INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

TC Energy Corporation and TransCanada Pipelines Limited

v.

United States of America

(ICSID Case No. ARB/21/63)

AWARD

Members of the Tribunal
Mr. Alexis Mourre, President of the Tribunal
Mr. Henri C. Alvarez, Arbitrator
Prof. John R. Crook, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Assistant to the Tribunal
Ms. Valentine Chessa

Date of dispatch to the parties: July 12, 2024

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II. PROCEDURAL BACKGROUND

1. On 22 November 2021, the Claimants submitted a Request for Arbitration against the United States of America.

2. On 22 December 2021, the Acting Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration

Proceedings.

3. On 8 January 2022, ICSID informed the parties that in the absence of a different agreement between the parties, the arbitral tribunal in this case would be constituted in accordance with NAFTA Article 1123, *i.e.*, the tribunal would comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. By the same communication, ICSID recalled that, on 17 December 2021, the Claimants informed the Centre of the appointment of Mr. Henri Alvarez, a national of Canada, as an arbitrator in this case, and that it would proceed to seek Mr. Alvarez' acceptance in accordance with ICSID Arbitration Rule 5(2).

4. On 12 January 2022, Mr. Alvarez accepted his appointment.

5. On 17 February 2022, the Respondent appointed Prof. John R. Crook, a national of the United States of America, as arbitrator. Prof. Crook accepted his appointment on 25 February 2022.

6. On 21 March 2022, the Claimants requested that the Secretary-General appoint the third, presiding arbitrator, pursuant to NAFTA Article 1124, as the parties had failed to agree on a presiding arbitrator and more than 90 days had passed since the Claimants submitted their claims to arbitration. The Respondent submitted a response on 22 March 2024.

7. On 1 April 2022, ICSID proposed to conduct a ballot procedure to assist the parties in selecting a mutually agreeable presiding arbitrator. Should the parties not agree on conducting a ballot, or should the procedure not result in the appointment of a mutually acceptable candidate, the Secretary-General would appoint the President of the Tribunal from the ICSID Panel of Arbitrators, following consultations with the parties, as envisaged in NAFTA Article 1124. The parties were requested to indicate by 7 April 2022, whether they wished for ICSID to conduct a ballot.

8. On 1 April 2022, the Claimants informed ICSID of their agreement with the ballot procedure. The Respondent agreed on 7 April 2022.

9. On 23 June 2022, ICSID submitted to the parties a ballot form with five potential candidates to serve as presiding arbitrators and requested the parties to complete the ballot form by 5 July 2022.

10. On 26 June 2022, the Respondent requested an extension to submit its completed ballot. The Claimants submitted their comments on 27 June 2022.

11. On 29 June 2022, after taking into consideration the parties' positions, the Centre granted the extension and invited the parties to submit their completed ballots by 15 July 2022.

12. On 15 July 2022, each party submitted its completed ballot form. On the same date, the Centre informed the parties that that the ballot process did not result in the selection of a

mutually agreeable candidate. Accordingly, the Secretary-General would proceed to appoint the presiding arbitrator from the ICSID Panel of Arbitrators, in consultation with the parties, as envisaged in NAFTA Article 1124.

13. On 12 August 2022, the Centre informed the parties that the Secretary-General was considering appointing Mr. Alexis Mourre, a national of France, as the presiding arbitrator. The parties were invited to submit any comments by 22 August 2022.

14. On 22 August 2022, the Respondent requested that the Secretary-General consider the appointment of another individual for presiding arbitrator.

15. On 22 August 2022, the Claimants informed that they had no objection to the appointment of Mr. Mourre as president.

16. On 8 September 2022, the Centre informed the parties that the Secretary-General, after taking in consideration the parties' comments and in the exercise of her discretion under NAFTA Article 1124, would proceed with the appointment of Mr. Mourre. The parties were reminded that, until the process for the appointment of Mr. Mourre was completed, they could agree on the name of the third, presiding, arbitrator.

17. On 21 September 2022, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. The Arbitral Tribunal was thus constituted by Mr Alexis Mourre (president), Mr Henri Alvarez and Prof. John Crook, in accordance with Annex 14-C of USMCA, the ICSID Convention and the ICSID Arbitration Rules. Mr. Gonzalo Flores, Deputy Secretary-General of ICSID, was designated to serve as Secretary of the Tribunal.

18. On 14 October 2022, the parties consented to the appointment of Ms. Valentine Chessa, an Italian and French national, as Assistant to the Tribunal.

19. Additional disclosures were made by Mr. Mourre on 7 November 2023, 5 January and 28 March 2024, and by Mr. Alvarez on 9 November 2023.

20. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the parties by videoconference on 1 December 2022.

The following persons attended:

Members of the Tribunal
Alexis Mourre, President of the Tribunal
Henri C. Alvarez, Arbitrator
John R. Crook, Arbitrator

ICSID Secretariat
Gonzalo Flores, Secretary of the Tribunal
Carlos Molina Esteban, ICSID Legal Analyst

Assistant to the Tribunal
Valentine Chessa

For the Claimants

Victoria Marselle, TC Energy
Matthew Maher, TC Energy
James P. White, JPW Energy Law PLLC
James E. Mendenhall, Sidley Austin LLP
Jennifer Haworth McCandless, Sidley Austin LLP
Eric M. Solovy, Sidley Austin LLP
Alex L. Young, Sidley Austin LLP

For the Respondent

Lisa J. Grosh, U.S. Department of State
John D. Daley, U.S. Department of State
Nicole C. Thornton, U.S. Department of State
Nathaniel E. Jedrey, U.S. Department of State
Melinda E. Kuritzky, U.S. Department of State
Mary T. Muino, U.S. Department of State
Alvaro J. Peralta, U.S. Department of State
David J. Stute, U.S. Department of State
Isaac D. Webb, U.S. Department of State

21. Following the first session, on 16 December 2022, the Tribunal issued Procedural Order No. 1, with Annexes A-C, recording the agreement of the parties on procedural matters. Procedural Order No. 1 provided, *inter alia*, that the applicable arbitration rules would be ICSID Rules in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also set out the agreed Procedural Calendar for the proceedings and restated the transparency regime set out in NAFTA, subject to a Confidentiality Agreement to be agreed by the parties.

22. On 11 January 2023, the Respondent submitted its Request for Bifurcation, along with Factual Exhibit R-1 and Legal Authorities RL-1 through RL-31.

23. On 8 February 2023, the Tribunal issued the Confidentiality Order in accordance with § 29.1 of Procedural Order No. 1. The Parties signed the Confidentiality Order on that same date.

24. On 10 February 2023, the Claimants filed their Observations on the Request for Bifurcation, along with Factual Exhibits C-2 (resubmitted) and C-84 through C-102 and Legal Authorities CL-13 through CL-50.

25. On 2 March 2023, the Respondent submitted its Reply to the Request for Bifurcation, along

with Factual Exhibits R-2 through R-4 and Legal Authorities RL-32 through RL-46.

26. On 22 March 2023, the Claimants filed their Rejoinder regarding the Respondent's Request for Bifurcation along with Factual Exhibits C-103 through C-109 and Legal Authorities CL-37 (resubmitted) and CL-51 through CL-82.

27. On 13 April 2023, the Tribunal issued Procedural Order No. 2 on Bifurcation, pursuant to which the proceedings were bifurcated in two phases (jurisdiction and merits).

28. On 12 June 2023, the Respondent filed its memorial on jurisdiction (the "**Memorial on Preliminary Objection**"), accompanied by the expert Reports of Prof. Richard Gardiner, (including Exhibits RG-1 through RG-8) and Prof. Hervé Ascensio (including Exhibits HA-1 through HA-15), Factual Exhibits R-5 through R-14 and Legal Authorities RL-47 through RL-64.

29. On 11 August 2023, the Claimants filed their counter-memorial (the "**Counter-Memorial on Preliminary Objection**"), accompanied by the legal opinion of Prof. Christoph Schreuer, Factual Exhibits C-94 (resubmitted) and C-110 through C-131, and Legal Authorities CL-50 (resubmitted) and CL-83 through CL-188.

30. On 11 September 2023, the United Mexican States ("**Mexico**") filed a written submission as a non-disputing State Party pursuant to NAFTA Article 1128.

31. On 11 September 2023, following exchanges between the parties, the Claimants filed a request for the Tribunal to decide on the production of documents.

32. On 11 October 2023, the Respondent filed responses and objections to the Claimants' request for production of documents and, on 26 October 2023, the Claimants submitted their replies.

33. On 6 November 2023, the Tribunal issued Procedural Order No. 3 on document production.

34. On 27 November 2023, Mexico submitted a communication, requesting that the Tribunal reconsider aspects of Procedural Order No. 3 to preserve the confidentiality of certain documents connected to the negotiation history of USMCA. On 1 December 2023, the Claimants and the Respondent commented thereon, and on 4 December 2023, the Tribunal decided not to reconsider its Procedural Order No. 3.

35. On 1 December 2023, the Claimants also submitted objections to Respondent's document production accompanied by Factual Exhibits C-141 and C-142 and Legal Authorities CL-198 through CL-200. The Respondent submitted comments to the Claimants' objections on 6 December 2023, along with Legal Authorities RL-65 through RL-78. The Claimants replied on 8 December 2023, accompanying Legal Authorities CL-201 through CL-207.

36. On 11 December 2023, the Tribunal issued Procedural Order No. 4 concerning production

of documents and matters of privilege, along with a draft Privilege Master's Terms of Reference and a draft non-disclosure statement.

37. On 14 December 2023, the Respondent submitted comments to the Tribunal's draft Privilege Master's Terms of Reference pursuant to § 23(d) of Procedural Order No. 4, suggesting adding, *inter alia*, that the Master should have "*experience in the US law of privilege*". The Claimants responded to these comments on 15 December 2023.

38. Also on 14 December 2023, the parties informed the Tribunal that they had been unable to agree on the selection of a Privilege Master pursuant to §§ 18 and 23(c) of Procedural Order No. 4. On the same date, the Tribunal informed the parties that it was considering appointing Ms. Yasmine Lahlou, a French national, as Privilege Master and invited comments from the parties by 20 December 2023. The Respondent objected to the appointment of Ms. Lahlou on 19 December 2023.

39. On 19 December 2023, the Tribunal proposed the appointment of Ms. Jennifer Kirby, a US national, as Privilege Master. On 20 December 2023, the parties informed the Tribunal that they had no comments on the appointment of Ms. Kirby. Accordingly, Ms. Kirby was appointed as Privilege Master.

40. On 21 December 2023 the Respondent provided Ms. Kirby and the Claimants with an updated privilege log and on the following day added Bates numbers to the disputed documents, providing Ms. Kirby with access to them.

41. On 24 December 2023, the Respondent sought an extension of the time-limit to reorganize the documentation, on which the Claimants commented on 27 December. On even date, the Tribunal (i) granted the Respondent until 3 January 2024 to provide re-numbered documents, (ii) invited the Master to issue her report by 12 January 2024, (iii) invited the Respondent to produce any document that the Master would identify as not protected by attorney-client privilege by 13 January 2024, and (iv) invited the Claimants to submit their Rejoinder on Preliminary Objection by 2 February 2024.

42. On the same date, the Respondent submitted its reply (the "**Reply on Preliminary Objection**") with the second expert reports of Prof. Gardiner (with Exhibits RG-9 through RG-36) and Prof. Ascensio (with Exhibits HA-16 through HA-21), Factual Exhibits R-15 through R-163, and Legal Authorities RL-79 through RL-119.

43. On 3 January 2024, following a request from the Claimants, the Tribunal granted the parties until 19 February 2024 to inform the Tribunal of which experts they wished to cross-examine. On the same date, it also dispatched an updated version of the Privilege Master's Terms of Reference.

44. On even date, the Respondent provided the Master with the reorganized documents.

45. On 4 January 2024, the Claimants proposed further adjustments to the draft Terms of

Reference, which were incorporated into the draft. The updated Terms of Reference were then signed by the parties and the Privilege Master on 5 January 2024, and by the members of the Tribunal on 18 January 2024.

46. On 9 January 2024, the time-limit for the submission of Privilege Master's report was extended to 19 January 2024.

47. On 11 January 2024, following a request by the Claimants, the Tribunal granted the Claimants a one-week extension to submit its rejoinder on the Preliminary Objection by 9 February 2024.

48. On 18 January 2024, the Privilege Master issued her report together with Annex A (containing the Privilege Master's determinations) and the signed Privilege Master's Terms of Reference.

49. On even date, the Tribunal invited the Respondent to produce non-privileged documents by 20 January 2024. On the same date, the Respondent informed the Tribunal that it had produced 839 documents and requested the reconsideration of the Privilege Master's decision in respect of 11 documents (log entries 1341A, 1347A, 1348A, 1356A, 1366A, 1372A, 1378A, 1405A, 1410B, 1419A, and 1614). On 22 January 2024, the Claimants objected to the protection of the document at log entry 1614 and requested the production of the final version of the document at log entry 1615.

50. On 23 January 2024, the Tribunal informed the parties that it would request the Privilege Master to reconsider her report regarding these 11 documents and invited observations from the Respondent regarding the Claimants' observations on document 1614.

51. The Respondent submitted these observations on the same date and the Claimants commented on them on 25 January 2024, submitting that one of the documents at log entry 1613 should have been produced. On 26 January 2024, the Respondent replied that it would produce the documents at log entries 1613 and 1615 and objected to the requested production of email chains containing a mix of privileged and non-privileged content.

52. On 30 January 2024, the Privilege Master issued an Addendum to her report and the Tribunal determined that (i) documents listed at log entries 1341A, 1347A, 1348A, 1356A, 1366A, 1372A, 1378A, 1405A, 1410B and 1419A were privileged and (ii) document listed at log entry 1614 was not privileged.

53. On 6 February 2024, the Claimants requested that a final version of the document listed at log entry 1614 be produced. The Respondent objected to that request on 7 February 2024 and the matter was referred by the Tribunal to the Privilege Master on 8 February. The Tribunal, based on the supplementary report issued by the Privilege Master, decided on 9 February 2024 that the final version of document 1614 was privileged.

54. On 9 February 2024, the Claimant submitted its rejoinder (the "**Rejoinder on Preliminary**

Objection") together with Attachments A and B, the second legal opinion of Prof. Christoph Schreuer, Factual Exhibits C-143 through C-222 and Legal Authorities CL-208 through CL-237.

55. On 19 February 2024, the parties informed the Tribunal of which experts they wished to cross-examine at the hearing.

56. On 20 February 2024, the Tribunal invited the parties to confer and reach agreements on the timeframe and manner of conducting the hearing. On 5 March 2024 the parties informed the Tribunal of the areas of agreement and disagreement regarding hearing organization. On the same date the Tribunal decided to hold a pre-hearing conference on 12 March 2024.

57. On 28 February 2024, the Respondent requested leave to file additional documents, which was objected by the Claimants on 29 February 2024 and partially granted by the Tribunal on 2 March 2024.

58. On 11 March 2024, Mexico submitted a request to intervene orally at the hearing.

59. The pre-hearing conference took place on 12 March 2024 by videoconference, and, on the following day, Tribunal issued its determinations on the points of disagreement and Mexico's participation in the hearing. The pre-hearing conference was attended by the following persons:

Members of the Tribunal
Alexis Mourre, President of the Tribunal
Henri C. Alvarez, K.C., Arbitrator
John R. Crook, Arbitrator

ICSID Secretariat
Gonzalo Flores, Secretary of the Tribunal
Carlos Molina Esteban, ICSID Legal Analyst

Assistant to the Tribunal
Valentine Chessa

For the Claimants
James E. Mendenhall, Sidley Austin LLP
Gavin Cunningham, Sidley Austin LLP
David Roney, Sidley Austin LLP
Riana M. Terney, Sidley Austin LLP
Angela Ting, Sidley Austin LLP
Mine Orer, Sidley Austin LLP

For the Respondent
Lisa J. Grosh, U.S. Department of State
John D. Daley, U.S. Department of State
David M. Bigge, U.S. Department of State
Julia H. Brower, U.S. Department of State

Nathaniel E. Jedrey, U.S. Department of State
Melinda E. Kuritzky, U.S. Department of State
Mary T. Muino, U.S. Department of State
Alvaro J. Peralta, U.S. Department of State
Mr. David J. Stute, U.S. Department of State

60. On 15 March 2024, the Claimants informed the Tribunal of the filing of a corrected version of Exhibit C-89 and requested leave to file four additional documents, which was objected to by the Respondent on 19 March 2024 and partially granted by the Tribunal on 20 March 2024.

61. On 19 March 2024, Mexico requested the Tribunal to allow its participation in the hearing by videoconference. The parties had no objections to Mexico's request and the Tribunal granted it on 25 March 2024.

62. On 22 March 2024, the ICSID Secretariat circulated a message containing logistical arrangements for the hearing.

63. On 27 March 2024, the Government of Canada advised the Tribunal that a representative of Canada's Trade Law Bureau would attend the hearing in person to observe proceedings, but that Canada did not intend to make an oral submission.

64. The hearing took place on 3-5 April 2024 in Washington, D.C., with the following participants:

Members of the Tribunal
Alexis Mourre, President of the Tribunal
Henri C. Alvarez, K.C., Arbitrator
John R. Crook, Arbitrator

ICSID Secretariat
Gonzalo Flores, Secretary of the Tribunal
Carlos Molina Esteban, ICSID Legal Analyst

Assistant to the Tribunal
Ms. Valentine Chessa

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Counsel:
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Gavin Cunningham, Sidley Austin LLP
David Roney, Sidley Austin LLP
Riana M. Terney, Sidley Austin LLP
Angela Ting, Sidley Austin LLP
Mine Orer, Sidley Austin LLP
Noah Goldberg, Sidley Austin LLP

Parties:
Patrick Keys, TC Energy
Victoria Marselle, TC Energy
Matthew Maher, TC Energy

For the Respondent
Counsel:
Steven F. Fabry, U.S. Department of State
Lisa J. Grosh, U.S. Department of State
John D. Daley, U.S. Department of State
David M. Bigge, U.S. Department of State
Julia H. Brower, U.S. Department of State
Nathaniel E. Jedrey, U.S. Department of State
Melinda E. Kuritzky, U.S. Department of State
Mary T. Muino, U.S. Department of State
Alvaro J. Peralta, U.S. Department of State
David J. Stute, U.S. Department of State
Samuel Childerson, U.S. Department of State
Anjail Al-Uqdah, U.S. Department of State
Eva J. Dantzler, U.S. Department of State
Teshia Ferguson, U.S. Department of State
Audrey Stone, U.S. Department of State
Catherine H. Gibson, Office of the U.S. Trade Representative
Anjani Nadadur, Office of the U.S. Trade Representative
Brandon Whitehill, Office of the U.S. Trade Representative

Non-Disputing Party (Mexico)

Alan Bonfiglio Ríos, Secretariat of Economy, United Mexican States
Rafael Rodríguez Maldonado, Secretariat of Economy, United Mexican States
Geovanni Hernández Salvador, Secretariat of Economy, United Mexican States
Pamela Hernández Mendoza, Secretariat of Economy, United Mexican States
Alejandro Rebollo Ornelas, Secretariat of Economy, United Mexican States
Jorge Escalona Gálvez, Secretariat of Economy, United Mexican States

Non-Disputing Party (Canada)
Florence Beaudet, Trade Law Bureau, Canada

Court Reporter
Laurie Carlisle, ENG Court Reporter

65. During the hearing, the following experts were heard and examined.

For the Claimants:
Professor Christoph Schreuer

For the Respondent:
Prof. Hervé Ascensio
Prof. Richard K. Gardiner

66. On 17 May 2024 the parties exchanged transcript redactions and corrections and submitted their joint redactions and corrections to the Tribunal on 24 May 2024.

67. On 7 June 2024 the parties filed their submissions on costs.

68. The Tribunal is satisfied that each party had a reasonable opportunity to make its case on the matters dealt with in this phase of the arbitration and therefore proceeds to make this award.

III. FACTUAL BACKGROUND

69. On 19 September 2008, TransCanada Keystone Pipeline, L.P. submitted an application to the State Department for a Presidential permit to construct, connect, operate, and maintain the cross-border segment of the KXL Pipeline.[1] The proposed pipeline was designed to transport up to approximately 900,000 barrels per day of Western Canadian Sedimentary Basin crude oil from a supply hub near Hardisty, Alberta to delivery points in Oklahoma and Texas, for ultimate delivery to U.S. refineries. The pipeline was to consist of three segments in the United States: (1) the Steele City Segment, which would extend from the Canadian border near Morgan, Montana to Steele City, Nebraska, where it would connect with an operating segment of pipeline that extends from Steele City to Cushing, Oklahoma; (2) the Gulf Coast Segment, which has been operating since 2014 and extends from Cushing to Port Arthur, Texas; and (3) the Houston Lateral, which splits off from the Gulf Coast Segment in Liberty County, Texas and extends to Moore Junction, Texas, near Houston.[2]

70. In January 2012 the State Department denied Keystone's application without prejudice.[3]

71. In May 2012, Keystone submitted a second application for a Presidential permit for the KXL Pipeline.[4] In November 2015, President Obama announced the U.S. decision to deny Keystone's second application.[5]

72. As a consequence, in June 2016, TransCanada Corporation and TransCanada Pipelines Limited submitted a Request for Arbitration under the ICSID Convention on grounds that there was a legitimate expectation that the Presidential permit would be granted[6] and that the November 2015 decision to deny the permit violated U.S. obligations under NAFTA Chapter 11.[7]

73. On 20 January 2017, Donald J. Trump was sworn in as President of the United States. On 26 January 2017, Keystone submitted a new application.[8]

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[1] Exhibit C-12.
[2] RFA, para 27.
[3] Exhibit C-34.
[4] Exhibit C-39.
[5] Exhibits C-42, C-44.
[6] RFA, para 29.
[7] Exhibit C-48.
[8] Exhibit C-49.

74. On 23 March 2017, the TransCanada claimants and the United States entered into a Termination Agreement and Release of the NAFTA claims introduced in June 2016 pursuant to which the claimants "*release*[d], *with prejudice, all claims raised in the NAFTA Arbitration"* and *"fully and finally release*[d] *all future claims arising out of events prior to the Effective Date*" of the Termination Agreement.[9]

75. On the same day, the State Department issued the 2017 permit.[10] On 29 March 2019, the Trump Administration issued a new permit replacing the 2017 permit due to certain issues that had arisen in litigation ("the 2019 Permit").[11]

76. On 1 July 2020, the United States-Mexico-Canada Agreement ("USMCA") entered into force and replaced NAFTA.[12]

77. On 20 January 2021, Joseph R. Biden was sworn in as President of the United States. On the same date, the newly elected President Biden revoked the 2019 Permit.[13]

78. On 22 November 2021, the Claimants filed their Request for Arbitration.

IV. The Parties' Positions

79. This arbitration is based on Annex 14-C of UMSCA. The parties disagree as to whether the Arbitral Tribunal has jurisdiction, under Annex 14-C, to entertain claims based on facts post-dating the expiration of NAFTA and the entry into force of UMSCA.

A. The Respondent's Position

80. The Respondent submits that the offer to arbitrate in Annex 14-C is for alleged breaches of NAFTA in respect of a legacy investment and that, because NAFTA expired on 30 June 2020, President Biden's revocation of the 2019 Permit on 20 January 2021 cannot constitute a breach of NAFTA and can therefore not be submitted to arbitration under Annex 14-C. When President Biden revoked the 2019 Permit, the United States was in fact no longer bound by NAFTA, and nothing in USMCA nor in NAFTA provides that the United States shall continue to be bound by NAFTA's substantive obligations after its termination.[14]

81. NAFTA does not have a survival/sunset clause. Nor does UMSCA contain any provision extending NAFTA's substantive obligations after 30 June 2020. If the parties to the treaty had intended to extend Chapter 11 past 30 June 2020, they would have said so in clear terms. For example, the U.S. Model BIT achieves post-termination survival in a single clear

[9] Exhibit C-53.
[10] Exhibit C-9.
[11] Exhibit C-10.
[12] Exhibits C-2, C-84.
[13] Exhibit C-11.
[14] Memorial on Preliminary Objection, para. 2.

sentence that was deliberately not used in USMCA.[15] The two BITs cited by the Claimants, which were replaced by subsequent Free Trade Agreements, also included clear language to that effect.[16] These examples show how USMCA parties have in the past either crafted language to bind themselves to the continued application of obligations in a terminated treaty or chosen not to terminate an agreement upon the entry into force of a new agreement in order to permit claims to be made under the legacy agreement on an ongoing basis. In the case of the Morocco,[17] Panama,[18] and Honduras[19] BITs, the United States and its counterparty used clear language to allow claimants with qualifying investments to assert claims under these treaties based on events occurring both before and for ten years after the FTA entered into force. There is no such language in the case of the replacement of NAFTA by USMCA.[20]

82. The consent of States is of paramount importance and must be manifest.[21] In the present case, there is no indication of any consent of the UMSCA parties to extend NAFTA's substantive obligations past 30 June 2020.

83. The relevant customary international law rules of treaty interpretation that apply to the analysis of Annex 14-C in this case are:[22]

    a) Article 31 of the Vienna Convention on the Law of Treaties ("the VCLT") which, according to the International Law Commission ("the ILC"), is "*based on the view that the text must be presumed to be the authentic expression of the intention of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties*";

    b) Article 31(1) of the VCLT, which provides that a treaty should be read "*in accordance with ordinary meaning to be given to the terms of the treaty*". As the ILC explained in its VCLT commentary, this is "*the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them*" and "*the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty*

[15] RL-017 (2012 U.S. Model Bilateral Investment Treaty, Article 22(3) "*For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments*."; RL-018 (2004 U.S. Model Bilateral Investment Treaty, Article 22(3).
[16] Exhibits CL-048 (Letter dated 5 August 2004 from Shaun Donnelly, U.S. State Department to Norman García Honduras Ministry of Industry and Commerce regarding relationship of CAFTA-DR to U.S. – Honduras BIT), CL-049 (2004 United States – Morocco Free Trade Agreement, Articles 1.2(1) and 1.2(4)); Reply on Bifurcation, paras. 26-28; Memorial on Preliminary Objection, para. 76.
[17] CL-049 (2004 United States – Morocco Free Trade Agreement, Articles 1.2(1) and 1.2(4)).
[18] RL-063 (2007 United States – Panama Trade Promotion Agreement, Articles 1.3(1) and 1.3(3)).
[19] Exhibits CL-048 (Letter dated 5 August 2004 from Shaun Donnelly, U.S. State Department to Norman Garcia Honduras Ministry of Industry and Commerce regarding relationship of CAFTA-DR to U.S. – Honduras BIT).
[20] Reply on Bifurcation, paras. 22-24; Memorial on Preliminary Objection, paras. 73-75; Reply on Preliminary Objection paras. 91-104; Exhibits CL-17-CL-22.
[21] Memorial on Preliminary Objection, para. 8.
[22] Transcript Day 1, pages 38-46.

and in light of its object and purpose";

c) Article 31(3)(c) of the VCLT, which refers to "*any relevant rules of international law applicable in the relations between the parties*", *i.e.*:

- *Pacta sunt servanda* as reflected in Article 26 of the VCLT and Article 70 of the VCLT, which provides that a treaty's termination releases the parties from any obligation to further perform the treaty. If the parties intend to derogate from that principle, that intention should be clear from the ordinary meaning of the treaty;

- Article 13 of the ILC Draft Articles on State Responsibility, pursuant to which "*an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs*", which mirrors the "*breach of an international obligation*" language used in Annex 14-C.

84. In case of recourse to supplementary means of interpretation pursuant to Article 32 of the VCLT, the focus should be on the documents reflecting what the parties said to each other about the treaty's terms.[23] As Prof. Gardiner explained, "[t]*he admission of material generated by one party needs to be carefully approached in the light of the principle that preparatory work should illuminate a common understanding of the agreement, not unilateral hopes and inclinations*".[24]

85. Documents postdating USMCA negotiations are not *travaux préparatoires* under any definition of these terms and should be disregarded. For example, Exhibit C-143 is [redacted].[25]

86. It emerges from the ordinary meaning of Annex 14-C that its purpose is solely to extend the consent of the NAFTA parties to arbitrate claims that arose prior to NAFTA's termination.[26] There is no language in Annex 14-C providing for the extension of NAFTA's substantive investment obligations beyond its termination.[27] The definition of "*legacy investment*" nowhere provides or even suggests that NAFTA's substantive investment protections would continue to apply following its termination.[28]

87. The requirement in Paragraph 1 of Annex 14-C for a claimant to allege a "*breach of an obligation*" under the specified NAFTA provisions limits the Tribunal's jurisdiction *ratione*

[23] Transcript Day 1, pages 46-50.
[24] Prof. Gardiner's Supplementary Report, paras. 48-50.
[25] Transcript Day 1, page 118.
[26] Request for bifurcation, paras. 12-24; Memorial on Preliminary Objection, para. 13
[27] Reply on Preliminary Objections, paras. 47-49.
[28] Memorial on Preliminary Objection, para. 26; Reply on Preliminary Objections, paras. 50-52.

temporis to the period when NAFTA was in force, consistent with the same limitation in NAFTA Articles 1116(1) and 1117(1). Expanding the jurisdiction *ratione temporis* of tribunals established under Annex 14-C to encompass claims based on events occurring when USMCA parties were no longer bound by NAFTA's substantive investment obligations would have required a material change to the language from NAFTA Articles 1116(1) and 1117(1). USMCA parties made no such change. Instead, they not only chose to retain the key language from these NAFTA Articles in Paragraph 1 of Annex 14-C but also made clear that the limitations in NAFTA itself would continue to apply to claims under Annex 14-C, by stating in Paragraph 1 that such claims must be submitted "*in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994*", which includes NAFTA Articles 1116(1) and 1117(1).[29]

88. USMCA parties, NAFTA tribunals and scholars – including Claimants' expert Professor Schreuer – well understood NAFTA Articles 1116(1) and 1117(1) to limit claims to facts having occurred while the allegedly breached obligations were in existence.[30] For example, the tribunal in *Marvin Roy Feldman Karpa v. United Mexican States* determined that its *ratione temporis* jurisdiction extended only to measures that occurred after NAFTA entered into force and that it lacked jurisdiction under NAFTA Article 1117(1) to consider claims based on "*measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when NAFTA came into force*".[31]

89. The purpose of Annex 14-C is to avoid an abrupt termination of the NAFTA offer to arbitrate by allowing an investor to make a claim for a breach that occurred while NAFTA was in force within three years from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it had incurred loss or damage.[32] The fact that the USMCA parties did not preserve the full NAFTA limitations period for all investors does not in any way undermine the conclusion that this was the outcome they intended to achieve.[33]

90. In this respect, the Claimants misconstrue the discussion exchanges among USTR officials to support their argument that there is no correlation between the three-year period in Paragraph 3 of Annex 14-C and NAFTA Articles 1116(2) and 1117(2). In these exchanges, which were not shared with the other USMCA parties, the USTR officials were grappling with difficulties created by potential delays between signing, ratification, and entry into force of USMCA.[34]

91. Footnote 21 of Annex 14-C addresses a specific class of potential claimants, namely those who may have a claim under both Annex 14-C and Annex 14-E, including, for example,

[29] Reply on Preliminary Objections, paras. 9-10.
[30] Reply on Preliminary Objection, paras. 10-21.
[31] Exhibit RL-080.
[32] Reply on Bifurcation, para. 36; Memorial on Preliminary Objection, para. 70; Reply on Preliminary Objection, para. 105.
[33] Reply on Preliminary Objection, para. 107.
[34] Reply on Preliminary Objection, para 108.

claimants alleging a continuing breach.[35] Hence, if an investor claim extends to measures that both pre-date and post-date NAFTA's termination, and the measures that post-date NAFTA give rise to a claim under Annex 14-E, the investor is constrained to asserting just the Annex 14-E claims.[36]

92. Prof. Gardiner explains that "[t]*here is nothing in the context to indicate that the reference in the footnote is limited by reference to claims rather than, as stated in the footnote, investors*" and that it is not for an arbitral tribunal "*to adjust the clear terms chosen by the parties to a treaty.*"[37]

93. The purpose of Annex 14-C to extend the consent of NAFTA parties to arbitrate claims that arose prior to NAFTA's termination is reflected in the treaty structures of USMCA and NAFTA, which both include a set of substantive rules for the treatment of investments, found in the body of Chapter 14 of USMCA and Section A of Chapter 11 in NAFTA, and a set of jurisdictional and procedural rules for the arbitration of disputes concerning the substantive rules, found in Annexes 14-C, 14-D, and 14-E of USMCA and Section B of Chapter 11 in NAFTA.

94. Annex 14-C, titled "*Legacy Investment Claims and Pending Claims*", simply sets forth USMCA parties' consent to arbitrate certain claims. While the body of Chapter 14 addresses substantive rules for the treatment of investments, Annex 14-C addresses only procedural matters and does not impose substantive investment obligations.

95. The ordinary meaning of Annex 14-C is consistent with the other provisions of USMCA:

a) the Protocol Replacing NAFTA with USMCA[38] is clear that NAFTA was terminated upon USMCA's entry into force.[39] The Protocol ensures that the references to NAFTA in Annex 14-C, which extend a claimant's ability to bring claims for an additional three years for a breach of NAFTA that occurred while it was in force, would not be rendered moot by its termination;[40]

b) Article 14.2(3) of USMCA[41] supports the ordinary meaning of Annex 14-C, *i.e.*, that it applies to breaches of obligations that were in force before NAFTA was terminated, and disproves the Claimants' argument on Article 28 of the VCLT[42]

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[35] Reply on Bifurcation, para. 31; Memorial on Preliminary Objection, para. 51.
[36] Memorial on Preliminary Objection, paras. 51-53; Reply on Preliminary Objection, paras. 57-65.
[37] Gardiner's Supplementary Report para. 31.
[38] Reply on Bifurcation, para. 16; Memorial on Preliminary Objection, para. 34; Reply on Preliminary Objections, para. 25.
[39] Reply on Bifurcation, para. 36, Memorial on Preliminary Objection, para. 37.
[40] Memorial on Preliminary Objection, para. 41; Reply on Preliminary Objections, para. 26.
[41] Article 14.2(3) of USMCA: "*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.*"
[42] Article 28 of the VCLT: "*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.*"

as:

- the presumption against retroactivity stated in Article 28 of the VCLT may be overcome if "*a different intention appears from the treaty or is otherwise established*";

- there is an "*an express agreement to the contrary*" in Article 14.2(3) of USMCA;

- the presumption against retroactivity is simply a presumption against the retroactive application of a treaty term. It does not require a tribunal to identify a prospective effect for a provision that does not have one based on the ordinary meaning of its terms;

c) Article 34.1 of USMCA supports the ordinary meaning of Annex 14-C and confirms that the USMCA parties did not extend NAFTA's substantive obligations. Unlike the express extension of the substantive obligations of NAFTA Chapter 19 as provided in USMCA Article 34.1, there is nothing in Annex 14-C or Article 34.1 that expressly extends the substantive obligations of NAFTA Chapter 11.

96. The Claimants' applicable law argument, based on which the parties to this arbitration (the Respondent through its offer to arbitrate and the Claimants by way of its acceptance of that offer) agreed that Annex 14-C would be a choice-of-law provision applying to the Claimants' claims, is meritless because:

a) Paragraph 1 of Annex 14-C provides that an investor must allege a "*breach of an obligation*" under the specified NAFTA provisions.[43] As Professor Gardiner explains, such a breach could only have occurred while NAFTA was in force;[44]

b) an agreement to arbitrate the Claimants' claims could only have been formed if the Respondent's offer to arbitrate encompassed alleged breaches postdating NAFTA's termination, which is not the case. In *CSOB v. Slovak Republic*,[45] the disputing parties' choice of law was embodied in a contract between the investors and the state (the Consolidation Agreement) which expressly contemplated that, although it had not entered into force, the Czech-Slovak BIT and its disputes settlement mechanism would apply to disputes that may arise from the performance of the obligations provided therein. These circumstances are clearly different than those of the present case, in which the arbitration agreement does not refer to a contractual relationship between the Claimants and the United

[43] Memorial on Preliminary Objection, para. 13; Reply on Preliminary Objection, paras. 30-44.
[44] Prof. Gardiner's Expert Report, pages 12,13,18.
[45] Exhibit CL-123.

States, but to treaty obligations;[46]

c) Paragraph 1 of Annex 14-C was never intended to be a choice of law clause; in fact, the same language in NAFTA Articles 1116(1) and 1117(1), which is incorporated into Paragraph 1 of Annex 14-C, is itself not the applicable law clause for disputes under NAFTA Chapter 11. Rather, the applicable law clause is NAFTA Article 1131, titled *Governing Law*, which provides that "[a] *Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*";[47]

d) footnote 20 in Annex 14-C is only an acknowledgement "*for greater certainty*" that NAFTA applies to claims based on breaches that occurred when it was in force. As indicated by Prof. Ascensio, "*it is quite obvious that NAFTA substantive provisions will apply to disputes arising out of its breach at a time it was in force. This is why the substantive provisions of NAFTA concerned are mentioned in footnote 20 'for greater certainty' only. Since the cause of action is a breach of NAFTA in respect of events that occurred when this treaty was in force, NAFTA and the choice of law clause it contains will apply to the substance of the claim*."[48]

97. The Claimants' argument on an alleged 'principle of consistency' fails because they have not demonstrated that the Respondent was at any point inconsistent, and the Claimants have not established the content of such a principle, much less its character as a binding rule that unequivocally and permanently bars a State or party from taking an inconsistent position on a matter of fact or law.[49] In particular, inconsistent statements alone are insufficient to have preclusive effect and the prongs of the estoppel test are not met in the present case as:

a) the United States has not contradicted itself with respect to the import of Annex 14-C. The public statements of U.S. officials, made in their official capacities between the conclusion of USMCA negotiations and the assertion of the United States' jurisdictional defense in this case, have been consistent to the effect that Annex 14-C only extended NAFTA's investor-State dispute settlement provisions. The statements did not address which claims might be eligible for such settlement. The very best that Claimants might be able to argue is that the statements of U.S. officials were vague on this point. As for the statements made by former U.S. officials after they returned to private practice, while they may reflect the personal views of such individuals, they cannot be ascribed to the United States;[50]

b) the Claimants have nowhere asserted that they reasonably relied upon the alleged statements of the United States, and they have not explained what opportunity

[46] Reply on Preliminary Objection, paras. 37-38.
[47] Reply on Preliminary Objection, paras. 42-44.
[48] Prof. Ascensio's Second Report, para 38.
[49] Reply on Preliminary Objection, para. 131.
[50] Reply on Preliminary Objection, § 136.

they would have missed, or what steps they would have been deprived of, by allegedly having been misled by the United States' previous statements concerning USMCA Annex 14-C. [51]

98. The Claimants' unclean hands argument requires the tribunal to prejudge the merits of the case before it has found jurisdiction. An unclean hands argument based solely on the alleged claim on the merits cannot confer jurisdiction where none exists. The only act that the United States seeks to leverage to assert its jurisdictional defense is the conclusion of the USMCA with Canada and Mexico. The conclusion of a treaty by three sovereign nations is self-evidently not a wrongful act. The alleged illegal act upon which the Claimants rely, on the other hand, is the revocation of the Presidential Permit in 2021. Even if, *arguendo*, this act was wrongful, the Claimants did not explain how the revocation of a pipeline permit itself is being leveraged to prevent them from bringing a claim pursuant to USMCA Annex 14-C.[52]

B. The Claimants' Position

99. Annex 14-C provides that, for a transition period of three years after the date on which USMCA replaced NAFTA, claimants holding legacy investments may bring claims alleging a breach of Section A of Chapter 11 of NAFTA using the procedures set forth in Section B of Chapter 11 of NAFTA.[53]

100. The Claimants' claims are within the scope of Annex 14-C because:[54]

a) the Claimants own legacy investments in connection with the Keystone XL Pipeline;
b) U.S. President Biden's revocation of the 2019 Permit breached the United States' obligations under Section A of Chapter 11 of NAFTA;
c) in filing their Request for Arbitration, the Claimants followed the procedures set forth in Section B of Chapter 11 of NAFTA;
d) the Claimants filed the Request for Arbitration on 22 November 2021, *i.e.*, before the expiration of the transition period (1 July 2023).

101. The Respondent's preliminary objection should thus be rejected. Pursuant to Article 31 of the VCLT, the overarching objective when interpreting treaties is to ensure that they are interpreted in good faith to reflect the intention of the parties.[55] None of the statements intended to inform the public made by the USMCA parties[56] as well as by the U.S. negotiators,[57] and none of the documents produced by the Respondent during the document production phase (the "Produced Documents") indicate that the protection afforded by

[51] Reply on Preliminary Objection, § 137.
[52] Reply on Preliminary Objection, para. 143.
[53] Observations on Bifurcation, para. 2; Counter-Memorial on Preliminary Objection, para. 1.
[54] Observations on Bifurcation, para. 2; Counter-Memorial on Preliminary Objection, para. 1
[55] Observations on Bifurcation, paras. 15-19; Counter-Memorial on Preliminary Objection, para. 23.
[56] Exhibits C-87, C-91, C-93, C-97, C-103, C-104, C-105.
[57] Exhibits C-100, C-101, C-102.

Annex 14-C would be limited to measures pre-dating the entry into force of USMCA.[58]

102. The Produced Documents are relevant to the interpretation of Annex 14-C pursuant to Article 32 of the VCLT because:[59]

- as confirmed by Prof. Gardiner, "[t]*he supplementary means of interpretation indicated in the Vienna rules are not an exclusive list*";

- 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;

- 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*";

- consideration of supplementary means of interpretation is always permissible under the VCLT in order to confirm the meaning of the provisions in dispute, regardless of whether the text is ambiguous or obscure or whether the interpretation would lead to a result which is manifestly absurd or unreasonable.

103. The Produced Documents show that:

- USTR's former lead negotiator, Lauren Mandell, has publicly explained that Annex 14-C allows legacy investment claims arising out of measures taken during the transition period. Mr. Mandell was the architect of Annex 14-C and the author or recipient (either a direct recipient or appearing on the "Cc:" line) of 71.1% of all documents listed in Respondent's privilege log;[60]

- at no point during the negotiations was there any indication that the purpose of Annex 14-C was to allow claims only in relation to measures that pre-dated the entry into force of USMCA;

[58] Observations on Bifurcation, Annex; Counter-Memorial on Preliminary Objection, para. 6; Rejoinder on Preliminary Objection, paras. 8, 19-27.
[59] Rejoinder on Preliminary Objection, paras. 9-27.
[60] Rejoinder, paras. 176-177.

- the terms "*transition*", "*grandfather*" and [redacted] that are widely used in the Produced Documents are consistent with the understanding that Annex 14-C was intended to allow claims to be asserted in relation to measures taken during the transition period;[61]

- while arbitration under USMCA would be available based on the proposed opt-in/opt-out mechanism for investments acquired after its entry into force, consent to arbitrate in respect of legacy investments would be [redacted][62] [redacted][63];

- the Industry Trade Advisory Committee for Services ("ITAC"), an official advisory committee, understood that the legacy investment annex would permit claims arising out of measures taken during the transition period;[64]

- in Prof. Gardiner's words, the Respondent has launched its Preliminary Objection "*with its fingers crossed behind its back*", *i.e.,* in bad faith. The Claimants refer specifically to C-143 [redacted] C-150 [redacted] C-151 [redacted], which show that the Respondent fabricated its Preliminary Objection solely for the purpose of obstructing and delaying this arbitration.[65]

104. The ordinary meaning of Annex 14-C is that claimants holding legacy investments may bring

[61] Exhibits R-119, R-102, R-129, R-140, R-148, R-150, C-112, C-164, C-166, C-169, C-174, C-175, C-177, C-182, C-195, C-200, C-204, C-205, C-213.
[62] Exhibits C-183, C-190.
[63] "*On September 18, 2017,* [redacted] (Rejoinder, § 47); *"Respondent's Preliminary Objection 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"* (Rejoinder, § 55); "*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"* (Rejoinder, § 56).
[64] Exhibit C-128.
[65] Rejoinder on Preliminary Objection, paras. 16-77.

claims in relation to measures taken during the transition period because:

- the title of Annex 14-C refers to "*legacy investment claims*", *i.e.,* claims related to legacy investments. Annex 14-C thus permits claims with respect to investments that were established or acquired while NAFTA was in force and that were in existence when USMCA entered into force. There is nothing in the text of Annex 14-C that provides that investors holding legacy investments may submit claims only with respect to measures taken prior to the time when USMCA replaced NAFTA;[66]

- through Paragraphs 1 and 3 of Annex 14-C, USMCA parties consented to arbitrate alleged breaches of Section A obligations for three years. The Section A obligations must, therefore, remain in force during that period, unless there is something in the text saying otherwise. In other words, the Respondent seeks to read into Annex 14-C a temporal limitation that is not there;[67]

- the comparison with other trade agreements that USMCA parties have entered into shows that the parties knew how to impose a temporal limitation on measures that could be challenged if they had wanted to do so.[68]

105. The ordinary meaning of the USMCA Protocol[69] confirms that Paragraphs 1 and 3 of Annex 14-C extend to Section A obligations for the transition period. Paragraph 1 of the USMCA Protocol[70] shows that, when the USMCA refers to NAFTA, as in Annex 14-C, the NAFTA provisions remain applicable even though USMCA replaced NAFTA.[71] Respondent cherry-picks which NAFTA obligations were to continue. Both Section B and Section A of Chapter 11 of NAFTA continue to apply as both are referenced in Annex 14-C without making any distinction between the two.[72]

106. The Produced Documents make it clear that the reference in the USMCA Protocol to "*those provisions set forth in the USMCA that refer to provisions of the NAFTA*" was intended to be inclusive and not restrictive, *i.e.,* not limited to Article 34.1 of USMCA (*Transitional Provisions from NAFTA 1994*):

- in Exhibits C-209 (email Exchange among U.S., Canadian, and Mexican

[66] Observations on Bifurcation, para. 24; Counter-Memorial on Preliminary Objection, para. 6.
[67] Counter-Memorial on Preliminary Objection, para. 26.
[68] Observations on Bifurcation, para. 24; Rejoinder on Bifurcation, paras. 49-59; Counter-Memorial on Preliminary Objection, paras. 50-51; Rejoinder on Preliminary Objection, para. 169.
[69] Exhibit R-1.
[70] "*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*."
[71] Observations on Bifurcation, para. 27; Counter-Memorial on Preliminary Objection, para. 82.
[72] Rejoinder on Bifurcation, para. 27; Counter-Memorial on Preliminary Objection, para. 81; Rejoinder on Preliminary Objection, para. 151.

officials, 21 November 2018) and C-210 (email Exchange among U.S., Canadian, and Mexican officials, 26 November 2018), the U.S acknowledged that transitional provisions can appear anywhere in the text and not just in the Final Provisions;[73]

- it emerges from Exhibits C-208 [redacted], R-153 [redacted] and R-53 (drafters' Notes agreed between USMCA parties, 27 March 27) that the reference to "*termination*" of NAFTA in Annex 14-C is directly tied to Paragraph 1 of the USMCA Protocol.[74]

107. The relationship between Annexes 14-C, 14-D, and 14-E of USMCA shows that Annex 14-C allows claimants holding legacy investments to bring claims in connection with measures taken during the transition period.[75] In particular:

- Annex 14-C allows challenges to measures taken before and during the transition period, except for investors that are "*eligible to submit claims to arbitration under paragraph 2 of Annex 14- E*" (as per footnote 21 of Annex 14-C);

- Annexes 14-D and 14-E, which are applicable to disputes between Mexico and the United States, allow challenge to measures taken only after USMCA replaced NAFTA;

- footnote 21 of Annex 14-C is a carveout from the scope of Paragraph 1 of Annex 14-C. As such, it only makes sense if both Annex 14-C and Annex 14-E overlap and apply to measures that post-date the entry into force of USMCA. Given that Annex 14-E applies only to measures that post-date the replacement of NAFTA by USMCA, Annex 14-C and Annex 14-E can only overlap if both apply to measures that post-date the replacement of NAFTA by USMCA.[76]

108. Respondent's interpretation of footnote 21 produces absurd results,[77] and in particular:

- 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. Yet, under the

[73] Rejoinder on Preliminary Objection, paras. 154-155.
[74] Rejoinder on Preliminary Objection, paras. 156-157.
[75] Observations on Bifurcation, paras. 29-32.
[76] Observations on Bifurcation, paras. 29-32; Counter-Memorial on Preliminary Objection, para. 66; Rejoinder on Preliminary Objection, para. 129.
[77] Counter-Memorial on Preliminary Objection, paras. 72-75; Rejoinder on Preliminary Objection, paras. 131-136.

Respondent's interpretation, these investors would be prohibited from asserting legacy investment claims;[78]

- only investors having suffered two injuries (before and during the transition period) would, under the Respondent's interpretation, be eligible to assert a claim under Annex 14-C and Annex 14-E. The Respondent's interpretation of footnote 21 would therefore prohibit an investor who is eligible to challenge a measure under Annex 14-E from challenging any unrelated measure under Annex 14-C;[79]

- 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. There is not a single instance where an investor has asserted a claim under both Annex 14-C and Annex 14-D;[80]

- the Respondent misapplies the concept of continuing breach, which could only be possible if Section A obligations remained in force during the transition period.[81] The Respondent's refocus on the 'continuing act' concept does not resolve the absurdity of its position as the investor would be deprived of its ability to assert a claim only because the breaching USMCA Party perpetuated and worsened the damage the investor suffered. Perversely, the breaching USMCA Party could thereby limit its own liability by continuing its bad act.[82]

109. The Respondent's interpretation of footnote 21 conflicts with the Produced Documents:

- Exhibit C-151 [redacted];[83]

- Exhibit R-158 [redacted] 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

[78] Counter-Memorial on Preliminary Objection, para. 74; Rejoinder on Preliminary Objection, para. 132.
[79] Counter-Memorial on Preliminary Objection, para. 74; Rejoinder on Preliminary Objection, paras. 133-135.
[80] Rejoinder on Preliminary Objection, paras. 142-145.
[81] Counter-Memorial on Preliminary Objection, para. 77-78.
[82] Counter-Memorial on Preliminary Objection, para. 78-80.
[83] Rejoinder on Preliminary Objection, para. 138.

use.[84]

110. The consent to arbitration and the designation of the applicable law are both provided in Annex 14-C, *i.e.,* directly and by the incorporation of Article 1131 of Chapter 11 of NAFTA.[85] As Professor Schreuer explained in his first Legal Opinion, "[i]*n the present case, Claimants have accepted the clause on applicable law in paragraph 1 and in footnote 20 to Annex 14-C by bringing their Request for Arbitration under the ICSID Convention and Annex 14-C*"[86] and "[b]*y virtue of Annex 14-C paragraph 1, Article 1131 of NAFTA, and footnote 20, NAFTA's substantive protections continue to apply to legacy investments during the transition period, provided the claim is brought before July 1, 2023. To this extent, NAFTA continues to apply even after its termination because the parties have so agreed in Annex 14-C*".[87]

111. In particular:

- 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. Respondent's position is contrary to the concept of parties' autonomy in choosing the applicable law, regardless of whether that law is otherwise in force. *CSOB v. Slovak Republic*[88] is an example where the parties chose a BIT that was not in force as the applicable law governing the dispute;[89]

- the "*obligations*" in Paragraph 1 of Annex 14-C are obligations derived from the applicable law specified in USMCA and not obligations pre-existing the time when NAFTA was in force;[90]

- when explaining the scope of Paragraph 1 of Annex 14-C in statements contemporaneous to the negotiation and conclusion of USMCA, the Respondent consistently used the word "*rules*," not "*obligations*." The word "*rules*" is a reference to the substantive investment obligations.[91] This is confirmed, *inter alia*, by:

  - [redacted]

[84] Rejoinder on Preliminary Objection, paras. 139-140.
[85] Counter-Memorial on Preliminary Objection, paras. 36-37.; Rejoinder on Preliminary Objection, para. 106.
[86] Exhibit CER-1, Prof. Schreuer Opinion, para. 79.
[87] Exhibit CER-1, Prof. Schreuer Opinion, para. 87.
[88] Exhibit CL-123.
[89] Counter-Memorial on Preliminary Objection, para. 47; Rejoinder on Preliminary Objection, paras. 104-106.
[90] Rejoinder on Preliminary Objection, paras. 78-98.
[91] Rejoinder on Preliminary Objection, paras. 97, 147-148, 192-194.

[redacted][92] and

- [redacted][93]

- the Respondent misrepresented the *Feldman* decision and omitted to specify that the tribunal in this case recognized that the parties could have given NAFTA retroactive effect had they chosen to do so.[94] In the present case, there is ample evidence that the USMCA parties intended to apply NAFTA as the applicable law throughout the transition period.

112. The Respondent's assertion that the transition period was intended to mirror the three-year limitation period in Articles 1116(2) and 1117(2) of NAFTA is false for various reasons:

- there is often no relationship in BITs between limitation periods and transition periods.[95] The Claimants specifically rely on Exhibit [redacted] in which Mr. Mandell indicates "[i]*f we were just intending to allow claims for pre-existing measures, we likely wouldn't have framed a three-year consent period – we would have just defaulted to the statute of limitations in NAFTA Section B that would apply to claims for those measures. In other words, we would have omitted paragraph 3 altogether*." Not one Produced Document references the need to align the transition period with NAFTA limitations period;[96]

- contrary to Articles 1116(2) and 1117(2) of NAFTA, Annex 14-C refers only to a breach of Section A of Chapter 11 of NAFTA and says nothing about the investor's knowledge of the damage arising out of a breach. In case of a breach of Section A of Chapter 11 of NAFTA before the replacement of NAFTA, and if the investor did not acquire knowledge of damage arising from the breach until after the replacement of NAFTA,

[92] Exhibit R-150.
[93] Exhibit R-119.
[94] Exhibit RL-80.
[95] Rejoinder on Bifurcation, paras. 30-31; Counter-Memorial on Preliminary Objection, para. 101; Rejoinder on Preliminary Objection, paras. 117-118.
[96] Rejoinder on Bifurcation, paras. 30-31; Rejoinder on Preliminary Objection, para. 119.

> the three-year transition period specified in Annex 14-C would expire before the end of the limitations period and the investor would not enjoy the full period allotted to it under NAFTA to bring those claims.[97]

113. The Produced Documents and the other documents in the file show that:

- the initial proposals for the legacy investment annex envisioned starting the three-year period from the date of entry into force of USMCA, not the date of termination of NAFTA. 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. 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;[98]

- in numerous instances USMCA negotiators considered transition periods longer than three years.[99]

114. Properly interpreted, Article 14.2(3) of USMCA confirms that Annex 14-C applies to pre-existing acts and facts, in addition to acts and facts that occurred after the entry into force of USMCA. Absent any express agreement to the contrary, there is a presumption against the retroactive application of a treaty, as stated in Article 28 of the VCLT. 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 force of USMCA. There are no facts in the present case showing that Paragraph 1 of Annex 14-C applies only retroactively.[100]

115. The Respondent's position is not consistent with the object and purpose of USMCA, *i.e.* to "*establish a clear, transparent, and predictable legal and commercial framework*",[101] and it is inconsistent with the reliance on the availability of ISDS. 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.[102]

116. The 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.[103] The Claimants pointed to numerous examples where the Respondent made it clear that Annex 14-C would extend NAFTA rules and procedures for

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[97] Observations on Bifurcation, paras. 41-43; Counter-Memorial on Preliminary Objection, para. 101.
[98] Rejoinder on Preliminary Objection, para. 122; Counter-Memorial on Preliminary Objection, para. 101; Exhibits C-180, R-25, R-32, R-33.
[99] Rejoinder on Preliminary Objection, para. 123; Counter-Memorial on Preliminary Objection, para. 104; Exbibits C-207, C-208, R-144, C-200, C-207, C-208, R-148, R-129.
[100] Rejoinder on Preliminary Objection, para. 160.
[101] Exhibit C-2, at p. 2 PDF.
[102] Rejoinder on Preliminary Objection, para.159.
[103] Counter-Memorial on Preliminary Objection, para. 126; Rejoinder on Preliminary Objection, para. 190

three years.[104]

117. The unclean hands doctrine forecloses the Respondent's preliminary objection.[105] Upholding the Respondent's objection would condone the Respondent's "*bait and switch*" behavior of inducing the Claimants to terminate their earlier NAFTA claims by promising a presidential permit, then breaching that understanding by revoking the 2019 Permit at a time when (according to Respondent's erroneous interpretation) the Claimants had no legal recourse.[106] The Respondent's denial of Keystone's applications for a presidential permit, the Respondent's subsequent invitation to the Claimants to reapply for the permit, its inducement to the Claimants to terminate their previous claims under NAFTA as a condition to obtain the permit, and its issuance of the 2019 Permit, took place when NAFTA was in force. From the time of the Termination Agreement onwards, the Claimants acted with the understanding that the Respondent had committed to issuing and maintaining the 2019 Permit. The Claimants legitimately expected that the United States would not reverse its position and subsequently revoke the 2019 Permit on the same grounds that gave rise to the 2016 NAFTA arbitration.[107] The Claimants have been subjected to the Respondent's unfair treatment for fifteen years and the Respondent's actions were specifically designed to induce them to drop their legal claims based on a promise that proved false. Hence, the Claimants relied on a promise that was intended to resolve their claims under NAFTA.[108]

V. MEXICO'S SUBMISSION

118. In accordance with NAFTA Article 1128, Mexico submitted its views, as follows.

119. The consent of a State is an essential requisite to the jurisdiction of a Tribunal and is limited by the provisions of the applicable Treaty. NAFTA was terminated on July 1, 2020, and as of that date it was no longer possible for the NAFTA parties to be bound by or violate NAFTA.[109]

120. The NAFTA parties did not include a survival clause to extend the substantive obligations of Chapter 11 (Investment) after its termination, nor does USMCA include any provision that supports such an interpretation.[110]

121. Pursuant to Article 31 of the VCLT, Annex 14-C must be interpreted in good faith in accordance with the ordinary meaning of its terms. The text of Annex 14-C is focused exclusively on claims to arbitration, not substantive protections. [111]

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[104] Counter-Memorial on Preliminary Objection, para. 109; Rejoinder on Preliminary Objection, para. 192.
[105] Counter-Memorial on Preliminary Objection, para. 133; Rejoinder on Preliminary Objection, para. 199.
[106] Observations on Bifurcation, paras. 36-40; Counter-Memorial on Preliminary Objection, para. 141-142.
[107] Observations on Bifurcation, paras. 44-57; Counter-Memorial on Preliminary Objection, para. 141-142.
[108] Rejoinder on Preliminary Objection, paras. 62-66; Counter-Memorial on Preliminary Objection, para. 142.
[109] Mexico's submission pursuant to Article 1128 of NAFTA, para. 3.
[110] Mexico's submission pursuant to Article 1128 of NAFTA, para. 6.
[111] Mexico's submission pursuant to Article 1128 of NAFTA, para. 7.

122. Pursuant to Articles 59(1) and 70(1)(a) of the VCLT, *a "treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and (a) it appears from the later treaty or is otherwise established that the parties intended that the matter be governed by that treaty*". Further "*unless the Treaty otherwise provides or the Parties otherwise agree, the termination of a Treaty under its provisions or in accordance with the present Convention, releases the Parties from any obligation further to perform the Treaty*". On this basis, Annex 14-C of USMCA does not extend NAFTA's substantive obligations in accordance with the ordinary meaning of the treaty and the intention of the parties. [112]

123. Footnote 20 of Annex 14-C 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 30 June 2020. The use of the words "*for greater certainty*" is not intended to change the scope or meaning of what was already foreseen.[113]

124. Footnote 21 of Annex 14-C refers to a specific situation when an investor that is "*party to a covered government contract*" has claims under both Annex 14-C for a breach of NAFTA (that arose prior to USMCA entry into force) and Annex 14-E for a breach of USMCA (that arose on or after USMCA entry into force) and clarifies that Mexico and the United States do not consent to arbitration under Annex 14-C under that situation.[114]

VI. DECISION

125. The Tribunal has carefully reviewed and considered all the Parties' arguments on jurisdiction. It has however only discussed in this award those of them that are relevant to its decision.

126. The issue in discussion is whether the Arbitral Tribunal has jurisdiction, based on Annex 14-C USMCA, to adjudicate, in accordance with Section B of NAFTA Chapter 11, the Claimants' claims arising out of President Biden's 20 January 2021 decision to revoke the 2019 Permit.

127. The alleged jurisdiction of the Arbitral Tribunal is based on Annex 14-C USMCA, which contains at Paragraph 1 the following offer to arbitrate:

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

[112] Mexico's submission pursuant to Article 1128 of NAFTA, paras. 7-10.
[113] Mexico's submission pursuant to Article 1128 of NAFTA, paras. 11-12.
[114] Mexico's submission pursuant to Article 1128 of NAFTA, paras. 11-12.

(a) Section A of Chapter 11 (Investment) of NAFTA 1994;
(b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
(c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994".

128. The claims are based on President Biden's allegedly illegal decision to revoke the 2019 Permit on 20 January 2021. In order for the Arbitral Tribunal to have jurisdiction, that fact needs to be capable of constituting a breach of an obligation under either Section A of Chapter 11, Article 1503(2) or 1502(3)(a) of NAFTA. In the present case, the Claimants rely on Section A. The question in dispute is thus whether the 20 January 2021 Permit revocation is capable of constituting a breach of Section A of Chapter 11.

129. There is no dispute, in this jurisdictional phase, on the fact that the Claimants own a legacy investment in connection with the Keystone XL Pipeline. At the core of the discussion is the fact that the permit revocation occurred after NAFTA was replaced by UMSCA on 1 July 2020. The question is one of *ratione voluntatis* jurisdiction under Annex 14-C and Article 25 of the ICSID Convention: is there, in the offer to arbitrate contained in Annex 14-C, a *ratione temporis* requirement that the alleged breach must have occurred before 30 June 2020?

130. In order for the 20 January 2021 Permit revocation to constitute a breach of Section A, Section A needs to have been applicable on that date. The fundamental query that the Tribunal has to answer is therefore whether the UMSCA parties agreed to extend the Section A substantive obligations beyond 30 June 2020.

131. Prof. Schreuer, the Claimants' expert, has framed that question as follows: "*Annex 14-C provides for the continued application of certain provisions of NAFTA to certain investments for a certain time. The core question is whether this includes NAFTA's substantive standards*".[115] The parties have engaged in a discussion as to whether there is a difference between the term 'standards' used by the expert and the treaty term 'obligation'.[116] The Arbitral Tribunal does not believe that there is anything behind this discussion: the offer to arbitrate is for the alleged breach of an "*obligation*" under Section A, and the task of the Tribunal is to assess whether the permit revocation in 2021 is capable of constituting such a breach of an obligation under Section A. Apart from that nuance, however, the Tribunal shares Prof. Schreuer's analysis that the core question in dispute is whether Annex 14-C includes an agreement to extend the substantive obligations contained in Section A.

132. Annex 14-C contains no express language referring to the continued application of Section A of Chapter 11 of NAFTA beyond 30 June 2020. It does not say that Chapter 11 shall "*continue to apply*" during three years after the termination of NAFTA, nor does it contain

[115] Exhibit CER-1, Prof. Schreuer Opinion, para. 52.
[116] Rejoinder on Preliminary Objection, paras. 94-97; Reply on Preliminary Objection, para. 36; Transcript Day 1, pages 59-61.

any equivalent formula. The only reference to the application of Section A to claims made under Annex 14-C is to be found in footnote 20, which says that, "*for greater certainty*", a number of relevant NAFTA provisions, including Chapter 11, "*apply*" to a claim made under Annex 14-C. Annex 14-C, however, does also not contain explicit language saying that the terms "*breach of an obligation*" necessarily refer to an event having occurred before 1 July 2020.

133. Each party has drawn from the absence of explicit language in one sense or another the conclusion that its thesis should be sustained. The Claimants aver that, had the UMSCA parties intended to exclude events post-dating 30 June 2020, they would have said so in express terms, and that the Respondent's interpretation therefore amounts to adding terms to the treaty in an impermissible way. The Respondent contends that if it had intended to extend Section A beyond the date of expiry of NAFTA, it would have used clear language to that effect, as it did in other occasions.

134. The question in dispute is therefore one of interpretation of Annex 14-C. The parties have debated the applicable burden and standard of proof. On the one hand, the Respondent has averred that the Claimants have the burden of proving that the USMCA parties intended to extend Section A[117] and that the evidence should show their clear intention to that effect.[118] On the other hand, the Claimants argued that the Arbitral Tribunal should not reason in terms of the burden of evidence but rather look at the preponderance of authority for or against jurisdiction, and that there is no requirement that there be clear language in the treaty to reach a conclusion in one sense or another.[119]

135. These questions are in the Arbitral Tribunal's view largely irrelevant. As the *SPP v Egypt* tribunal correctly held, there is no presumption for or against jurisdiction based on a treaty instrument with respect to a sovereign state, and there is no principle that such an instrument should be interpreted restrictively. The Tribunal shares the *SPP* tribunal's conclusion that "*jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favour of it is preponderant*".[120]

136. The Claimants submit that the Arbitral Tribunal does have jurisdiction on what were confirmed at the hearing to be two alternative and different theories.[121] The first is that the offer to arbitrate that is included in Paragraph 1 of Annex 14-C is applicable to breaches of Section A having occurred both before and after the termination of NAFTA on 30 June 2020.[122] In other words, through Annex 14-C, the USMCA parties agreed to extend the substantive provisions of NAFTA Chapter 11 for three years in respect of legacy claims.

[117] Memorial on Preliminary Objection, para. 8 ; Rejoinder on Preliminary Objection, para. 127.
[118] Rejoinder on Preliminary Objection, paras. 128-129.
[119] Transcript Day 1, pages. 138-139.
[120] Exhibit CL-85, Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction, Apr. 14, 1988, 3 ICSID Reports 131, page 144.
[121] Transcript Day 2, page 355, 12:19.
[122] Counter-Memorial on Preliminary Objection, para. 2.

This interpretation of Annex 14-C, as the Claimants accepted at the hearing, effectively functions as a sunset clause according to which the Parties agreed that Section A would remain applicable during 3 years after 30 June 2020.[123] The second theory, as the Claimants also explained, is that the acceptance by the Claimants of the offer to arbitrate included in Paragraph 1 of Annex 14-C perfects a choice of law agreement whereby the parties to this arbitration agreed to make Section A of NAFTA Chapter 11 the law applicable to their dispute.[124]

137. The Respondent, to the contrary, submits that Annex 14-C only defines the scope and extent of its offer to arbitrate claims under NAFTA and does not have the effect of extending its substantive provisions beyond 30 June 2020.[125] As a consequence, the offer to arbitrate is for breaches of NAFTA Chapter 11, which supposes that NAFTA is still in force at the time of the alleged breach. Therefore, there is no offer to arbitrate disputes arising out of facts that occurred when NAFTA was no longer in force. The Respondent also denies that Annex 14-C can be construed as a choice-of-law agreement.[126]

138. As said above, although the Claimants have not always distinguished them with clarity, their jurisdictional case rests on two fundamentally different premises: the first assumes that the USMCA parties agreed that Section A continued to apply after 30 June 2020 in respect of legacy investments, while the second posits that Section A was somehow contractually made applicable by way of a choice-of-law agreement concluded between the Claimants and the Respondent. However, because any acceptance by an investor of a treaty-based offer to arbitrate is subject to the limitations that are contained in that offer, under both theories Annex 14-C needs to be interpreted as extending Section A beyond 30 June 2020.

139. This is a matter of treaty interpretation that is subject to Articles 31 and 32 of the VCLT. Although the Respondent is not a party to the VCLT, both parties agree that because the VCLT codifies customary international law concerning treaty interpretation, it can be applied as such in the present case.[127]

140. The Arbitral Tribunal will therefore first assess whether the VCLT allows it to conclude that Annex 14-C extends Section A beyond 30 June 2020 (**A**). It will then assess the Claimants' choice of law agreement theory (**B**). Finally, their arguments on the principle of consistency and the unclean hands doctrine will be analyzed (**C**).

A. Interpretation of Annex 14-C

[123] Claimants closing: "*on Day 1, the President asked whether Annex 14-C functions as a sunset clause…. The answer is yes, Annex 14-C can be seen to effectively function as a sunset clause*" (Transcript, Day 3, page 460, 16:21).
[124] Counter-Memorial on Preliminary Objection, para. 4.
[125] Memorial on Preliminary Objection, para. 2.
[126] Memorial on Preliminary Objection, para. 13; Reply on Preliminary Objection, paras. 30-44.
[127] Transcript Day 1, page 24, 18:21 and page 136, 11:22. The ICJ confirmed that the principles of Article 31 are indeed applicable as customary international law (*Kasikili/Sedudu Island*, 13 December 1999, ICJ Reports 1999, pp. 1059-1060, par. 18-20; *Sovereignty over Pulau Litigan and Pulau Sipidan*, 17 December 2002, ICJ Reports 2002, pp. 645-646, para. 37-38).

141. The two relevant articles of the VCLT are Articles 31 and 32. As their respective titles clearly indicate, Article 31 contains the general rule of interpretation, while Article 32 relates to supplementary means of interpretation. While the Arbitral Tribunal agrees that it should not be confined in Article 31 and limit its investigations to the general rule, the structure of the VCLT shows that the starting point should be the general rule.

1. Article 31 VCLT

142. Article 31(1) VCLT mandates interpretation of Annex 14-C in good faith in accordance with the ordinary meaning of its terms in their context and in light of the object and purpose of the treaty.

143. The starting point of the analysis should therefore, in accordance with Article 31(1), be to determine the ordinary meaning of the terms in their context.

144. The point of interpretation at stake goes to the terms "*breach of an obligation under Section A of Chapter 11*": do these terms refer to obligations existing under Chapter 11 while NAFTA was into force, or did the USMCA parties agree that these obligations would continue to exist after 30 June 2020 in respect of legacy investments? In the former case, the 2019 Permit revocation cannot be a "*breach*" because at the time of the disputed fact, NAFTA was no longer into force. In the latter case, the Arbitral Tribunal does have jurisdiction because the offer to arbitrate would apply to these extended substantive obligations.

145. These terms apply to the first part of Paragraph 1 of Annex 14-C, which provide that "[e]*ach Party consents, with respect to a legacy investment, to the submission of a claim to arbitration*", which clear meaning is to establish consent to arbitrate certain claims.

146. In the ordinary meaning of its terms, Annex 14-C therefore operates to establish consent to arbitrate certain claims: the intention of the State parties was to allow the submission to arbitration, after 30 June 2020, of claims for breaches of an obligation under Section A. This, however, does not imply that they also agreed to extend Section A itself. This is perfectly understandable in the context of the transition between NAFTA and USMCA. Pursuant to Article 70(1) VCLT, the termination of a treaty releases the parties from any obligation to further perform the treaty. That applies to the substantive provisions of the treaty as well as to an offer to arbitrate contained in the treaty. Consequently, absent any transitory provision, the termination of NAFTA would have had the consequence not only that its substantive provisions would no longer be applicable past 30 June 2020, but also that investors would no longer be able to accept the offer to arbitrate contained in Section B, irrespective of the date of the alleged breach. As correctly noted by Prof. Schreuer,[128] the USMCA parties could have agreed to make an exception to that general rule by extending the offer to arbitrate, by

[128] Exhibit CER-1, Prof. Schreuer Opinion, paras. 81-88.

extending the substantive provisions of NAFTA, or both. The ordinary terms of Annex 14-C indicate that they agreed to extend the offer to arbitrate. They did however not agree to also extend Section A.

147. The above interpretation is confirmed by the context of the interpreted terms.

148. Article 31(2) provides that context shall comprise the text, including its preamble and annexes, as well as any agreement between the parties relating to the treaty (31(2)(a)), and any instrument made by one of the parties in connection with the treaty and accepted by the other parties (31(2)(b)). Article 31(3) specifies that, together with the context, there shall be taken into account any subsequent agreement between the parties regarding the interpretation or application of the treaty (31(3)(a)), any subsequent practice of the parties on the application of the treaty (31(3)(b)), as well as any relevant rules of international law as applicable between the parties (31(3)(c)). No argument has been made by the parties concerning Articles 31(2)(a) and (b) or 31(3)(a) and (b). The parties however did make submissions concerning the relevant rules of international law (31(3)(c)), which will be discussed further.

149. The interpretation of the terms in discussion in their context should consider Annex 14-C as a whole, including Paragraph 3, footnote 20 and footnote 21 as well as other relevant provisions of USMCA. Annex 14-C is in fact not a standalone treaty, but it is part of USMCA, and there is no doubt that both the terms of the Annex and other USMCA provisions form part of the context in which the disputed phrase must be interpreted.

150. Article 14.2-4 of USMCA confirms the procedural nature of Annex 14-C by providing that Annexes 14-C, 14-D and 14-E contain the offer to arbitrate claims under USMCA. Other parts of the treaty also confirm the limited procedural scope of Paragraph 1. One of them is the USMCA Protocol. According to the Protocol, USMCA supersedes NAFTA as from its entry into force on 1 July 2020. As a consequence, NAFTA is terminated unless there is an exception to the contrary. The Protocol however provides that the termination of NAFTA is "*without prejudice to those provisions set forth in the USMCA that refer to the provisions of the NAFTA*". USMCA Article 14.2.3 then confirms that Annex 14-C is such an exception ("*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"*).

151. Annex 14-C therefore establishes an exception to the expiry of Chapter 11. Because the scope of Annex 14-C is procedural (the offer to arbitrate), that exception has to be understood as an exception to the expiry of the offer to arbitrate. On the face of the text of Annex 14-C, it cannot be also understood as an exception to the termination of Section A (hence a provision operating as a sunset clause based on which Section A would have been extended for three years).

152. In this regard, Prof. Schreuer has made the point that, by construing Annex 14-C as an exception limited to the offer to arbitrate, "*Respondent tries to defeat an exception to a rule by relying on that very rule*",[129] and that "*in a discussion of what parts of NAFTA are covered by Annex 14-C, it is contrary to logic to say* [that] *the general rule that NAFTA was terminated on July 1, 2020 must somehow prevail*".[130] The Arbitral Tribunal disagrees. The purpose of Annex 14-C is to establish consent to arbitrate in accordance with Section B in respect of certain claims. That purpose is procedural in nature and does not cover the substantive provisions of NAFTA unless there is evidence to the contrary. Annex 14-C is therefore only an exception to the expiration of NAFTA in respect to the offer to arbitrate. It is not an exception to the termination of Section A.

153. The structure of the treaty confirms that the purpose of Annex 14-C was not to extend the substantive obligations in Section A of NAFTA, but only the procedure for submission of a claim under Section B. The USMCA parties did in fact agree on transitional provisions extending the life of other substantive provisions of NAFTA in Article 34.1 of USMCA. While Article 34.1(1) states that "*the parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement*", the rest of Chapter 34 indicates that this language refers to matters other than investment. Critically, there is no language in Chapter 34, or anywhere else in USCMA, indicating that the parties intended to maintain the substantive provisions of Section A of Chapter 11 in respect of legacy investments.

154. The Claimants have argued that there could be termination provisions in USMCA elsewhere in the treaty so that the absence, in Chapter 34, of language pointing to the continuous application of Section A of Chapter 11 would not be dispositive.[131] However, the Claimants have not pointed to any other provision of USMCA containing termination provisions which could have the effect of extending Section A.

155. In the Arbitral Tribunal's view, any agreement to extend Section A would either have been mentioned in Chapter 34 or, in view of its significance, be the subject of a specific provision elsewhere.

156. There is however no indication in USMCA that the parties intended to extend the substantive provisions of Section A beyond 30 June 2020. To the contrary, both Annex 14-C and the relevant other provisions in the Protocol, in Chapter 14 and in the Final Provisions of USMCA point to the conclusion that Annex 14-C only extended NAFTA in respect of the offer to arbitrate included in Section B. Because Section A expired on 30 June 2020, the conclusion must be that the offer to arbitrate contained in Article 1 of Annex 14-C is only maintained in respect of facts predating the expiry of NAFTA.

157. The Claimants have submitted, however, that other provisions of Annex 14-C would point to an extension of Section A beyond 30 June 2020. The parties have in this respect discussed

[129] Transcript Day 2, page 368, 04:06.
[130] Transcript Day 2, page 369, 04:07.
[131] Transcript Day 3, pages 470-471.

Paragraph 3 as well as Footnotes 20 and 21.

158. As to Paragraph 3, which provides that the consent to submission of claims expires three years after the termination of NAFTA, the argument is that, if the scope of Annex 14-C was only to establish consent to arbitrate NAFTA claims without extending NAFTA's substantive provisions, Paragraph 3 would be useless, since the time-limitation of Articles 1116(2) and 1117(2) of NAFTA would be sufficient.[132] The argument is incorrect. In the absence of Annex 14-C, consent to arbitrate NAFTA claims would have ended on 1 July 2020, so that no legacy investor could have brought claims after that date for pre-existing breaches. Annex 14-C allows legacy investors to arbitrate such claims. However, in the absence of Paragraph 3, consent to arbitrate would have existed for such breaches as long as the limitation period provided by Articles 1116(2) and 1117(2) of NAFTA had not expired. Because Articles 1116(2) and 1117(2) set the *dies a quo* at the latest at the date of knowledge of the breach and the date of knowledge of the loss, the time during which claims could be brought under Annex 14-C would be indefinite. As the Respondent has convincingly explained in its closing, Paragraph 3 therefore limits that time and establishes certainty in this regard.[133]

159. The parties have also discussed the significance of Footnote 20 and its "*for greater certainty*" language. The Respondent has submitted that the terms "*for greater certainty*" confirm the intertemporal rule, and that an extension of the substantive provisions of NAFTA listed in the footnote would be inconsistent with the confirmatory nature of the terms "*for greater certainty*", as commonly used in treaties signed by the United States.[134] The Claimants, to the contrary, submit that Footnote 20 confirms the meaning of Paragraph 1 of Annex 14-C as extending the operative effect of the listed NAFTA provisions, giving it the effect of a sunset clause.[135]

160. Prof. Schreuer has in this respect opined that:[136]

> *76. The drafters of USMCA confirmed that Annex 14-C chooses NAFTA's substantive obligations as the applicable law to Annex 14-C claims through footnote 20. They introduced that footnote with the words '[f]or greater certainty', thereby indicating that the choice was already contained in paragraph 1 of Annex 14-C.*
>
> […]
>
> *78. Reduced to its essentials, footnote 20 confirms that the substantive protections for investments under NAFTA (Chapter 11, Section A) apply to a dispute concerning a legacy investment under Annex 14-C.*

[132] Rejoinder on Preliminary Objection, page 67, para. 121.
[133] Transcript Day 3, page 429.
[134] Transcript Day 1, pages 67-69.
[135] Transcript Day 3, page 456.
[136] Exhibit CER-1, Prof. Schreuer Opinion.

> *79. In the present case, Claimants have accepted the clause on applicable law in paragraph 1 of Annex 14-C, as confirmed by footnote 20, by bringing their Request for Arbitration under the ICSID Convention and Annex 14-C. It follows that there is an agreement between the parties that the substantive protections for investments under NAFTA (Chapter 11, Section A) apply to the present dispute.*
>
> *80. The Respondent as well as its experts, agree that Section B of Chapter 11 of NAFTA applies, but contest the applicability of Section A, even though Section B contains a choice of law provision to that effect. In addition, they argue that the application of Section A of Chapter 11 of NAFTA to legacy investments during the transition period would lead to overlap and confusion through the application of two distinct sets of investment obligations to the same investments. This concern is unwarranted. Footnote 20 to Annex 14-C contains a clear choice of law clause that avoids this alleged dilemma. It states that Chapter 11 (Section A) of NAFTA 1994 applies to claims under Annex 14-C of USMCA concerning legacy investments. A clear choice of one set of rules operates to the exclusion of a competing set of rules. Hence there is no overlap.*

161. The Arbitral Tribunal has a number of problems with these submissions. First, as said above, the Treaty parties did not in Paragraph 1 agree that Section A would apply as a choice-of-law provision to events having occurred after termination of NAFTA. Rather, they made an offer to arbitrate claims alleging breaches of Section A. While it is correct that Section A would apply to any such claim, jurisdiction still supposes that the claim be based on facts capable of constituting such a breach. Second, it is evident from the respective texts of Paragraph 1 and footnote 20 that their scope is different: Paragraph 1 identifies the NAFTA provisions a breach of which is encompassed by the offer to arbitrate, while footnote 20 has a different role. It indicates the much broader set of substantive rules that may be applied in the context of an arbitration under Section B.

162. The "*for greater certainty*" language included in footnote 20 can therefore not be understood to show an agreement to extend Section A that would purportedly result from Paragraph 1. The Respondent has submitted in this respect that in the U.S. treaty practice, the terms "*for greater certainty*" have a confirmatory value and are used to confirm the state of the law.[137] The Arbitral Tribunal agrees. The ordinary meaning of these terms is to confirm the existence of a given rule. These terms therefore indicate that the provision in which they are included does not introduce new obligations; therefore, footnote 20 cannot be construed as an agreement to extend Section A. It also does not confirm any such agreement in Paragraph 1, which has a different scope and contains no language extending Section A beyond 30 June 2020.

163. From a more general perspective, it is in the Arbitral Tribunal's view extremely unlikely that an agreement to extend for three years not only Section A of Chapter 11 but also article 1503(2), Chapter 14 (referred to in article 1503(2)) and Chapter 17 (referred to in article

[137] Transcript Day 1, pages 67-68, 21:11; Memorial on Preliminary Objection, footnote 43.

1110-7), would have been done by implication in obscure terms and not explicitly in Annex 14-C or in the final provisions of USMCA. It is in this respect interesting to note that when the USMCA parties decided to extend Chapter 19 of NAFTA (Review and Dispute Settlement in Antidumping), they did so in express terms in Article 34.1.4 of USMCA. Although the lack of explicit language is not dispositive *per se*, it indicates the implausibility of Claimants' interpretation of the treaty.

164. The unlikeliness of such an implied extension of NAFTA's substantive provisions is even more evident in light of the overlap that would exist between these extended NAFTA provisions (as invocable in the context of a claim under Paragraph 1) and the corresponding provisions of USMCA (Chapters 17 (financial services), 20 (intellectual property) and 21 (competition)), and the likely differences between the extended NAFTA provisions and USMCA. It is noteworthy that article 1110-7 of NAFTA refers generally to Chapter 17 on intellectual property (insofar as the issuance of compulsory licenses granted in relation to intellectual property rights or the revocation, limitation or creation of intellectual property rights is concerned), and that – under the Claimant's interpretation – one would have to conclude that Chapter 17 would be extended in its entirety for its relevant provisions to apply to a claim referring to such matters under 1110-7. The same observation applies, as the behavior of state enterprises exercising regulatory, administrative or governmental authority is concerned, to Chapter 14 on financial services, which is referred to in a generic way in article 1503(2).

165. Although a claim under Annex 14-C could not be directly based on Chapters 14 or 17, a breach of any provision of these two chapters would fall under its scope if contrary to the obligations established in Article 1110 (concerning the issuance of compulsory licenses or intellectual property rights) or article 1502(3) (concerning the behavior of state enterprises exercising regulatory, administrative or governmental authority). Because the substantive provisions of USMCA apply to legacy investments, the resulting situation would be that the USMCA parties would be bound until 30 June 2023 by different - and potentially conflicting - sets of substantive norms on matters as sensitive as competition, intellectual property or financial services. There is no indication that such was the parties' intention.

166. Footnote 21 also does not assist the Claimants' case. According to the Claimants, it demonstrates that the parties agreed that NAFTA Chapter 11 would continue to apply prospectively because there could otherwise not be an overlap between Annex 14-C and Annex 14-E (which applies prospectively to holders of governmental contracts in the energy, telecoms and infrastructures sector).[138] However, the Respondent offers two possible explanations for footnote 21.

167. The first is that footnote 21 establishes clarity in case of a continuous or composite breach (in the sense of Articles 14 and 15 of the ILC Articles).[139] The Claimants have in this respect

[138] Observations on Bifurcation, paras. 29-32; Counter-Memorial on Preliminary Objection, para. 66; Rejoinder on Preliminary Objection, para. 129.
[139] Reply on Bifurcation, para. 31.

pointed to what they view as the absurdity of an outcome preventing a claimant having suffered a continuous or composite breach from recovering the largest part of its loss when it was suffered under NAFTA.[140] It is true that a NAFTA tribunal would in case of a continuous or composite breach have no jurisdiction to assess the parts of that breach occurring after the NAFTA termination; equally, a USMCA tribunal would not have jurisdiction to assess facts occurring before USMCA's entry into force. However, as there may be uncertainty as to what part of a loss is attributable to facts occurring before or after NAFTA's expiration, the parties may have wanted to address the uncertainty through footnote 21. In the case of a composite breach, there may also be uncertainty as to when the action or omission occurred which, taken with the other actions or omissions, constitutes the wrongful act. The parties may have wanted to eliminate this by including footnote 21. Finally, because of the temporal limitations that would apply to the respective jurisdictions of NAFTA and USMCA tribunals in case of continuous or composite breaches, there would be the risk of parallel arbitrations based on both treaties. Footnote 21 does therefore not necessarily presuppose that Chapter 11 remains in force after 30 June 2020: the parties may have wanted to avoid the uncertainties described above and the potential parallel arbitrations.

168. The reason why a similar provision has not been included in Annex 14-D remains unclear. The Claimants explained that it is likely due to the limited offer to arbitrate and the requirement to exhaust local remedies in Annex 14-D.[141] However, that apparent defect of the Treaty does not assist one party more than the other since, whatever interpretation of Annex 14-C prevails, a provision like footnote 21 would also have made sense for Annex 14-D.

169. The second possible explanation advanced by the Respondent is that footnote 21 applies to categories of investors rather than claims.[142] In other words, its purpose would simply be to exclude those investors who qualify under the favorable regime established by Annex 14-E from benefiting as well from Annex 14-C. That may well have been the result of a bargain between the United States (which sought to protect its investors in the Mexican governmental sector) and Mexico. That, however, is no more than speculation.

170. At any rate, the Tribunal sees no reason to interpret footnote 21 as the Claimants propose, showing an intent to extend NAFTA's substantive provisions in a way that is inconsistent with the ordinary meaning of Annex 14-C and other USMCA provisions.

171. The ordinary meaning to be given to the terms of the treaty does therefore not support the Claimants' interpretation. Article 31 VCLT then mandates Annex 14-C to be interpreted in good faith. The Claimants allege that Respondent's interpretation would not be in good faith because it is inconsistent with the United States' understanding of Annex 14-C at the time

[140] Transcript Day 3, page 484.
[141] Transcript Day 1, page 212.
[142] Reply on Preliminary Objection, para. 58.

of negotiating the Treaty[143]. The argument is akin to one of estoppel. It has several flaws.

172. First, the argument is premised on the assumption that the United States' intention in negotiating the Treaty was to introduce a clause operating as a sunset clause through Annex 14-C. However, as discussed above, there is no persuasive evidence showing that such was indeed the case. Second, the agreed text of a treaty may not reflect the intention of one of the USMCA parties at some point during its negotiations. In that case, there can be no bad faith on the part of the United States in interpreting the treaty as it was ultimately agreed. Third, and most importantly, the Claimants have cited no case law in which the alleged lack of good faith in a treaty interpretation advanced by a party would lead a tribunal to disregard the ordinary meaning of the treaty's terms. The Claimants have quoted Prof. Gardiner's book where he says that "*good faith requires that no party has its fingers crossed behind its back*",[144] but Prof. Gardiner says this to explain that "*differences in interpretation based on one party's individual concerns could only flow from* […] *established mechanisms of reservations and interpretive statements (in either case, where permitted or accepted)*". As Prof. Gardiner explains,[145] the concept of good faith is rather applied to prevent an interpretation that is abusive, unreasonable or that deprives the treaty of its meaning. However, the Respondent's interpretation of Annex 14-C is neither abusive nor unreasonable, and it does not deprive the treaty of its meaning.

173. Article 31(1) further requires the terms to be interpreted "*in light of the object and purpose*" of the treaty. Two general comments need to be made here. First, the analysis of the object and purpose of the treaty does not allow to override its text. As noted by the US-Iran Claims Tribunal, "*under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text*".[146] Second, the treaty may not have a singular object and purpose, so that investigating the object and purpose may in some cases not allow to shed light on the text.[147]

174. The object and purpose must be assessed from the treaty as a whole; the Protocol, the Preamble, the Initial Provisions and Definitions as well as Chapter 14 are obvious sources of reference for making this assessment. None of these, indicate that the object and purpose of UMSCA would be inconsistent with the above interpretation of Annex 14-C. To the contrary, as stated in Article 1 of the Protocol, the object of USMCA was to replace NAFTA, which is consistent the Tribunal's conclusion that NAFTA was not extended save in the narrow exceptions clearly provided by the treaty. As to the Preamble, the seventh paragraph sets out the treaty parties' desire to establish a "*clear, transparent and predictable*" legal framework to support the expansion of trade and investment, an objective which would not

[143] Transcript Day 1, pages 222-223.
[144] Transcript Day 1, page 166; Exhibit CL-163, page 31.
[145] Exhibit CL-163, pages 168-180.
[146] *USA, Federal Reserve Bank v Iran, Bank Markazi*, Case A28, (2000-02) 36 Iran-US Claims Tribunal Reports 5, at 22, para 58.
[147] As noted by the WTO Appellate Body, "*most treaties do not have a single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes*" (*US-Import Prohibition of Certain Schrimp and Schrimp Products*, WT/DS58/AB/R (1998), par. 17).

be served by a broad interpretation of Annex 14-C leading to an implicit and unclear extension of Section A. Finally, consistent with the above, Articles 14.2.3 and 14.2.4 confirm that Annex 14-C operates as an exception to the principle of non-retroactivity of the treaty as far as the offer to arbitrate is concerned. The Claimants have in this respect averred that "*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*".[148] However, extending the offer to arbitrate past the treaty termination is an exception to the principle of non-retroactivity and the language of Articles 14.2.3 and 14.2.4 confirm that the scope of Annex 14-C is to derogate to such principle of non-retroactivity as far as the consent to arbitrate is concerned. Overall, the Tribunal does not find in the Treaty any indication that interpreting Annex 14-C to extend Section A of NAFTA beyond 30 June 2020 would be in harmony with the object and purpose of USMCA.

175. Finally, Article 31(3)(c) VCLT mandates taking into account any relevant rule of international law applicable between the parties. Article 70 VCLT and Article 13 of the State Responsibility Articles are such relevant rules applicable to the consequences of a treaty termination. According to Article 70, unless the treaty provides otherwise (which is not the case, as indicated above), termination of a treaty releases the parties from any obligation to perform it, and pursuant to Article 13, in the absence of any such obligation, there is no breach. The consequence is that the revocation of the 2019 Permit on 21 January 2021 is not capable of constituting a breach for purposes of the Tribunal's jurisdiction under Annex 14-C. The *Ambatielos* case discussed by Prof. Ascensio[149] confirms the relevance of the customary international law rules codified by these provisions as applied to a comparable case. These relevant rules require that the terms "*breach of an obligation*" apply to events having occurred while a treaty is in force.

176. At the hearing, the Arbitral Tribunal asked the Claimants whether any other treaty, signed or not by the Respondent, had a sunset clause drafted in implied terms similar to Annex 14-C. The Claimants pointed in response[150] to the 2012 U.S. Model BIT, the DR-CAFTA side-letter and to the U.S.- Morocco FTA.[151] However, none of these examples assist the Claimants. As to the U.S. Model BIT, its language clearly provides that, for 10 years after termination, "*all other articles shall continue to apply to covered investments*…". And both the DR-CAFTA side-letter and the U.S.-Morocco FTA provide that, for a period of 10 years, the relevant substantive provisions of the treatises "*shall not be suspended*". These treaties therefore include clear language to the effect that the substantive provisions shall "*continue to apply*" or "*shall not be suspended*". The absence of such language in USMCA and the fact that no other treaty signed by the United States ever included a sunset clause in an implicit way suggest that the parties did not intend to introduce a provision having the effects of a sunset clause in Annex 14-C.

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[148] Rejoinder, § 163.
[149] Prof. Ascensio Expert Report, para. 14.
[150] Transcript Day 3, pages 495-496.
[151] Exhibits CL-048, CL-049, RL-017.

177. It follows from the foregoing that the ordinary meaning of Annex 14-C is that consent to arbitrate was established until 30 June 2023 for facts capable of constituting a breach of NAFTA while NAFTA was in force. This interpretation does not amount to adding language to Annex 14-C; it is rather the result of an interpretive exercise of the Annex.

2. Article 32 VCLT

178. Pursuant to Article 32 VCLT, recourse may be had to supplementary means of interpretation either to confirm the meaning resulting from Article 31 or to determine it when interpretation according to Article 31 leaves it ambiguous, obscure or leads to a result that is manifestly absurd or unreasonable.

179. The Tribunal considers that the meaning resulting from its Article 31 analysis is not ambiguous, obscure, absurd, or unreasonable. Rather, the general rule leads to the conclusion that the USMCA parties intended through Paragraph 1 of Annex 14-C to ensure that, for a period limited to three years, holders of legacy investments could arbitrate under Section A of Chapter 11 claims resulting from breaches of Chapter 11 that occurred prior to the termination of NAFTA, which they would have been unable to do in the absence of Annex 14-C.

180. The fact that the general rule of interpretation leads to a clear conclusion does however not preclude the Arbitral Tribunal from applying Article 32. As explained by Prof. Gardiner at the hearing, a confirmatory investigation under Article 32 may in fact lead the Tribunal to reconsider the outcome obtained on the basis of Article 31 "[i]*f it leads* […] *to suspect that there may be an alternative possibility"*.[152]

181. Article 32 does not define what the supplementary means of interpretation are, but it specifies that they include "*preparatory work*" and "*the circumstances of its conclusion*". There is no definition of "*preparatory work*" nor of the "*circumstances of conclusion*". Three observations need to be made here.

182. First, the concept of "*preparatory work*" refers to material pre-dating the conclusion of the treaty. Material that postdates the treaty may be relevant to assess the circumstances of its conclusion, but it cannot be part of the *travaux préparatoires*.

183. Second, in order to be relevant to an assessment of the ordinary meaning of the treaty, the supplementary means of interpretation need to provide an indication as to what the common intention of the parties may have been.[153] As a consequence, material that is internal to the U.S. negotiation team and that has not at least been shared with the other parties will have limited value as to what the intention of the other parties may have been.

184. That last point is critical to the assessment of the Claimants' submissions on Article 32, as

[152] Transcript Day 2, page 283, 07:08.
[153] Transcript Day 1, page 47, 10:17.

many of the documents on which they rely, in particular Exhibits C-143 and C-221, are U.S. internal documents which have not been shared with the other USMCA parties. The Claimants have in this regard submitted that other tribunals, such as in the *Churchill Mining* case, have relied on internal notes of one of the treaty parties.[154] The Respondent, however, has correctly pointed out that there is no other example in the record of a tribunal having relied on internal notes as supplementary means of interpretation and that, in the *Churchill Mining* case, the Tribunal held that these internal notes had been taken during the negotiations and could therefore be relevant to assessing the position of both treaty parties before the conclusion of the treaty.[155] In the present case, however, save for Exhibit R-140, which will be discussed further, none of the internal documents relied upon by the Claimants is susceptible to reflect the content of the discussions that took place between the USMCA parties before the Treaty was concluded. Rather, these documents reflect the *post hoc* views of certain U.S. officials as to what they believed the meaning of Annex 14-C to be.

185. Finally, as clarified by Prof. Gardiner at the hearing, the supplementary means of interpretation may only lead to an outcome different from that obtained based on the general rule if it leads to an alternative interpretation which better reflects the intention of the parties.[156]

186. On that basis, the Tribunal first needs to assess whether the material that was exchanged during the negotiations is of significance to the interpretive exercise.

187. The Claimants have relied on language contained in the Produced Documents referring to "*grandfathering*",[157] [redacted],[158] [redacted],[159] [redacted][160] or "*transition*"[161] to conclude that these references would point to an intention of the USMCA parties to extend Section A. The Arbitral Tribunal disagrees.

188. Communications referring to the "*grandfathering*" of ISDS do not provide evidence that the parties intended to extend NAFTA's substantive provisions past the treaty termination date. The terms "*grandfathering*" or "*transition*", if unqualified, refer to a transitory provision maintaining the benefit of certain clauses of a treaty, but in and by themselves they say nothing more. The use of these terms may therefore simply refer to the fact that ISDS based on Section B would continue to be available past 30 June 2020 for claims involving breaches that occurred while NAFTA was in force, which is what Annex 14-C in fact provides. The same observation applies to those documents referring to [redacted] Language relating to [redacted][162]

[154] Rejoinder on preliminary objection, para. 18; Exhibit CL-34.
[155] Transcript Day 1, page 99
[156] Transcript Day 2, page 283.
[157] See for instance Exhibits C-112, C-151, C-164, C-166, C-169, C-175, C-185, C-195, C-200, C-204, C-205, C-206, C-213, R-51, R-102, R-119, R-129, R-140, R-148.
[158] See for instance Exhibit C-182.
[159] See for instance Exhibits C-160, R-140, R-150.
[160] See for instance Exhibits C-166, C-185, C-187, C-190.
[161] See for instance Exhibits C-164, C-165, C-167, C-168, C-169, C-170, C-171, R-41.
[162] See for instance Exhibit R-157.

[redacted] Equally, the reference made to the [redacted][163][redacted]. Overall, all these terms and expressions are imprecise and susceptible of different meanings, which warrants great caution in drawing from them the conclusion that the treaty does not say what it says.

189. The Claimants have also submitted that the "*opt-in/opt-out proposal*" to ISDS under USMCA framed by USTR personnel in late 2017 is further evidence of the United States' intention to extend NAFTA substantive standards for three years past its termination.[164] [redacted][165] According to the Claimants, the reference to access to arbitration being "*mandatory*" would only make sense if the treaty were interpreted as meaning that for events post-dating 30 June 2020, there would be an op-in/opt-out access to arbitration, while access to arbitration would remain mandatory for past events.[166] Several observations need to be made here. First, there is no such language in the opt-in/opt-out proposal. Rather, [redacted].[167] The mechanism that seems to have been contemplated would therefore have been an optional access to arbitration concerning investments acquired after the entry into force of USMCA, as opposed to a "*mandatory*" consent to arbitration for legacy investments. In other words, the "mandatory" offer to arbitrate legacy claims was defined in contrast with the offer to arbitrate claims relating to non-legacy investments. However, the opt-in/out-out proposal was not pursued, and USMCA only provides for arbitration between the U.S. and Mexico. In addition, the fact that the offer to arbitrate legacy claims was characterized as "*mandatory*" does not imply that it should apply to events post-dating the expiry of NAFTA. Finally, the evidence relied upon by the Claimants contains no reference to Section A being extended beyond the expiry of NAFTA, and the deductions drawn by the Claimants therefrom are largely speculative. Second, the task of the Arbitral Tribunal is to interpret the treaty as it exists, not to interpret proposed clauses that were ultimately not adopted. Third, even assuming that the Claimants' submissions accurately reflect what the intention of the United States in 2017 may have been, they say nothing on what the intention of the three parties was at the time of the conclusion of the treaty in November 2018.

190. Finally, the reliance by the Claimants on Mr. Mandell's views should also be treated with

[163] See for instance Exhibits C-187, C-190, R-109.
[164] See for instance Exhibit C-180.
[165] See for instance Exhibits C-190, R-109, C-183.
[166] See footnote 63 above.
[167] [redacted] (Exhibit C-185).

caution. First, the only document authored by Mr. Mandell in which clear reference is made to the fact that Section A would continue to apply after the termination of NAFTA postdates the USMCA.[168] Second, it cannot be excluded that Mr. Mandell misunderstood the legal implications of the language of Paragraph 1 of Annex 14-C limiting the offer to arbitrate to a breach of NAFTA.

191. [redacted] which the Arbitral Tribunal will now discuss.

192. Exhibit R-119 is [redacted][169] The Claimants aver that the reference to "*legal rules*" is a reference to the NAFTA substantive provisions.[170] The Tribunal does not find this document to be conclusive for two reasons. The first is that the distinction between 'rules' and 'procedures' is ambiguous; for example, the offer to arbitrate at Article 1116 may well be considered as referring to ISDS "*procedures*", while the provisions relating to corporate control (Article 1117) or to the enforcement of awards (Article 1136), which are also part of Section B, may be regarded as "*legal rules*". The second is that this is an internal U.S. document that has not been shared with the other USMCA parties. Even assuming that [redacted], there is no evidence that this is what the three Treaty parties intended to achieve when they agreed on Annex 14-C in November 2018.

193. [redacted] is an ITAC report summary referring to the fact that "*the 3-year window is short compared to the 10 year period typically provided under terminated BITs*", which seems to suggest the understanding of the ITAC members was that they were discussing a sunset clause. However, apart the fact that the ITAC is a consultative group of experts that was not part of the negotiating team, this document has not been shared with the other State parties and says nothing about their intention.

194. The Claimants have also relied on Exhibits R-140, C-221 and C-143.

195. Exhibit R-140 is [redacted][171]. The document says [redacted]

[168] Exhibit C-221.
[169] [redacted]
[170] Transcript Day 1, pages 158-159.
[171] [redacted] see also C-205 and C-206.

[redacted] The Claimants have argued that [redacted][172] The Arbitral Tribunal is not prepared to draw such a conclusion. First, as said above, the terms [redacted] and [redacted] are ambiguous, and it is unclear whether reference to [redacted] as opposed to [redacted] is a reference to Section A as sustained by the Claimants. Second, [redacted]. Third, assuming that such draft was the text of Annex 14-C as it was ultimately adopted, Canada may well, in the final weeks preceding signature of the treaty, have revisited its legal analysis of its legal meaning and come to the conclusion that Annex 14-C did not imply an extension of the substantive provisions of NAFTA. What the document certainly shows is that, [redacted] and there is no evidence that its position subsequently changed.[173]

196. Exhibits C-221 and C-143 [redacted] C-221 is an answer by Mr. Mandell to a query by Mr. Gharbieh.[174] At the time, Mr. Mandell was in private practice and no longer in the government. As such, this document can be given no evidentiary value. C-143 is [redacted] and it therefore also has no evidentiary value to assess the common intention of the USCMA parties in November 2018.

197. In sum, the Tribunal is of the view that the Produced Documents do not provide any evidence that the USMCA parties may have had the common intention, in agreeing on Annex 14-C, to extend the substantive provisions of Chapter 11 until June 2023. Rather, the evidence points to the contrary conclusion. In particular, the United States proposed in August of 2018 to delete the words "*alleging breach of an obligation*" from Paragraph 1 of the draft of Annex 14-C. This may presumably have been done with the intention of expanding the offer to arbitrate in Annex 14-C. However, that deletion appears to have been refused and the language referring to a breach of the NAFTA obligations was maintained. If any conclusion can be drawn from that episode, it is that the other USMCA parties insisted to maintain the limitation of the offer to arbitrate to breaches of Chapter 11 while it was into force. This seems to be confirmed by Exhibit C-114, which is an internal USTR email exchange dated 28 November 2018 (two days before the signature of the treaty), to which are attached "*Talking Points on Scrub Items in USMCA*". These "*Talking points*" mention the negotiating teams' understanding that "*Annex 14-C (the grandfather provision) allows investors to bring*

[172] Transcript Day 1, pages 160-163.

[173] See in this respect R-138, [redacted] Exhibit C-143,

[174] Mr. Khalil Gharbieh was then USTR Director for Investment.

ISDS claims with respect to legacy investments where the alleged breach took place before entry into force of the USMCA". It is reasonable to infer from that language that the author of the document understood that the offer to arbitrate in Annex 14-C applied to breaches having taken place before the entry onto force of USMCA, not after. Had the author of this note understood that Annex14-C allowed arbitration under Section A for facts postdating the expiry of NAFTA, he would presumably have drafted his comment by saying that 'Annex 14-C (the grandfather provision) allows investors to bring ISDS claims with respect to legacy investments during the transition period', or an equivalent formula. Rather, the specific indication in the note that arbitration is allowed "*where the alleged breach took place before entry into force of the USMCA"* indicates that there was no intention to extend the offer to arbitrate where the alleged breach took place after the entry into force of USCMA.

198. Based on the foregoing, the Arbitral Tribunal concludes that an investigation based on supplementary rules of interpretation does not allow to depart from the conclusions drawn on the basis of article 31 VCLT, which is that the offer to arbitrate contained in Annex 14-C only applies to events pre-dating the 1st of July 2020.

B. The Applicable Law Theory

199. The second legal theory advanced by the Claimants, and supported by Prof. Schreuer, is that Annex 14-C constitutes a choice of law agreement whereby the parties to this arbitration agreed to apply NAFTA, even if terminated, to Claimants' claims. That theory would therefore no longer rest on the argument that the treaty parties agreed to extend Section A, but rather on the idea that the Respondent (by way of its offer to arbitrate in Annex 14-C) and the Claimants (by way of their acceptance of that offer in the RFA) agreed to submit the Claimants' claims to NAFTA, even if NAFTA had already expired.

200. Prof. Schreuer submits in this respect that "*by virtue of the reference in Annex14-C to Section B of NAFTA Chapter 11 and its Article 1131, the substantive protections of NAFTA and applicable rules of international law are to be applied in investment arbitration independently of NAFTA's termination*".[175]

201. The Claimants, in support of this theory, have in particular relied on the *CSOB* decision on jurisdiction dated 24 May 1999 to sustain that parties can agree to adopt a treaty that is not in force as their applicable law.[176] It is undisputed that, in general, parties can agree to submit to a treaty that is not into force or that has expired. The Claimants' reliance of *CSOB* is however misplaced. In *CSOB*, the investor and the State had concluded a contract (the consolidation agreement) referring to a treaty that was not yet in force as the law applicable to certain existing situations and identified obligations undertaken by the State.[177] It was therefore clear from the consolidation agreement that their intention was to adopt the treaty provisions to apply to future disputes that would arise from that contract. In the instant case,

[175] Exhibit CER-2, Prof. Schreuer's Second Legal Opinion.
[176] Exhibit CL-124; Transcript Day 1, pages190-191.
[177] Exhibit CL-124, para. 52.

to the contrary, the purported arbitration agreement has been concluded by way of an acceptance by the Claimants of a general offer to arbitrate contained in a treaty. While in the *CSOB* case any possible breach of the contract would necessarily occur in the future, in the instant case the offer to arbitrate embedded in Annex 14-C referred either to events that may have occurred before Annex 14-C was concluded in November 2018, or after that date until 30 June 2020.

202. From a general perspective, the Claimants' applicable law theory cannot lead to a different conclusion that that reached by the Tribunal based on an interpretation of Annex 14-C. This is because the agreement to arbitrate resulting from the acceptance of an offer contained in a treaty cannot have a broader scope than the offer to arbitrate itself. If the USMCA parties did not agree to extend Section A beyond 30 June 2020, the Claimants cannot have agreed by way of the Request for Arbitration to arbitrate claims based on events post-dating 30 June 2020. At the end of the day, Prof. Schreuer's applicable law theory necessarily supposes that the USMCA parties agreed to extend Section A. As discussed before, that is not the case.

203. The Claimants rely on Article 42(1) of the ICSID Convention, according to which the Tribunal "*shall decide a dispute in accordance with such rules of law as may be agreed by the parties"* to submit that *"in deciding claims brought under Annex 14-C, the Tribunal must apply the law chosen by the parties to govern such claims*", which is Section A of NAFTA.[178] There is no doubt that section A of NAFTA is applicable to a claim based on Paragraph 1 of Annex 14-C. This, however, cannot take away that jurisdiction based on Paragraph 1 is for breach of Section A. The Claimants, therefore, still need in order to establish jurisdiction to allege facts which, *pro tem*, fall under the scope of the offer to arbitrate, *i.e.,* are capable of constituting a breach of Section A.[179] Whether that is so is a matter that is itself submitted to the law applicable to claims under Section A, which is, in accordance with article 1131, NAFTA itself and "*applicable rules of international law*". Whether the revocation of the 2019 permit on 20 January 2021 can constitute a breach of Section A is therefore a matter that has to be assessed in accordance with applicable rules of international law. Article 70 VCLT and Article 13 of the State Responsibility Articles are part of these rules and provide that termination of a treaty releases the parties from any obligation to perform it and that, in absence of an obligation, there can be no breach.

204. Of course, the Treaty parties could have derogated to these rules and agreed to extend Section A for three years after 30 June 2020, but as said above there is no indication that they intended to do so in Annex 14-C. The offer to arbitrate contained therein is not a broad offer to arbitrate any claim based on events having occurred during the three-year period identified in Paragraph 3, but it is limited to those of such events constituting a breach of Section A. Therefore, in application of the rules of law to which the offer to arbitrate is submitted, this Tribunal has no jurisdiction on the permit revocation.

205. The Claimants submit that "*the applicable law determines the existence and scope of the*

[178] Rejoinder, § 85.
[179] *Oil Platforms*, Exhibit CL-189, p. 810; Transcript Day 2, page 391, 17:23.

obligations at issue".[180] The Tribunal agrees. In this case, as said above, the applicable law leads to the conclusion that, at the date of the permit revocation, the Respondent was released from its obligations under Section A and that such fact can therefore not constitute a breach falling under the offer to arbitrate in Annex 14-C. As already explained, the concept of party autonomy does not assist the Claimants because their acceptance of the offer to arbitrate contained in Annex 14-C is subject to the limitations contained in that same offer.

206. Prof. Scheuer considers in this respect that because "*Annex 14-C objectively provides for the application of Section A of Chapter 11*", at the time of the Request for Arbitration "*these rules were already in force*".[181] The argument is however circular. In fact, the offer to arbitrate contained in Annex 14-C, rather than having been made "objectively" – whatever that characterization may mean –, was made for alleged breaches of Section A, which implies that it is only valid insofar as such a breach is alleged. In absence of an extension of Section A past 30 June 2020, that cannot be the case of the 2019 Permit revocation.

207. In sum, the situation in this case is not conceptually different than that which led the *Feldman* tribunal to decline jurisdiction: for the same reasons why a treaty-based tribunal has no jurisdiction on breaches pre-dating the treaty, it equally lacks jurisdiction on breaches post-dating its termination. The Claimants have suggested that *Feldman* would be distinguishable from the present case. It is indeed different in that *Feldman* related to breaches predating a treaty while this case relates to breaches postdating its expiration. However, in both cases, the Tribunal's lack of jurisdiction is a consequence of the intertemporal international law rule established by Article 28 VCLT. In the same way as in *Feldman*, where the claimants relied on NAFTA as the applicable law to preexisting breaches, in this case the Claimants rely on NAFTA, through Annex 14-C, to apply to posterior breaches. Because Annex 14-C only applies prospectively in respect of the offer to arbitrate and of Section B of NAFTA, and not in respect of the substantive provisions of Section A, in both cases, the treaty was not applicable at the time of the breach and the tribunal consequently lacks jurisdiction.

C. Unclean hands Doctrine and Principle of Consistency

208. Finally, the Claimants have argued that, because the Respondent induced them to withdraw their earlier NAFTA claim in exchange for a promise to grant a new permit to then revoke that new permit when the Claimants could no longer have recourse to NAFTA, allowing the Respondent to now object to jurisdiction would amount to allowing it to reap advantage from its own wrong.[182]

209. The Claimants have confirmed that they do not maintain that the United States terminated NAFTA in bad faith. The alleged wrongful act is rather the fact of having induced the Claimants to withdraw the 2016 NAFTA claims[183]. The difficulty is however that the Claimants are not asking the Tribunal to find that the U.S. breached its obligations under

[180] Rejoinder, § 190.
[181] Transcript Day 2, p. 376, 02:09.
[182] Rejoinder on Preliminary Objection, para. 188
[183] Rejoinder on Preliminary Objection, para. 203.

NAFTA in 2016 (which claim would in any event be time-barred), nor do they submit that the alleged breach supporting their claim would be a continuous or composite breach having started in 2016.

210. Further, if the argument is one of estoppel, it is difficult to understand why the actions by the Trump administration in 2016 caused the Claimants to lose their ability to now initiate arbitration proceedings. The reason why the Claimants are unable to make a NAFTA claim for the revocation of the 2019 Permit is simply that the revocation postdates the termination of NAFTA.

VII. COSTS

A. Parties' costs

211. Each party seeks compensation for the entirety of the costs sustained in this phase of the arbitration.

212. The Claimants seek USD 3,092,942.53 in representation costs, as well as USD 138,434.84 as expert's fees and expenses and USD 12,879.24 as other expenses.[184]

213. The Respondent has calculated the cost to the U.S. government of attorney and paralegal time devoted to the TC Energy arbitration by multiplying the sum of each individual's salary and benefits for a given year by the estimated percentage of time that the individual spent on the arbitration in that year. The resulting attorney and paralegal costs is a total of USD $1,058,281.21. The Respondent also seeks $123,243.67 for expert services and travel.[185]

214. Each party also seeks the reimbursement of its share of the advance on costs paid to ICSID, *i.e.*, USD $500,000 for the Claimants and USD $500,000 for the Respondent. No interest is sought on the costs' claims.

B. Decision on costs

215. Article 61(1) of the ICSID Convention provides that:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

216. The Arbitral Tribunal considers both parties' costs to be reasonable in light of the complexity of the matter, the extensive documents production process as well as the

[184] Claimants' Statement of Costs, 7 June 2024.
[185] Respondent's Submission on Costs, 7 June 2024.

interests at stake. The Tribunal also considers that both parties acted efficiently and in a professional manner, so that there is no reason to reduce their entitlement to costs on these bases.

217. The Arbitral Tribunal considers the costs of the arbitration, as well as the parties' representation costs, should be apportioned based on the generally recognized costs-follow-the-event principle.

218. Accordingly, the Claimants having failed in their jurisdictional case, should reimburse the costs and expenses sustained by the Respondent, including their share of the advance on costs paid to ICSID, in the following amounts:

(a) The costs of the arbitration proceedings, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses:

(i) Arbitrators' Fees and Expenses:

Alexis Mourre:	USD $181,227.36
John R. Crook:	USD $75,625.00.
Henri C. Alvarez:	USD $85,983.31

(ii) Assistant to the Tribunal's Fees and Expenses

Valentine Chessa	USD $36,542.93

(iii)	ICSID Administrative Fees:	USD $136,000.
(iv)	Direct expenses (estimated):	USD $85,810.21.
Total:		**USD $601, 188.81**

The above costs have been paid out of the advances made by the parties in equal parts in the total amount of USD1,000,000.[186]

Claimants must pay Respondent the amount of **USD $300,594.41** for the expended portion of the Respondent's advances to ICSID.

(b) Respondent's fees, costs, and expenses: **USD $1,181,524.88**

[186] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID. The ICSID Secretariat will provide the parties with a detailed Final Financial Statement.

VIII. DISPOSITIVE SECTION

219. For the foregoing reasons, the Arbitral Tribunal:

- Declares that it has no jurisdiction over the Claimants' claims.

- Orders the Claimants to compensate the Respondents for their costs in an amount of USD $300,594.41 and USD $1,181,524.88.

[signed]

Henri C. Alvarez
Arbitrator
(Subject *to the attached dissenting opinion*)

Date: 12 July 2024

[signed]

John R. Crook
Arbitrator

Date: 12 July 2024

[signed]

Alexis Mourre
President of the Tribunal

Date: 12 July 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TC Energy Corporation and TransCanada Pipelines Limited

v.

United States of America

(ICSID Case No. ARB/21/63)

DISSENTING OPINION OF ARBITRATOR HENRI C. ALVAREZ, K.C.

Date: 12 July 2024

1. The majority of the Tribunal finds that the ordinary meaning of Annex 14-C is that consent to arbitration was established until 30 June 2023 only for facts capable of constituting a breach of NAFTA Chapter 11, Section A occurring before the termination of NAFTA. In the majority's view, this interpretation does not amount to adding language to create an additional condition for the submission of a claim with respect to a legacy investment under Annex 14-C.

2. I respectfully disagree.

3. In my view, the plain or ordinary language of Annex 14-C to the USMCA offers consent by the State Parties to arbitrate all legacy investment claims, subject only to four conditions. These are that:

a) the claim must be with respect to a legacy investment:
b) the claim alleges the breach of an obligation under NAFTA Chapter 11, section A;
c) the claim must be made under the procedure set out in NAFTA, Chapter 11 section B;
d) the claim must be brought within three years of NAFTA's termination.

4. In my view, where these conditions are met, Annex 14-C applies to all measures taken prior to the expiry of the three-year transition period after termination of NAFTA on 30 June 2020. In this case, the legacy investment claim submitted by the Claimants alleging a breach of an obligation under NAFTA Chapter 11, Section A on 20 January 2021 fulfills the only applicable conditions under USMCA Annex 14-C.

5. A legacy investment is defined in Annex 14-C 6 as an investment of an investor made during the period that NAFTA was in force and continues in existence at the date of entry into force of the USMCA. Annex 14-C 1 provides consent with respect to legacy investments without any temporal limitation or requirement that the alleged breach of an obligation of Chapter 11, Section A must occur before the termination of NAFTA. Rather, in its plain meaning 14-C 1 relates to all legacy investments and all claims alleging a breach of an obligation under NAFTA, Chapter 11, section A. Annex 14-C refers to legacy investments, not legacy claims, measures or disputes. In addition to the existence of the investment at the date of the entry into force of the USMCA, the only other temporal limitation is that consent to the submission of a claim to arbitration with respect to a legacy investment expires on 1 July 2023.

6. Annex 14-C applies prospectively from the date of the entry into force of the USMCA, granting consent to arbitration for a period of three years from that date. There is no requirement that the relevant measure or alleged breach of an obligation have occurred before the termination of NAFTA. Had this been the intention of the Parties, it would have been simple to so provide expressly.

7. To fall within the scope of the consent under 14-C1, an investor must allege a breach of an obligation under NAFTA, Chapter 11, Section A. The Respondent maintains that an obligation can only arise from a treaty that is in force and since NAFTA was not in force during the three-year transition period in this case, it could not be bound by an obligation under NAFTA Chapter 11, Section A. I do not agree.

8. It was common ground that Annex 14-C provided for the continued application of certain parts of NAFTA, Chapter 11 until 30 June 2023, despite the termination of NAFTA; Annex 14-C created a limited exception to the general rule that Parties are released from obligations under a treaty after its termination. In these circumstances, it is not logical to find that the general rule prevails by separately considering the word "obligation" and imbuing it with the meaning ascribed by the majority. It is not disputed that NAFTA Chapter 11, Section A contains specific obligations. Grammatically, this provision must be read as a whole. In these circumstances, the ordinary meaning of Annex 14-C is that the Parties consented to arbitrate claims that alleged "breach of an obligation under Section A of Chapter 11 (Investment) of NAFTA 1994". Here, Annex 14-C 1 provides consent to the submission of a legacy investment claim alleging a breach of an obligation under NAFTA Chapter 11 A, in accordance with Chapter 11, Section B. Annex 14-C 3 confirms that this consent expires three years after the termination of NAFTA.

9. In my view, the natural meaning of Annex 14-C is that the Parties agreed to arbitrate claims alleging breaches of obligations under NAFTA Chapter 11, Section A for a period of three years after the termination of NAFTA. Therefore, unless the text otherwise expressly provides, for the purposes of Annex 14-C, Chapter11, Section A must remain in force. Again, Annex 14-C 1 does not limit its application to alleged breaches that occurred prior to the termination of NAFTA. Rather, it provides consent to arbitrate claims alleging a breach of an obligation of Section A of Chapter 11 with respect to legacy investments, without distinguishing between breaches that occurred before or after the termination of NAFTA. The Respondent seeks

to read in a temporal limitation and effectively add an additional condition in the language of the text. In my view, the Respondent's interpretation, which the majority accepts, makes the term "obligation" bear a meaning that is not justified in the context of Annex 14-C.

10. Therefore, in my view, Annex 14-C provides for the continued application of Sections B and A of NAFTA Chapter 11, both of which are required to determine a claim alleging a breach of Section A with respect to a legacy investment. Annex 14-C 1 plainly refers to both sections of Chapter 11 and provides for the application of each in the case of a claim with respect to a legacy investment. The application of Section A is confirmed by footnote 20. In addition, Article 1131, contained in Section B, provides for the application of NAFTA, whose most relevant provisions relating to investment disputes are contained in Chapter 11 A, and the applicable rules of international law. Further, the USMCA Protocol provides that the replacement of NAFTA is "without prejudice to those provisions set forth in the USMCA that refer to the provisions of NAFTA". Annex 14-C refers to both Sections A and B of Chapter 11 of NAFTA.

11. In my view, Annex 14-C is a transitional provision addressing the treatment of ongoing investments made under one treaty under a new, replacement treaty.[1] It provides for a short transition period of three years. I do not share the majority's view that the extension of the application of NAFTA Chapter 11, Section A for that period is implausible and extremely unlikely because footnote 20 would extend the application of a number of other chapters of NAFTA, including Chapters 14 (Financial Services), 15 (Competition Policy, Monopolies and State Enterprises) and Chapter 17 (Intellectual Property). A number of the chapters in question are referred to in NAFTA Chapter 11, certain contain exceptions applicable to the obligations in Chapter 11, Section A, and others contain definitions of terms that are used in Chapter 11, Section A. It seems logical that the Parties intended to ensure that those references, exceptions and definitions would continue to any apply to any claims under Annex 14-C made during the transition period.[2]

12. Further, the chapters listed in footnote 20 apply only to the extent they are relevant to a legacy investment claim alleging a breach of an obligation under Chapter 11, Section A. They do

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1 The Parties referred to Annex 14-C as providing a transition period on a number of occasions. See, for example: R-041 discussing ISDS and the transition from NAFTA 1.0 to NAFTA 2.0; C-021.

2 In this regard, see: NAFTA Chapter 11, Section A, Articles 1101(3), 1108(5), and 1110(7).

not apply as wholesale requirements going forward during the transition period and claims cannot be brought for a breach of the provisions of those chapters. In my view, the potential overlap of the provisions of the chapters listed in footnote 20 and the chapters or provisions of the USMCA relating to the same subject matter are limited. To the extent that they are relevant to a claim under Chapter 11 A, Annex 14-C provides that the NAFTA chapters listed in footnote 20 apply. Therefore, the provisions of the corresponding chapters in the USMCA do not apply to the claim and there is no conflict or inconsistency with respect to the rules applicable to the claim. Apart from the context of a legacy investment claim, the NAFTA chapters listed in Footnote 20 have no enduring effect. Therefore, to the extent there may be an inconsistency arising from additional obligations in the USMCA, these would not be relevant to claims under Annex 14-C, to which the provisions of NAFTA apply. To the extent that there may be some overlap more generally, outside the scope of a legacy investment claim, it is not unusual for two treaties to apply in situations that address the same subject matter. Here there was no evidence of any actual conflict between the relevant provisions of NAFTA and the USMCA and their potential effect.[3]

13. In my view, a number of the documents produced by the Respondent in the document disclosure process described in the Procedural Background section of the Award (the "Produced Documents"), as well as other documents in the record, are admissible pursuant to VCLT Article 32 to confirm the ordinary meaning of Annex 14-C. As outlined above, my view is that the ordinary meaning of Annex 14-C permits the arbitration of legacy investment claims alleging a breach of an obligation under NAFTA Chapter, Section 11 A in respect of facts occurring before the expiry of NAFTA or within the three-year transition period. Further, in the event the meaning of Annex 14-C as it relates to the date of the measure giving rise to a breach of an obligation of Chapter 11, Section A were to be considered ambiguous or obscure, these documents would be equally admissible.

14. In my view, the clearest example in the Produced Documents confirming the Parties' common understanding relating to the relevant issue here are those describing the Respondent's Annex 14-C proposal and discussions between the State Parties during the course of negotiations

[3] I note that in footnote 21 the Parties addressed the potential overlap between Annex 14-C 1 and Annex 14-E 2 and Mexico and the United States expressly excluded their consent to arbitrate in such a case.

relating to the application of the "rules and procedures" of NAFTA 1.0 to claims with respect to legacy investments. In this regard, it is important to bear in mind that Annex 14-C was proposed and progressed through negotiations by the Respondent.

15. [redacted]

16. [redacted]

17. In my view, the matters reported in this document demonstrate [redacted] It also reflects that [redacted] The alternative would be to [redacted]

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4 R-119, [redacted]

5 *Ibid.* [redacted] See C-195, [redacted]

18. My view of this document differs from that of the majority. In my view, [redacted] While Exbibit R-119 [redacted]

19. Then, [redacted]

[redacted]

20. My view of this document also differs from that of the majority. [redacted] Exhibit R-119. Further, [redacted]

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6 See Exhibit R-140, [redacted]

7 C-205, [redacted]

[redacted] The text under discussion at this late stage of the negotiations was very likely the text of Annex 14-C as it was finally adopted.

21. [redacted] The US-Canada Closing Term Sheet, dated 28 September 2018 recorded that "Canada agrees to 3-years grandfathering of ISDS."[9]

22. The Parties subsequently signed the USMCA without, it appears, further discussion of Annex 14-C.

23. The majority speculates that preceding the signature of the USMCA, Canada may have revisited its legal analysis of the meaning of Annex 14-C and come to the conclusion that it did not imply an extension of the substantive provisions of NAFTA. There is no evidence of this. [redacted] Whether Canada changed its analysis of the meaning of Annex 14-C after the signature of the USMCA is irrelevant.

24. In my view, the documents discussed above are properly admissible as supplementary means of interpretation under Article 32 of the VCLT to confirm the meaning of Annex 14-C resulting from the application of Article 31 of the Treaty. The documents predate the signature of the USMCA and report on the proposed text of Annex 14-C and the discussions between the State Parties in respect of them. As such, in my view, they qualify as preparatory work of the USMCA as they are contemporaneous notes or reports which reflect the content of discussions between the Parties and their positions during negotiations. In my view, the documents in question are similar to those admitted in the case of *Churchill Mining Plc v. Republic of Indonesia.*[10]

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8 C-143, [redacted]

9 C-206.

10 *Churchill Ming Plc v. Republic of Indonesia,* ICSID Case No. ARB/12/14 and 12/14, Decision on Jurisdiction, Feb. 24, at para 212.

25. The Claimants also referred to a number of documents which postdate the signature of the USMCA in support of their position that Annex 14-C permits claims with respect to legacy investments flowing from measures implemented in the three years after the entry into force of the USMCA. In particular, they relied on Exhibits C-143 and C-221. The majority addresses these briefly at paragraph 196 of the Award where it finds that since they are internal communications between representatives of the USTR, postdate the signature of the USMCA and were not shared with the other State Parties, they can be given no evidentiary value. I accept that these are internal documents that postdate the signature of the USMCA and are not admissible to interpret the common intention of the Parties at the time of signature of the USMCA. Nevertheless, they are of interest in that they reflect [redacted]

26. Exhibit C-143, [redacted]

27. [redacted]

28. [redacted]

29. [redacted]

[redacted] Mr. Gharbieh quoted the response he had received from Mr. Mandell as follows:

> Regarding your question, we intended the annex to cover measures in existence before AND after USMCA entry into force. That could probably be clearer. I'd have to think about the best textual argument, but the one that immediately comes to mind rests on paragraph 3. If we were just intending to allow claims for pre-existing measures, we likely wouldn't have framed a three-year consent period -- we would have just defaulted to the statute of limitations in NAFTA Secon B that would apply to claims for those measures. In other words, we would have omitted paragraph 3 altogether. The contrary argument -- the purpose of paragraph 3 was intended to alter the SOL for claims with respect to pre-existing measures, that's it, doesn't make a lot of sense. I think it's also significant that the title of the annex -- and the key concept in the annex -- references legacy investments, not legacy measures. If we were focused only on legacy measures, it would have been easy to expressly limit paragraph 1 accordingly, but we didn't. Finally, I think footnote 21 probably helps as well. The whole point of the footnote was to require keyhole investors to arbitrate under the "new and improved" USMCA rules and procedures (there was no reason to give them the option of arbitrating under NAFTA rules and procedures under 14-C instead). If 14-C only applied to pre-existing measures, there'd be no reason to say that. We'd just be punishing keyhole investors, which is contrary to the clear intentions of the whole keyhole framework.[11]

30. The exchanges recorded in Exhibit C-143 come after the entry into force of the USMCA and cannot serve as preparatory work to the USMCA under VCLT Article 1132. However, they are, in my view, useful because [redacted]

31. Mr. Mandell was the USTR Investment Chapter Lead in the negotiation of the investment chapter of the USMCA, including Annex 14-C. The evidence related to the negotiation of Annex 14-C, including the Produced Documents, indicates that Mr. Mandell played a central role in the negotiations. Mr. Bahar, to whom Mr. Mandell reported, was the Chapters Lead for the Respondent in the negotiations. In his email, [redacted]

[11] [redacted]. See also, C-221, dated 2 March 2021. This is the original exchange of messages between Mr. Gharbieh and Mr. Mandell. In this version, at the end of his email, Mr. Mandell seems to have expressed surprise when he asked: "Are [sic] friends across the border aren't questioning this, are they?"

[redacted] Mr. Mandell's understanding was the same for the reasons set out in his exchange with Mr. Gharbieh. [redacted]

32. In my view, these exchanges [redacted] This understanding is consistent with and confirms the description and discussion of the proposed text of Annex 14-C described above at paragraphs 14 to 18.

33. In conclusion, I would find that this Tribunal has jurisdiction to hear the Claimants' claim on its merits.

[signed]

Henri C. Alvarez
Arbitrator
Date: 12 July 2024