under an earlier treaty.[271]

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[266] Respondent's Reply on Preliminary Objection at para. 68.

[267] Second Ascensio Report at para. 12.

[268] Exhibit RL-16, VCLT at Art. 28 (emphasis added).

[269] Exhibit C-2, USMCA at p. 1246 PDF (emphasis added).

[270] Exhibit C-214, (USMCA CONFIDENTIAL), at attachment p. 2 (Bates No. RESP0026673).

[271] Exhibit CL-32, VCLT Commentary at p. 212. *See also* Exhibit CL-230, *Nordzucker AG v. Republic of Poland*, UNCITRAL, Partial Award (Jurisdiction), Dec. 10, 2008, at para. 109 ("[t]he immediate application of a

164. In any case, as reflected in Article 28 of the VCLT, there is a presumption under international law that a treaty applies only prospectively to acts that take place after the treaty enters into force. Respondent agrees that there is "a presumption against the retroactive application of a treaty term."[272] The disputing parties also agree that the presumption of prospective application is just that, a presumption, and the parties to a treaty can agree to apply the treaty retroactively. The VCLT Commentary confirms this point, stating that "[t]here 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."[273]

165. Respondent asserts that, through Article 14.2(3), the USMCA Parties "expressly agreed" to overcome the presumption against retroactivity.[274] Whatever Article 14.2(3) might be, it is not an express agreement that paragraph 1 of Annex 14-C applies only retroactively. Indeed, Article 14.2(3) makes no reference whatsoever to paragraph 1 of Annex 14-C or to any other specific provision of Annex 14-C. Article 14.2(3) states only that, "[f]or greater certainty, this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does not" apply to acts or facts that pre-dated the entry into force of USMCA. This statement

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jurisdictional Treaty clause, also to pre-existing breaches, does not constitute a retro-active application of that clause, but is a correct application of article 28 of the Vienna Convention . . . ."); Exhibit CL-231, Sadie Blanchard, "State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration," 10 *Wash. U. Global Stud. L.* 419 (2011), at p. 429 ("If the dispute arose before the treaty and involved obligations that existed before the treaty entered into force, allowing a tribunal to hear the dispute is not a prima facie violation of the rule against retroactivity."). In *Jan de Nul*, the tribunal was faced with a situation in which an investor submitted a claim to arbitration under a successor BIT but also asserted claims in the same proceeding alleging a breach of an earlier BIT. Exhibit CL-100, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, at para. 57(v). The tribunal found that it could hear the claims related to the earlier BIT without running afoul of the principle of retroactivity. *See id.* at paras. 103-04, 131, 137. As Professor Murphy has explained, "At the merits stage, the Tribunal viewed itself as being empowered to use the dispute resolution procedure of the successor BIT for interpreting violations arising under the protections of both BITs, although 'in practical terms the application of the different texts will make no meaningful difference as the protections of the two treaties are essentially identical'. Thus, the rule of non-retroactivity served to prevent retroactive application of the successor BIT's protections to acts occurring prior to its entry into force, but did not serve to prevent dispute resolution established under the successor BIT from reviewing those acts as against the predecessor BIT's protections." Exhibit CL-141, Sean D. Murphy, "Temporal Issues Relating to BIT Dispute Resolution," 37 *ICSID Review* 51 (2022), at p. 71.

[272] Respondent's Reply on Preliminary Objection at para. 69.

[273] Exhibit CL-32, VCLT Commentary at p. 211.

[274] Respondent's Reply on Preliminary Objection at para. 68.

does not encompass all provisions of Annex 14-C (even Respondent admits that certain provisions of Annex 14-C apply prospectively[275]), but which provisions it applies to is a matter of interpretation. Without further context, Article 14.2(3) could be understood to apply to paragraph 5 of Annex 14-C (which refers to pre-existing arbitration proceedings) or to the fact that the annex applies to "legacy investments," which is defined with reference to earlier facts (*i.e.*, the existence of an investment undertaken when NAFTA was in force and in existence when USMCA entered into force). Article 14.2(3) also does not specify the extent to which, or the circumstances under which, any provision in Annex 14-C might apply retroactively. Article 14.2(3) does nothing more than recognize that some unspecified provisions in Annex 14-C may apply in some undefined way to acts or facts that pre-dated the entry into force of USMCA. None of those issues are addressed explicitly in the text, and all must be resolved through application of the rules of treaty interpretation.

166. Respondent then asserts that, even if Article 14.2(3) is not an "express" agreement that paragraph 1 of Annex 14-C applies retroactively, there is no need for an agreement to be "express."[276] Claimants never said otherwise, but Respondent asserts that they did based on its own misquote of Claimants' Counter-Memorial.[277] Respondent quoted the following statement from Claimants' Counter-Memorial but excluded the first clause of the sentence, thereby altering the meaning the sentence: "the default presumption is 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."[278] Thus, Claimants explicitly stated that, absent an express agreement to the contrary, there is a presumption against retroactive application of a treaty. The implication of that presumption is that paragraph 1 of Annex 14-C must be presumed to allow claims arising out of measures taken after the entry into

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[275] Respondent's Reply on Preliminary Objection at para. 70 ("Regardless, the United States does not deny that Annex 14-C has certain prospective effects.").

[276] Respondent's Reply on Preliminary Objection at para. 67.

[277] *Compare* Claimants' Counter-Memorial on Preliminary Objection at para. 25 ("<u>the default presumption is that,</u> 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.") *with* Respondent's Reply on Preliminary Objection at para. 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.'").

[278] Claimants' Counter-Memorial on Preliminary Objection at para. 27.

force of USMCA. This is the starting point of the analysis. Claimants agree that this presumption can be overcome based on the totality of the facts, but there are no facts in the present case showing that paragraph 1 of Annex 14-C applies *only* retroactively.[279]

167. The above points are largely academic, given that Claimants agree that, based on the totality of the circumstances, paragraph 1 of Annex 14-C allows claims arising out of measures taken before USMCA entered into force. Claimants stated as much in their Counter-Memorial.[280] However, that conclusion proves nothing with respect to Respondent's Preliminary Objection, as this interpretation is perfectly consistent with Annex 14-C also allowing claims arising out of measures that post-date the entry into force of USMCA. Furthermore, as explained in the next subsection, the legal mechanism by which paragraph 1 of Annex 14-C applies to measures that pre-dated the entry into force of USMCA is inconsistent with Respondent's Preliminary Objection.

H. Respondent Fails to Distinguish Precedent Showing that When a Treaty Allows Claims Only with Respect to Acts that Predated the Entry into Force of the Treaty, the Treaty Made the Limitation Express

168. In previous submissions, the parties have presented the Tribunal with ample argumentation about how the language used in other treaties may bear on the interpretation of Annex 14-C. In its Reply, Respondent basically rehashes all of its earlier arguments without adding any new arguments or evidence. Therefore, except for the few points highlighted below, Claimants rely on the arguments they have already presented on these matters, which address the general points that Respondent makes in its Reply.[281]

169. First, in their earlier submissions, Claimants demonstrated that (a) when parties to a successor treaty provide for dispute settlement with respect to claims under an earlier treaty but (b) seek to allow such claims only with respect to measures taken while the earlier treaty was in

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[279] It is Respondent that is misstating the law, not Claimants, when, elsewhere in its submission and to suit its needs, it states that there must be an express agreement to apply a treaty to acts when the treaty was not in force. *See* Respondent's Reply on Preliminary Objection at paras. 102-04.

[280] Claimants' Counter-Memorial on Preliminary Objection at para. 27.

[281] *See* Claimants' Counter-Memorial on Preliminary Objection at Section IV.C; Claimants' Observations on Bifurcation at para. 24; Claimants' Rejoinder on Bifurcation at Section III.D.

force, they do so expressly.[282] Claimants provided numerous examples, including CETA and the EU-Mexico Agreement in Principle ("EU-Mexico Agreement").[283] Respondent argued that the language in CETA and the EU-Mexico Agreement that limited claims in this way was necessary in order to ensure that the sunset clauses in the earlier treaties were terminated.[284] Claimants fully refuted Respondent's argument by showing that <u>other</u> provisions in the relevant treaties (specifically, Article 30.8(1) of CETA and Article 22.1(1) of the EU-Mexico Agreement) were specifically designed for that purpose.[285] The limitation on the ability to assert claims only in relation to measures taken while the earlier treaty was in force had nothing to do with the termination of the sunset clauses of the earlier treaties.

170. Respondent has no real response to this point, other than to argue that Claimants' position is somehow "pure supposition."[286] However, there is no "supposition" involved. Article 30.8(1) of CETA states expressly that "[t]he [earlier BITs between Canada and EU Member States] shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the [earlier BITs between Canada and EU Member States] shall take effect from the date of entry into force of this Agreement."[287] The language "cease to have effect" pertains to the entirety of the earlier BITs, including the sunset clauses.[288] The EU-Mexico Agreement also expressly stated in Article 22.1 that, "[f]or greater certainty, the provisions for termination under Article XX (Termination) of this Chapter shall on the date of entry into force supersede the

[282] Claimants' Counter-Memorial on Preliminary Objection at paras. 50-51; Claimants' Observations on Bifurcation at para. 24; Claimants' Rejoinder on Bifurcation at para. 49.

[283] Claimants' Counter-Memorial on Preliminary Objection at para. 50.

[284] *See* Respondent's Reply on Preliminary Objection at para. 100; Respondent's Memorial on Preliminary Objection at para. 79.

[285] Claimants' Counter-Memorial on Preliminary Objection at paras. 58-62.

[286] Respondent's Reply on Preliminary Objection at para. 100.

[287] Exhibit CL-37, Comprehensive Economic and Trade Agreement between Canada and the European Union, signed Oct. 30, 2016, provisionally entered into force Sept. 21, 2017, at Art. 30.8(1).

[288] *Cf.* the language used in Article 2(2) (Termination of Bilateral Investment Treaties) in the EU Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, which states ". . . Sunset Clauses of Bilateral Investment Treaties . . . are terminated in accordance with paragraph 1 of this Article and shall not produce legal effects." Exhibit CL-232, Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 2020 J.O. (L 169), at p. 4.

corresponding provisions on termination of the Agreements [which included the BITs' sunset clauses] listed in Annex YY."[289]

171. Second, Respondent notes that several of the successor treaties that Claimants referenced expressly stated that the earlier treaty would continue to apply in some fashion.[290] Respondent asserts that no such language exists with respect to Annex 14-C.[291] This ignores the fact that, for example, Footnote 20 of Annex 14-C expressly states that Chapter 11 (Section A) of NAFTA shall "apply" to claims asserted during the transition period. As Claimants have explained at length, paragraph 1 of Annex 14-C (including through its reference to Section B of Chapter 11 of NAFTA) also specifies NAFTA as the applicable law for claims asserted during the transition period.

172. Third, Respondent references a number of other treaties that Claimants have discussed in their earlier submissions.[292] Respondent says nothing new about these treaties. Therefore, it is sufficient for Claimants to incorporate their earlier arguments with respect to these treaties.[293]

I. The Definition of Legacy Investment Reflects the Fact that Paragraph 1 of Annex 14-C Allows Claims Arising Out of Measures Taken During the Transition Period

173. As Claimants have shown in their earlier submissions, the definition of "legacy investment" in Annex 14-C reflects an intention to allow claims under paragraph 1 of Annex 14-C arising out of measures taken during the transition period. To qualify as a legacy investment,

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[289] Exhibit CL-68, European Commission, "EU-Mexico agreement: The Agreement in Principle," Investment Chapter, Apr. 21, 2018, *available at* https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en, at Art. 22.1, n.18. The Produced Documents show that CETA was discussed during the negotiation of the USMCA investment chapter and formed the basis of Canada's original proposal. Respondent's expert, Mr. Gardiner, notes in his treatise that "courts and tribunals often make comparisons between wording of a treaty in issue and that in other treaties without indicating any basis in the Vienna rules for this. If, however, the comparable treaty provisions were part of a line of treaties in some sense linked such as by subject matter, and even more so if reference was made to them in the preparatory work, they may be treated as part of the history and warrant consideration as part of the circumstances of conclusion" of the treaty. Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 400.

[290] Respondent's Reply on Preliminary Objection at para. 102.

[291] Respondent's Reply on Preliminary Objection at paras. 102-04.

[292] Respondent's Reply on Preliminary Objection at paras. 102-04.

[293] *See* Claimants' Counter-Memorial on Preliminary Objection at Section IV.C; Claimants' Observations on Bifurcation at para. 24; Claimants' Rejoinder on Bifurcation at Section III.D.

an investment must have been made while NAFTA was in force and must exist at the time USMCA entered into force. We will not reiterate the arguments that the Tribunal has already heard several times but incorporate Claimants' previous arguments here.[294] We make only two brief points.

174. First, as Claimants have shown, when other agreements have included similar language requiring investments to exist at the time a successor agreement entered into force, the purpose of the language was to ensure continuing protection for those investments under the successor treaty.[295] In its Reply, Respondent does not deny this point. All it says is that the definition of "legacy investment" does not expressly state that "NAFTA's obligations were extended after its termination."[296] At no point has Respondent explained why an investment would need to exist at the time USMCA entered into force except to ensure continuing protection of that investment during the three-year transition period.

175. Second, when an investment treaty requires that an investment exist at the time it enters into force, the presumption is that the investment treaty protects those investments prospectively.[297] Paragraph 1 of Annex 14-C specifically applies "with respect to a legacy investment," which is defined as investments that were established while NAFTA was in force and also existed on the date when USMCA entered into force.[298] As Professor Sean Murphy explained in his article "Temporal Issues Relating to BIT Dispute Resolution":

> BITs often provide that their protections extend not just to new investments, which were made after entry into force of the BIT, but also to investments already existing in the host country as of that date. Such a provision might be construed as meaning that the BIT operates retroactively to protect against governmental measures that were taken against such investments prior to entry into force of the

[294] *See* Claimants' Counter-Memorial on Preliminary Objection at Section V.C; Claimants' Observations on Bifurcation at paras. 33-34; Claimants' Rejoinder on Bifurcation at paras. 60-61.

[295] Claimants' Counter-Memorial on Preliminary Objection at paras. 87-89.

[296] Respondent's Reply on Preliminary Objection at para. 52. Mexico similarly asserts that the definition of "legacy investment" does not extend consent under Annex 14-C. Mexico's 1128 Submission at para. 16.

[297] Claimants' Counter-Memorial on Preliminary Objection at paras. 87-89.

[298] Exhibit C-2, USMCA at Annex 14-C, para. 6(a).

> BIT, but investor-State tribunals generally have not reached such a conclusion. . . .
>
> Overall, the approach of these tribunals is that such a provision is simply indicating that a breach and a dispute arising after entry into force of the treaty may involve an investment that was made before entry into force and that still exists thereafter.[299]

Article 14.2(3) of course clarifies that Annex 14-C applies retroactively, and thus resolves the ambiguity that Professor Murphy highlights. However, again, this is perfectly consistent with the applicable law also applying to measures taken during the transition period. Article 14.2(3) does not override the prospective application of paragraph 1 of Annex 14-C.

IV. The USMCA Parties' Explanations of Annex 14-C Do Not Support Respondent's Objection

A. Respondent's Attempts to Discount the Statements of the Former Lead U.S. Negotiator of Annex 14-C Should Be Rejected

176. As Claimants have noted in their earlier submissions, USTR's former lead negotiator, Lauren Mandell, has publicly explained exactly how Annex 14-C was intended to work,[300] and

[301] Mr. Mandell has explained that Annex 14-C allows legacy investment claims arising out of measures taken during the transition period. We will not repeat those statements here but refer the Tribunal to our earlier submissions.[302]

177. Respondent admits that Mr. Mandell's statements "suggest that claims based on events occurring after the NAFTA's termination are viable" but asserts that they "are not material to the

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299 Exhibit CL-141, Sean D. Murphy, "Temporal Issues Relating to BIT Dispute Resolution," 37 *ICSID Review* 51 (2022), at pp. 73-74.

300 *See* Claimants' Counter-Memorial on Preliminary Objection at paras. 118-122, at Annex pp. A-5-A-8; Claimants' Observations on Bifurcation at pp. 36-37; Claimants' Rejoinder on Bifurcation at para. 23.

301 *See supra* at para. 22 (citing to Exhibit C-143, (CONFIDENTIAL)). *See also* Exhibit C-221, Email Exchange between Lauren Mandell and Khalil Gharbieh, "[EXTERNAL] RE: Your ICSID Review article," Mar. 2, 2021, at p. 1.

302 *See* Claimants' Counter-Memorial on Preliminary Objection at paras. 118-22, at Annex pp. A-5-A-8; Claimants' Observations on Bifurcation at Annex; Claimants' Rejoinder on Bifurcation at para. 23.

Tribunal's analysis."[303] It is worth recalling Mr. Mandell's role in the negotiations. Respondent does not contest that he was the lead negotiator for the United States during the negotiation of Annex 14-C, but even that admission does not capture the full extent of Mr. Mandell's role. The Produced Documents confirm that Mr. Mandell was the architect of Annex 14-C, the central individual in interagency discussions within the U.S. Government, the person responsible for presenting Annex 14-C to his Mexican and Canadian counterparts, and the person responsible for negotiating those provisions. He was the drafter/sender of documents accounting for over one-third of the documents listed in Respondent's privilege log.[304] He was the author or recipient (either a direct recipient or appearing on the "Cc:" line) of documents accounting for 71.1% of all documents listed in Respondent's privilege log.[305] There is no person inside or outside the U.S. Government who is better-positioned to opine on the intended meaning of Annex 14-C. [redacted][306] To assert that his understanding of the intended operation of Annex 14-C is "not material" is to deny reality. And, of course, everything that Mr. Mandell has stated publicly is consistent with the positions that he took while in the government and during the negotiation of Annex 14-C.

B. Minister Freeland's Statements Do Not Support Respondent's Preliminary Objection

178. In its Reply, Respondent points to various statements from Canada's Deputy Prime Minister Chrystia Freeland indicating that USMCA removed ISDS with respect to Canada.[307] According to Respondent, this somehow shows that paragraph 1 of Annex 14-C was not

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[303] Respondent's Reply on Preliminary Objection at para. 114.

[304] Of the 1605 documents listed in Respondent's revised privilege log, Mr. Mandell is listed as the sender of 587 documents (under the "From" column). *See* Exhibit C-153, Respondent's Privilege Log (revised), Jan. 3, 2024.

[305] Of the 1605 documents listed in Respondent's revised privilege log, Mr. Mandell is listed as the sender of 587 documents (under the "From" column) and the recipient of 554 documents (under the "To" and "Cc" columns). *See* Exhibit C-153, Respondent's Privilege Log (revised), Jan. 3, 2024.

[306] *See, e.g.*, Exhibit C-143, [redacted] (CONFIDENTIAL); Exhibit C-221, Email Exchange between Lauren Mandell and Khalil Gharbieh, "[EXTERNAL] RE: Your ICSID Review article," Mar. 2, 2021, at p. 1.

[307] Respondent's Reply on Preliminary Objection at paras. 116-17, 120-22.

intended to allow claims arising out of measures taken during the transition period. Respondent's interpretation of Minister Freeland's statements is highly misleading.

179. Respondent asserts that "Claimants do not . . . provide any support for this reading of Deputy Prime Minister Freeland's statements [*i.e.*, that the statements refer to the elimination of ISDS after the transition period in Annex 14-C], and their argument is inconsistent with the language of the statements themselves."[308] It is frankly absurd for Respondent to even make this assertion; however, here is the "support": (1) Minister Freeland nowhere refers to Annex 14-C, and Respondent has not shown any instance where she does; and (2) Minister Freeland could not have literally meant that ISDS was eliminated in all its forms, because, even under Respondent's (and Canada's own[309]) interpretation of Annex 14-C, Annex 14-C clearly allows some form of new ISDS claims.[310]

180. Minister Freeland's statements are points of emphasis, not legal interpretations of the agreement. If more proof were needed, then the Tribunal need look no further than the official statements of the Canadian Government itself. In these statements, the Canadian Government refers to the elimination of ISDS and then immediately clarifies that Annex 14-C is an exception. For example:

- "Under CUSMA, there will be no ISDS mechanism between Canada and the United States. . . . 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."[311]

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[308] Respondent's Reply on Preliminary Objection at para. 120.

[309] The Government of Canada's Statement of Implementation of CUSMA recognizes that "Paragraph 1 [of Annex 14-C] allows the submission of a new claim by an investor in accordance with Section B of Chapter 11 of NAFTA, with respect to legacy investments, meaning those established or acquired while NAFTA was in force and in existence on the date of entry into force of this Agreement, for an alleged breach of an obligation under Section A of Chapter 11, or Articles 1503(2) and 1502(3)(a) of NAFTA." Exhibit C-96, Government of Canada, "Canada-United States-Mexico Agreement – Canadian Statement on Implementation," *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/implementation-mise_en_oeuvre.aspx?lang=eng#61 (page last modified Sept. 3, 2020), at pp. 125-26 PDF.

[310] According to UNCTAD's website, 19 investor-state arbitration cases have been filed against the USMCA Parties under Chapter 14 of USMCA to date, including four cases against Canada. *See* Exhibit C-222, List of USMCA cases (UNCTAD), *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement (last accessed Feb. 8, 2024).

[311] Exhibit C-97, Global Affairs Canada, "The Canada-United States-Mexico Agreement: Economic Impact Assessment," Feb. 26, 2020, at pp. 31-32.

- "CUSMA is the first such treaty in which Canada has not included an ISDS mechanism. Under CUSMA, apart from the three-year transition period (i.e., until June 30, 2023), investment disputes can only be brought under the State-to-State dispute settlement mechanism."[312]

- "Under the Canada-United States[-]Mexico Agreement (CUSMA), the ISDS mechanism will not apply to Canada, nor will Canadian investors have access to ISDS. NAFTA's existing ISDS mechanism will continue to apply for three years after termination of the Agreement for investments made prior to the entry into force of CUSMA."[313]

- ". . . CUSMA does not provide for ISDS involving Canada. However, CUSMA does allow for ISDS 'legacy claims' to be brought under NAFTA Chapter 11 until June 30, 2023."[314]

- "CUSMA will not include a trilateral investor-state dispute settlement (ISDS) mechanism . . . . The parties have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA. Apart from this transition period for existing investments, U.S. investors will not be able to launch an ISDS claim against Canada. . . . Removes the trilateral ISDS mechanism that was in place under the original NAFTA, but the original NAFTA ISDS mechanism will remain available to investors with respect to their existing investments for a period of three years after entry-into-force of CUSMA."[315]

- "The Parties have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA."[316]

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[312] Exhibit C-215, Government of Canada, "Minister of Small Business, Export Promotion and International Trade appearance before the Standing Committee on International Trade (CIIT) on Main Estimates and Investor State Dispute Settlement (ISDS)," *available at* https://www.international.gc.ca/transparency-transparence/briefing-documents-information/parliamentary-committee-comite-parlementaire/2021-04-26-ciit.aspx?lang=eng (page last modified Jan. 5, 2022), at p. 25.

[313] Exhibit C-120, Government of Canada, "Minister of International Trade - Briefing book," Nov. 2019, *available at* https://www.international.gc.ca/gac-amc/publications/transparency-transparence/briefing-documents-information/transition-trade-commerce/2019-11.aspx?lang=eng (page last modified Aug. 22, 2022), at p. 42 PDF.

[314] Exhibit C-126, Government of Canada, "Minister of International Trade – Briefing book," Oct. 2021, *available at* https://www.international.gc.ca/transparency-transparence/briefing-documents-information/briefing-books-cahiers-breffage/2021-10-trade-commerce.aspx?lang=eng (page last modified Aug. 22, 2022), at p. 137 PDF.

[315] Exhibit C-121, Government of Canada, "Investment chapter summary," *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/investment-investissement.aspx?lang=eng (page last modified July 10, 2019), at p. 2-3 PDF.

[316] Exhibit C-105, Government of Canada, "Explore key changes from NAFTA to CUSMA for importers and exporters," *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/nafta-cusma_aceum-alena.aspx?lang=eng (page last modified Sept. 25, 2020), at p. 5.

- "CUSMA does not include a trilateral investor-state dispute settlement (ISDS) mechanism. . . . The 3 Parties have also agreed to a transitional period of 3 years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA."[317]

- "Under CUSMA (Canada-United States-Mexico Agreement), Canada will not be subject to an ISDS (Investor State Dispute Settlement) mechanism. . . . The Parties also agreed to a transitional period of three years, during which ISDS (Investor State Dispute Settlement) under the original NAFTA (North America Free Trade Agreement) will continue to apply only for investments made prior to the entry into force of the CUSMA (Canada-United States-Mexico Agreement). . . . Apart from this transition period for existing investments, U.S. (United States) investors will not be able to launch an ISDS claim against Canada; nor will Canadian investors be able to bring claims against the United States."[318]

181. The above statements reflect the standard Canadian Government explanation of the ISDS mechanisms in USMCA. The fact that Minister Freeland's political statements emphasize the first part of the points (discussing the general elimination of ISDS in the long term) does not in any way negate the second part of the points (reflecting the exception arising from Annex 14-C).

182. Finally, Claimants showed in their Counter-Memorial that the Canadian legislation implementing USMCA recognizes a "cause of action" arising out of Annex 14-C. As Claimants explained, "The only way that Annex 14-C can provide a basis for a substantive cause of action is if Annex 14-C constitutes an arbitration agreement that requires NAFTA as the applicable substantive law."[319] Respondent recognizes that "[t]he statute . . . acknowledge[s] that causes of action may arise out of Annex 14-C . . . ."[320] Respondent then goes on to say that the Canadian statute "does not address the nature or permissible scope of such causes of action, which is left to the text of the Annex."[321] However, Annex 14-C creates the cause of action either by direct extension of NAFTA obligations for the duration of the transition period or due to the

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[317] Exhibit C-127, Government of Canada, "GBA+ of the Canada-United States-Mexico Agreement," *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/gba-plus_acs-plus.aspx?lang=eng (page last modified Jan. 17, 2023), at p. 25 PDF.

[318] Exhibit C-106, Government of Canada, "Bill C-4, Canada-United States-Mexico Agreement Implementation Act," *available at* https://www.canada.ca/en/privy-council/corporate/transparency/briefing-documents/parliamentary-committees/standing-committee-internal-trade/bill-c-4-canada-united-states-mexico-agreement-implementation-act-february-18-2020.html (page last modified Sept. 25, 2020), p. 86 PDF.

[319] Claimants' Counter-Memorial on Preliminary Objection at para. 113.

[320] Respondent's Reply on Preliminary Objection at para. 113.

[321] Respondent's Reply on Preliminary Objection at para. 113.

designation of NAFTA as the applicable law. If Annex 14-C merely allowed for the arbitration of claims regarding breaches of pre-existing NAFTA obligations, then the cause of action would not (in Respondent's words) "arise out of Annex 14-C" but out of NAFTA itself.[322]

C. Ambassador Lighthizer's Statements Do Not Support Respondent's Preliminary Objection

183. Respondent's assertions with respect to Ambassador Lighthizer's statements are similarly misleading. Respondent has not presented a single statement from Ambassador Lighthizer about Annex 14-C.[323] Respondent draws the conclusion that, because he was "silent about any 'transition period'"[324] and "never mentioned that the implementation of [the USMCA's new ISDS] framework would, in effect, 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,"[325] then that must mean there was no transition period. Respondent is essentially saying that, because Ambassador Lighthizer did not talk about Annex 14-C in any way, Annex 14-C does not exist. The fact that Respondent would even make this argument shows its desperation.

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[322] Respondent's expert, Professor Ascensio, asserts that "[t]he reference to NAFTA in USMCA Annex 14-C simply refers back to the previous treaty for the cause of action, ..." Second Ascensio Report at para. 36. Thus, Professor Ascensio asserts that the cause of action does not arise out of Annex 14-C, but out of NAFTA obligations that pre-existed Annex 14-C. If that were the case, then Canada's acknowledgement of a cause of action "arising out of" Annex 14-C would make no sense. Separately, Professor Ascensio argues for a distinction between a cause of action and the applicable law. Second Ascensio Report at paras. 33-36. However, the authority he cites shows that a cause of action must be rooted in the applicable law. The authority that Professor Ascensio cites defines the cause of action (or *causa petendi*) as "the source of law for a claim and for an adjudicatory body's ultimate ruling." Exhibit HA-20, *"President Allende" Foundation, Victor Pey Casado, Coral Pey Grebe v. The Republic of Chile*, PCA Case No. 2017-30, Award, Nov. 28, 2019, at para. 206. The "source of law" is, by definition, part of the applicable law. The tribunal in that case then explained that "a tribunal may occasionally apply a different law than the Treaty in order to decide some issues in dispute," such as whether an individual is a national of a State. *Id*. However, that does not mean that the cause of action need not derive from the applicable law. Again, whether there is a cause of action is a question that must be resolved in accordance with the applicable law. The question at issue in *Pey Casado* was whether the claimant could assert a claim under national law rather than the treaty. The tribunal found that the claimant could not assert claims under national law because the dispute settlement clause specifically limited claims with respect to disputes "within the meaning of the present treaty," *i.e.*, claims asserting a breach of the BIT. *Id*., at para. 200. It did not say that the applicable law was irrelevant to determining rights and obligations under the BIT.

[323] *See* Respondent's Reply on Preliminary Objection at paras. 117, 124.

[324] Respondent's Reply on Preliminary Objection at para. 117.

[325] Respondent's Reply on Preliminary Objection at para. 124.

D. Mexico's Position in *Legacy Vulcan* Was Devised for Litigation Purposes

184. In their Counter-Memorial, Claimants showed that Mexico's position in the *Legacy Vulcan* arbitration is a litigation position that does not reflect Mexico's understanding of the legacy investment annex at the time the annex was negotiated.[326] Claimants also stated that "[o]ne can reasonably surmise that Mexico did not even consider an objection on the basis of Annex 14-C until the United States raised the issue with them to coordinate a new position."[327] Respondent resisted document production on this point,[328] yet it does not deny in its Reply that such coordination took place.[329]

185. There is no evidence that statements made in the course of litigation reflect any shared understanding of the USMCA Parties. Furthermore, as one commentator noted:

> practice that comes to light in judicial or arbitral proceedings must be treated with caution. Such evidence or statements may have been advanced with a specific, short-term goal in mind, namely, to put forward any arguments deemed effective in defending the State's position in the proceedings, such as jurisdictional objections, rather than as a reflection of the State's long-term position on a legal issue.[330]

186. There is nothing more to be said with respect to Respondent's reference to *Legacy Vulcan*, except to note the irony of Respondent's reliance on a position asserted by Mexico in a pending arbitration while disowning evidence of the U.S. Government's own understanding of Annex 14-C at the time the legacy investment annex was negotiated and in the years immediately after the negotiation concluded.

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[326] *See* Claimants' Counter-Memorial on Preliminary Objection at para. 117.

[327] Claimants' Counter-Memorial on Preliminary Objection at para. 117.

[328] *See* U.S. Responses & Objections to Claimants' Document Requests, Oct. 11, 2023, at pp. 63-64.

[329] *See* Respondent's Reply on Preliminary Objection at para. 123.

[330] Exhibit CL-233, "Subsequent Practice as a Means of Treaty Interpretation," in Irina Buga, *Modification of Treaties by Subsequent Practice* (2018), at p. 30. According to UNCTAD's website, 19 investor-state arbitration cases have been filed against the USMCA Parties under Chapter 14 of USMCA to date. *See* Exhibit C-222, List of USMCA cases (UNCTAD), *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement (last accessed Feb. 8, 2024).

V. Respondent Bears the Burden of Proof with Respect to Its Preliminary Objection

187. Respondent offers nothing new in its Reply with respect to the burden of proof.[331] It suffices to say that, whatever burden of proof Claimants might bear, the mountain of evidence that is now on the record is sufficient to carry that burden. Claimants have made a *prima facie* showing that Annex 14-C allows claims arising out of measures taken during the transition period. The burden now rests with Respondent to show otherwise. Respondent has failed to carry that burden.

VI. Equity Requires the Tribunal to Reject Respondent's Preliminary Objection

188. As Claimants explained in their Counter-Memorial, Respondent is precluded from asserting its Preliminary Objection because: (i) Respondent has violated the principle of consistency, which requires a party to advance positions in a dispute resolution proceeding that are consistent with its own prior representations and conduct; and (ii) Respondent is acting with unclean hands, which prohibits a party from benefiting from its own wrong.[332]

189. Unable to rebut Claimants' arguments, Respondent instead tries to set up a straw man, asserting that Claimants are making arguments they are not in fact making. Respondent then seeks to rebut those unasserted arguments. Respondent's tactics are unavailing. In Section VI.A below, Claimants show again that Respondent is violating the principle of consistency. In Section VI.B, Claimants show again that Respondent is acting with unclean hands.

A. The Principle of Consistency Forecloses Respondent's Preliminary Objection

190. As shown in Claimants' Counter-Memorial, the principle of consistency prohibits States from taking litigation positions that contradict their earlier positions.[333] Consequently, Respondent is precluded from deploying its Preliminary Objection in this arbitration.

191. From the time USMCA was negotiated until Respondent raised its Preliminary Objection in the present case, Respondent repeatedly represented that investors may bring legacy investment claims under Annex 14-C so long as they: (a) held legacy investments; (b) alleged a

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[331] *See* Respondent's Reply on Preliminary Objection at Section II.F.

[332] Claimants' Counter-Memorial on Preliminary Objection at Section VIII.

[333] *See* Claimants' Counter-Memorial on Preliminary Objection at Section VIII.A.

breach of the Section A obligations; (c) submitted their claims in accordance with Section B of NAFTA Chapter 11; and (d) submitted their claims during the transition period.[334] At no point prior to November 30, 2022, did Respondent assert the existence of the fifth condition it now seeks to impose: that a claim must arise out of a measure that was taken while NAFTA was in force. Respondent is precluded by the principle of consistency from asserting its new, contradictory position for purposes of this arbitration.

192. In their earlier submissions, Claimants pointed to numerous examples where Respondent made it clear that Annex 14-C would extend NAFTA rules and procedures for three years.[335] The Produced Documents contain many more examples of such statements,[336] thus further confirming exactly what the public statements were intended to convey.

[334] *See* Claimants' Counter-Memorial on Preliminary Objection at para. 129.

[335] In their Counter-Memorial, Claimants referred to talking points written by a USTR official and reviewed by the U.S. Department of State ("State Department") in preparation for OECD investment committee meetings that explain that "investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those 'legacy investments' for three years after the termination of the NAFTA." Claimants' Counter-Memorial on Preliminary Objection at para. 109 (citing Exhibit C-118, Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," Oct. 19, 2018, at attachment p. 1 "Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings" (p. 2 of PDF)) (emphasis added). The background document prepared for the OECD investment committee meetings repeats the same statement regarding the continued applicability of "NAFTA rules and procedures with respect to . . . 'legacy investments.'" *See* Exhibit C-118, Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," Oct. 19, 2018, at attachment "USMCA Investor-State Dispute Settlement Provisions: Background and Talking Points" (p. 4 of PDF). A November 6, 2019, report from the OECD titled "Freedom of Investment Roundtable 29: Summary of Discussion" reflects these points, stating that "[t]he US noted that for three years following the termination of NAFTA, covered investors with existing investments could continue to bring ISDS claims under NAFTA (known as 'legacy claims')." *See* Exhibit CL-165, OECD, Directorate for Financial and Enterprise Affairs Investment Committee, "Freedom of Investment Roundtable 29: Summary of Discussion," Doc. No. DAF/INV/WD(2019)16/FINAL, Nov. 6, 2019, at para. 22.

[336] *See, e.g.*, Exhibit R-150, (CONFIDENTIAL) ( ) (emphasis added); Exhibit R-140, (USMCA CONFIDENTIAL), at p. 1 ((emphasis added)); Exhibit C-206, (USMCA CONFIDENTIAL), at attachment p. 1 (Bates No. RESP0019435) ( ); and Exhibit C-143, (CONFIDENTIAL)

193. Respondent does not deny that it made these statements but asserts that "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."[337] If Respondent is suggesting that the "rules" that the public officials referenced are not "NAFTA's substantive investment obligations," then Respondent's own statements and internal documents directly contradict that position. As far back as the Statement of Administrative Action for the U.S. NAFTA implementing legislation, the United States referred to the substantive obligations in NAFTA Chapter 11 as "rules."[338] But it is not necessary to go back that far. [339]

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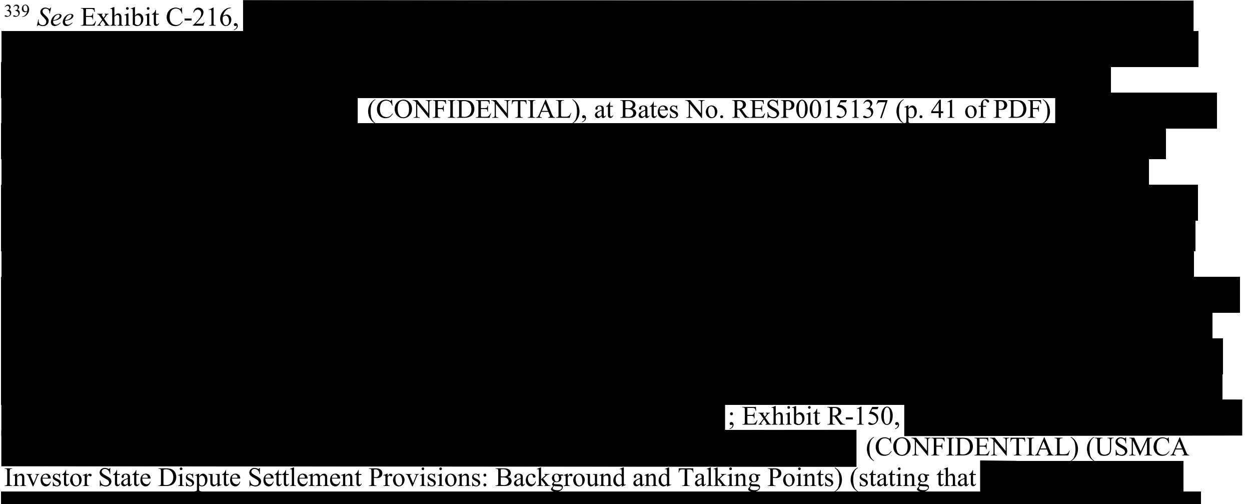
[337] Respondent's Reply on Preliminary Objection at para. 136.

[338] Exhibit C-115, North American Free Trade Agreement Implementation Act, Statement of Administrative Action, Nov. 4, 1993, at p. 140 (referring to "basic non-discrimination rules of 'national treatment' and 'most-favored-nation treatment'"); p. 141 (referring to "rules prohibiting performance requirements"); p. 142 (referring to "Chapter Eleven rules"); and p. 143 (referring to "Chapter Eleven's rules regarding non-discrimination, performance requirements and senior management").



[339] *See* Exhibit C-216, (CONFIDENTIAL), at Bates No. RESP0015137 (p. 41 of PDF) ; Exhibit R-150, (CONFIDENTIAL) (USMCA Investor State Dispute Settlement Provisions: Background and Talking Points) (stating that

194. Unable to reconcile its contradictory positions with the principle of consistency, Respondent instead argues in its Reply that: (i) Claimants have not established the "content" or "binding character" of such a principle;[340] and (ii) Claimants are actually arguing that Respondent breached a different principle, *i.e.*, estoppel, which requires application of a different two-pronged test.[341] Neither of these assertions has any merit.

195. First, as Claimants have already shown, the principle of consistency is a well-established principle of good faith that provides, as explained in Dr. Bin Cheng's seminal treatise, "a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another."[342] International arbitral tribunals have consistently affirmed the content and binding character of this principle by applying it to find that a State Party may not take positions in litigation on jurisdictional issues that contradict their earlier statements or conduct.[343] For example:

- In *Chevron v. Ecuador II*, Ecuador argued that the tribunal lacked jurisdiction over the dispute because the claimant did not have a direct investment in Ecuador.[344] However, Ecuador's judiciary had taken the opposite position in domestic court proceedings where

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(emphasis added). *See also* Exhibit C-217, (CONFIDENTIAL) Exhibit C-218, (CONFIDENTIAL), at Bates No. RESP0011287 (p. 6 of PDF) (emphasis added); Exhibit R-119, (USMCA CONFIDENTIAL), at p. 1 (Bates No. RESP0018668) ((emphasis added).

[340] Respondent's Reply on Preliminary Objection at para. 131.

[341] Respondent's Reply on Preliminary Objection at paras. 132-34.

[342] Claimants' Counter-Memorial on Preliminary Objection at para. 127 (citing Exhibit CL-50, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2d ed., 2006) (excerpts), at p. 141).

[343] *See* Claimants' Counter-Memorial on Preliminary Objection at paras. 127-28 and footnotes 198-201. *See also* Exhibit CL-138, *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 1962 I.C.J. 6 (June 15), at Separate Opinion of Vice-President Alfaro, p. 40 (p. 37 of PDF).

[344] *See* Exhibit CL-171, *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, Aug. 30, 2018 ("*Chevron v. Ecuador II*, Second Partial Award on Track II"), at para. 7.59.

it found that the claimant had been an investor in Ecuador.[345] Applying the principle of consistency—as an expression of good faith—the tribunal held that Ecuador's contradictory position in the arbitration foreclosed its jurisdictional objection.[346]

- In *Stabil v. Russia*, the claimants alleged that the measures taken by the respondent with respect to investments in Crimea amounted to a breach of the Russia-Ukraine BIT.[347] Russia contested the tribunal's jurisdiction on the ground that the claimants' claims arose from an investment in the territory of Crimea and Sevastopol, which was part of Ukraine but now "forms an integral part of" Russia and "cannot be regulated by the [Treaty]."[348] The tribunal rejected that argument, concluding that "Russia cannot at the same time claim that Crimea forms part of its territory and deny the application of a Treaty that it has concluded to protect investments made on its territory, without incurring an inconsistency contrary to good faith and the principle of consistency."[349] As the tribunal explained:

> Good faith also encompasses the principle of consistency and the Latin maxim of *allegans contraria non audiendus est* (colloquially translated as "one cannot blow hot and cold"), which has often been applied by international courts and tribunals. . . . [T]ribunals have found that the principle of consistency stems from "the more generally conceived requirement of good faith" and have disallowed inconsistent behavior by States vis-à-vis foreign investors, accentuating the principle that "[a] State that has taken a particular position may be under an obligation to act consistently with it on another occasion."[350]

[345] *See* Exhibit CL-171, *Chevron v. Ecuador II*, Second Partial Award on Track II at paras. 7.108-11.

[346] *See* Exhibit CL-171, *Chevron v. Ecuador II*, Second Partial Award on Track II at paras. 7.106, 7.112 ("Applying Article 26 of the VCLT and customary international law, the Tribunal decides that the Parties are bound to act in good faith in the exercise of their rights and the performance of their respective obligations under the Arbitration Agreement derived from Article VI of the Treaty. That duty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can 'have it both ways' or 'blow hot and cold', to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment. . . . Applying the principle of good faith under international law to the exercise of rights and the performance of obligations under the Arbitration Agreement, the Tribunal decides that it is impermissible for the Respondent to 'blow hot and cold' or to 'have it both ways', to Chevron's detriment and to the Respondent's benefit. . . . The Tribunal concludes that the Respondent is required in this arbitration, as a matter of good faith, to treat Chevron as 'standing in the shoes' of TexPet (with Texaco), consistently with the statements made and acted upon by the Respondent's judicial branch in the Lago Agrio Litigation.") (emphasis added).

[347] Exhibit CL-174, *Stabil LLC and others v. Russian Federation*, PCA Case No. 2015-35, Award on Jurisdiction, June 26, 2017 ("*Stabil v. Russia*, Award on Jurisdiction"), at paras. 3-4.

[348] *See* Exhibit CL-174, *Stabil v. Russia*, Award on Jurisdiction at para. 5.

[349] Exhibit CL-174, *Stabil v. Russia*, Award on Jurisdiction at para. 170.

[350] Exhibit CL-174, *Stabil v. Russia*, Award on Jurisdiction at paras. 166-67 (emphasis added) (footnotes omitted).

- In *Mobil v. Argentina*, a claimant was assigned concession and permit rights that it claimed constituted protected investments under the U.S.-Argentina BIT.[351] Argentina objected to the tribunal's jurisdiction, claiming that it had not approved the assignment until after the claimants had submitted claims to arbitration.[352] The tribunal rejected Argentina's objection because it contradicted Argentina's own prior conduct, which indicated that Argentina had treated the claimant as the owner of the rights well before the claimants submitted claims to arbitration.[353] The tribunal concluded that "the principle of good faith and the doctrine of *venire contra factum proprium* [('one may not set one's self in contradiction to one's own previous conduct')[354]] prevent Argentina from denying the validity of the Claimants' acquisition or ownership of the above interests and others constituting its investment."[355]

196. Second, contrary to Respondent's assertion in its Reply, Claimants did not raise an estoppel argument and Claimants were therefore not required to prove the two prongs of the estoppel test (inconsistency and reliance).[356] Respondent's claim that "when the sources Claimants rely upon are reviewed closely, it is plain that they in fact are discussing the principle of estoppel" is without merit.[357] The sources in question—Judge Alfaro's opinion and Dr. Bin Cheng's treatise—explain that the principle of consistency is different and separate from the principle of estoppel:

- Judge Alfaro explained in his separate concurring opinion in *Temple of Preah Vihear*:

> This principle [on which the court's decision is based] … is that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation. . . .

[351] *See* Exhibit CL-179, *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, Apr. 10, 2013 ("*Mobil v. Argentina*, Decision on Jurisdiction and Liability"), at paras. 186-88.

[352] *See* Exhibit CL-179, *Mobil v. Argentina*, Decision on Jurisdiction and Liability at paras. 183-85.

[353] Exhibit CL-179, *Mobil v. Argentina*, Decision on Jurisdiction and Liability at paras. 217-30.

[354] Exhibit CL-234, "Venire contra factum proprium," in *Guide to Latin in International Law* (1 ed., Oxford University Press 2009), *available at* https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-2077#:~:text=%E2%80%9CTo%20come%20against%20one's%20own,to%20one's%20own%20previous%20conduct..

[355] *See* Exhibit CL-179, *Mobil v. Argentina*, Decision on Jurisdiction and Liability at para. 228 (emphasis added).

[356] Respondent's Reply on Preliminary Objection at paras. 132-34.

[357] Respondent's Reply on Preliminary Objection at para. 132.

> The principle, not infrequently called a doctrine, has been referred to by the terms of "estoppel", "preclusion", "forclusion", "acquiescence". I abstain from adopting any of these particular designations, as I do not believe that any of them fits exactly to the principle or doctrine as applied in international cases.
>
> . . . [W]hen compared with definitions and comments contained in Anglo-American legal texts we cannot fail to recognize that while the principle, as above enunciated, underlies the Anglo-Saxon doctrine of estoppel, there is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features of the municipal system. It thus results that in some international cases the decision may have nothing in common with the Anglo-saxon estoppel . . . .
>
> Of course, I feel bound to mention these designations since they have been so generally used in international texts, but I set them aside in stating my views with regard to the principle which is the subject of this separate opinion.
>
> 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 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 *(venire contra factum proprium non valet)*.[358]

[358] Exhibit CL-138, *Temple of Preah Vihear*, Judgment at Separate Opinion of Vice-President Alfaro at pp. 39-40 (pp. 36-37 of PDF) (emphasis added).

- Dr. Cheng explained in his seminal treatise *General Principles of Law as Applied by International Courts and Tribunals*:

> The principle [of consistency] applies equally, though perhaps not with the same force, to other admissions of a State which do not give rise to an equitable estoppel. Thus it has been held that a State cannot be heard to repudiate liability for a collision after its authorities on the spot had at the time admitted liability and sought throughout to make the most advantageous arrangements for the Government under the circumstances. Again, if a State, having been fully informed of the circumstances, has accepted a person's claim to the ownership of certain property and entered into negotiation with him for its purchase, it becomes "very difficult, if not impossible" for that State subsequently to allege that he had no title at the time.[359]

Indeed, the *Chevron* tribunal, which applied the principle of consistency,[360] made the same observation: "Dr Bin Cheng recognised that, although estoppel is consistent with the general principle of good faith, it is a different doctrine under international law."[361]

197. Other scholars agree that the principle of consistency is a standalone principle separate from estoppel:

- Sir Ian Brownlie explained that estoppel is derived from, but not the same as, the principle of consistency:

> A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency.[362]

- Dr. Iain C. MacGibbon provided a similar explanation:

> What appears to be the common denominator of the various aspects of estoppel which have been discussed, is the requirement that a State ought to maintain towards a given factual or legal situation an

[359] Exhibit CL-50, Cheng, *General Principles of Law as Applied by International Courts and Tribunals* at p. 144 (emphasis added).

[360] *See supra* para. 195. *See also* Claimants' Counter-Memorial on Preliminary Objection at n.200.

[361] Exhibit CL-171, *Chevron v. Ecuador II*, Second Partial Award on Track II at para. 7.107.

[362] Exhibit CL-235, James Crawford, *Brownlie's Principles of Public International Law* (8th ed. 2012) (excerpts), at p. 420 (emphasis added).

> attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflects the possible variations, in circumstances and effects, of **the underlying principle of consistency which may be summed up in the maxim *allegans contraria non audiendus est***. . . .[363]

- Lord Arnold McNair explained:

> In the *Fur Seal Arbitration* it was demonstrated that some advantage is to be gained by one State, party to a dispute, by convicting the other State of inconsistency with an attitude previously adopted. . . . This is not estoppel *eo nomine,* but it shows that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est.*[364]

198. As the principles of consistency and estoppel are distinct, and Claimants have shown that Respondent breached the principle of consistency, Respondent's contention that Claimants failed to satisfy the elements under the estoppel doctrine is simply irrelevant. Claimants have shown in their Counter-Memorial and again in this Rejoinder that Respondent's current position regarding Annex 14-C fundamentally contradicts its prior public position (as well as its prior private position[365]) regarding Annex 14-C and thus is contrary to the principle of consistency.[366] The Tribunal should therefore reject Respondent's Preliminary Objection based on the principle of consistency.

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[363] Exhibit CL-171, *Chevron v. Ecuador II*, Second Partial Award on Track II at para. 7.91 (citing I. MacGibbon, "Estoppel in International Law" (1958), 7 International and Comparative Law Quarterly 468, p. 45) (emphasis added).

[364]Exhibit CL-178, Arnold D. McNair, "The Legality of the Occupation of the Ruhr," 5 *British Yearbook of International Law* 17 (1924), at p. 35 (footnote omitted).

[365] *See supra* at Sections II.B, II.C.3, II.C.8, and II.C.10.

[366] *See* Claimants' Counter-Memorial on Preliminary Objection at Section VII.B and Annex; Claimants' Observations on Bifurcation at Annex; Claimants' Rejoinder on Bifurcation at paras. 23-24; *see supra* at Section IV.A.

B. The Unclean Hands Doctrine Forecloses Respondent's Preliminary Objection

199. As Claimants explained in their Counter-Memorial, Respondent raises its Preliminary Objection with unclean hands, and is prohibited from taking advantage of its own wrong.[367] Specifically, Respondent induced Claimants to withdraw their original 2016 NAFTA Claims in exchange for the promise of a Presidential permit for the KXL Pipeline. Claimants upheld their part of the bargain by withdrawing the claims in question. Respondent then reneged on its promise and revoked the permit (on the same basis that gave rise to the 2016 NAFTA Claims).[368] Respondent now attempts to argue (disingenuously) that Claimants are precluded from asserting claims under NAFTA.

200. Rather than address Claimants' arguments head-on, Respondent: (i) attempts to recast Claimants' arguments; (ii) mischaracterizes the wrongful act identified by Claimants; and (iii) accuses Claimants of asking the Tribunal to judge the merits of this arbitration during the jurisdictional phase. Respondent's tactics are unavailing.

201. First, Respondent asserts that Claimants have failed to show how Respondent's hands are unclean based on the reasoning in the PCIJ's Judgment in *Chorzów Factory*.[369] In particular, Respondent argues that "[t]he 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."[370] Once again, Respondent resorts to recasting Claimants' arguments and then asserting that these arguments (which Claimants did not make) are unsupported.

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[367] Claimants' Counter-Memorial on Preliminary Objection at Section VIII.B.

[368] *See* Claimants' Counter-Memorial on Preliminary Objection at paras. 134-42 (providing a brief synopsis of the events leading to this arbitration, and in particular, the facts underlying Claimants' argument regarding Respondent's unclean hands).

[369] Respondent's Reply on Preliminary Objection at paras. 139-140.

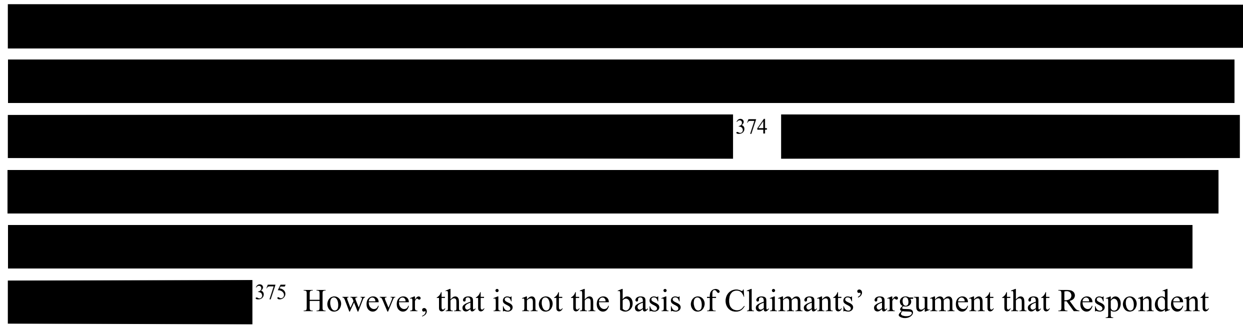
[370] Respondent's Reply on Preliminary Objection at para. 140.

202. As Respondent itself acknowledges, the PCIJ has summarized the unclean hands doctrine as follows:

> [O]ne 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.[371]

In line with this reasoning, Claimants explained in their Counter-Memorial that Respondent is precluded by the unclean hands doctrine from asserting in this arbitration that Claimants have "no recourse to [a] tribunal which would have been open to [them]" (*i.e.*, a NAFTA tribunal) after Respondent induced Claimants to release their 2016 NAFTA Claims with the promise of a Presidential permit, and then unlawfully reneged on that promise by revoking the permit at a time when they assert (disingenuously) that recourse to redress (*i.e.*, NAFTA) was no longer possible.[372]

203. Second, Respondent attempts to cast "the conclusion of the USMCA with Canada and Mexico" as the wrongful act at the heart of Claimants' unclean hands claim and then argues that "[t]he conclusion of a treaty by three sovereign nations is self-evidently not a wrongful act."[373]



[374] [375] However, that is not the basis of Claimants' argument that Respondent

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[371] Respondent's Reply on Preliminary Objection at para. 139, quoting Exhibit CL-180, *The Factory at Chorzów (Jurisdiction) (Germany v. Poland)*, Judgment, 1927 P.C.I.J. (ser. A) No. 8 (July 26), at p. 31 (p. 57 of PDF) (emphasis added).

[372] Claimants' Counter-Memorial on Preliminary Objection at paras. 134-43.

[373] Respondent's Reply on Preliminary Objection at para. 143.

[374] Exhibit C-191, (CONFIDENTIAL), at p. 2 (Bates No. RESP0030902).

[375] Exhibit C-188, (CONFIDENTIAL), at draft text pp. 11-4, 11-5, and 11-41 (Bates Nos. RESP0030717, and RESP0030718, and RESP0030754).

has unclean hands, and Claimants never argued that the conclusion of USMCA was the wrongful act in question. As explained above and in Claimants' Counter-Memorial, Respondent's wrongful act was inducing Claimants to withdraw their 2016 NAFTA Claims in exchange for a Presidential permit and then reneging on that bargain at a time when Respondent asserts Claimants no longer have recourse to NAFTA.[376]

204. Finally, Respondent argues that dismissing its Preliminary Objection on the basis of the unclean hands doctrine necessarily requires the Tribunal to prejudge the merits of this case.[377] That is incorrect. The facts underlying Claimants' unclean hands arguments overlap with the facts underlying Claimants' claims on the merits only to a limited extent. Claimants can assure the Tribunal and Respondent that it will take more than a few paragraphs to cover the facts underlying the merits of the dispute in their Memorial. Respondent's slippery slope argument—that no jurisdictional objections could ever be raised in ISDS if the Tribunal were to dismiss their objection on the basis of the United States' unclean hands—is similarly unavailing.[378] The set of facts at issue here is unique. Claimants are not aware of any other situation in which a State has induced a claimant to relinquish claims that the state's own president conceded were strong[379]—in fact, [redacted] [380]—only to renege on the deal on the very same basis giving rise to the original claims.

205. Good faith principles require this Tribunal to reject Respondent's Preliminary Objection and proceed to the merits phase of this arbitration.

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[376] *See supra* para. 199 and Claimants' Counter-Memorial on Preliminary Objection at paras. 133-43.

[377] Respondent's Reply on Preliminary Objection at para. 144.

[378] Respondent's Reply on Preliminary Objection at para. 144.

[379] Claimants' Counter-Memorial on Preliminary Objection at paras. 138, 142; Exhibit C-51, John T. Bennett, "Trump Boasts of Forcing Canadian Firm to Drop Keystone Lawsuit," *Roll Call*, Mar. 22, 2017, *available at* https://www.rollcall.com/2017/03/22/trump-boasts-of-forcing-canadian-firm-to-drop-keystone-lawsuit/; *see also* Exhibit C-52, Damian Paletta and Steven Mufson, "Trump Says He Told Aide to Threaten Keystone XL Pipeline Company over Arbitration Case," *Washington Post*, Mar. 22, 2017, *available at* https://www.washingtonpost.com/news/wonk/wp/2017/03/22/trump-says-he-told-aide-to-threaten-keystone-xl-pipeline-company-over-arbitration-case/.

[380] Exhibit C-191, [redacted] (CONFIDENTIAL), at p. 2 (Bates No. RESP0030902).

VII. Conclusion

206. For the reasons explained above, the Tribunal should reject Respondent's Preliminary Objection.

207. Furthermore, under Rule 28 of the ICSID Arbitration Rules, the Tribunal has the power to award arbitration costs and attorney fees to either party "with respect to any part of the proceeding."[381] The evidence now before the Tribunal establishes that Respondent has acted in bad faith in asserting its Preliminary Objection. Claimants therefore request that, in its forthcoming decision on jurisdiction, the Tribunal order Respondent to compensate Claimants for all costs and attorney fees associated with the bifurcated stage of this arbitration, beginning from the time Respondent raised its request for bifurcation through the resolution of Respondent's Preliminary Objection.

Respectfully submitted,

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David Roney
Riana Terney
Angela Ting
SIDLEY AUSTIN LLP
Counsel for Claimants

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[381] Rule 28(1) (Cost of the Proceeding) of the ICSID Arbitration Rules (2006) provides as follows: "(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide: (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre; (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties." *See* ICSID Arbitration Rules (2006) at Rule 28(1), *available at* https://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partF-chap03.htm#r28.