



**BEFORE THE HONORABLE ARBITRAL TRIBUNAL ESTABLISHED UNDER
CHAPTER XI OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)
AND ANNEX 14-C OF THE AGREEMENT BETWEEN THE UNITED STATES OF
AMERICA, THE UNITED MEXICAN STATES AND CANADA (USMCA)**

**CYRUS CAPITAL PARTNERS, L.P. &
CONTRARIAN CAPITAL MANAGEMENT, LLC
(CLAIMANTS)**

v.

**UNITED MEXICAN STATES,
(RESPONDENT)**

(ICSID Case No. ARB/23/33)

POST HEARING BRIEF

ON BEHALF OF THE UNITED MEXICAN STATES:

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GLOSSARY

10th Collegiate Court	Tenth Collegiate Court in Civil Matters of the First Circuit of the Federal Judicial Branch, located in Mexico City.
Indirect Amparo 1009/2024	Indirect Amparo filed by BNYM and BNYM LB against the July 8, 2024 resolutions in Appeal 1186/2023 and Appeal 694/2024.
Appeal 1186/2023	Appeal filed by BNYM and BNYM LB against the September 27, 2022 Injunction.
Appeal 694/2024	Appeal filed by BNYM and BNYM LB against the ruling of January 25, 2024, through which the 63 rd Civil Court rejected the incidental request to revoke the Injunction.
BNYM LB	The Bank of New York Mellon London Branch.
BNYM or Trustee	The Bank of New York Mellon.
ILC	International Law Commission.
ICSID	International Centre for Settlement of Investment Disputes.
Final Offering Circular	Circular issued in August 2017, whereby TV Azteca tendered \$400,000,000 aggregate principal amount of the Notes bearing interest at 8.250% due 2024.
Contrarian	Contrarian Capital Management, LLC.
Contrarian Funds	Contrarian Funds, LLC.
Contrarian Markets	Contrarian Emerging Markets L.P.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
VCLT	Vienna Convention on the Law of Treaties.
Cyrus	Cyrus Capital Partners L.P.
Cayman Islands Funds or Funds	Cyrus Opportunities Master Fund II, Ltd. and Sandpiper Limited.

Indenture or Bond Agreement	Bond Indenture dated August 9, 2017.
Mercantile Lawsuit 995/2022	Ordinary Mercantile Lawsuit 995/2022 filed in the 63rd Civil Court.
38th Civil Court	Thirty-Eight Civil Court of the Superior Court of Justice of Mexico City.
63rd Civil Court	Sixty-Third Civil Court of the Superior Court of Justice of Mexico City.
Injunction or September 2022 Injunction	Injunction issued in Ordinary Mercantile Lawsuit 995/2022, in which the execution of any collection related to the Bond Agreement was temporarily suspended.
Notes	Unsecured debt issued by TV Azteca in the amount of USD \$400 millions.
Notice of Intent	Notice of Intent to submit a claim to arbitration, filed on June 28, 2023.
Opportunities	Cyrus Opportunities Master Fund II, Ltd.
USMCA Protocol	Protocol replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States and Canada.
Appeal for Review 71/2025	Appeal for review 71/2025 filed by BNYM and BNYM LB before the 10th Collegiate Court against the January 31, 2025 ruling of the Indirect Amparo 1009/2024
Sandpiper	Sandpiper Limited.
Request for Arbitration	Request for Arbitration filed on June 30, 2023.
Noteholders	Noteholders that purchased the Notes.
Third Chamber	Third Civil Chamber of the Superior Court of Justice of Mexico City.
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership.
NAFTA	North American Free Trade Agreement.
USMCA	Agreement between the United States of America, the United Mexican States and Canada.

I. INTRODUCTION

1. Respondent submits this Post-Hearing Brief in accordance with the agreement reached by the Parties—which was confirmed by the Tribunal—during the Hearing on Jurisdiction held on November 5-6, 2025.
2. The Respondent confirms all the arguments and positions presented in its briefs. In order to avoid unnecessary repetition, it will focus on developing its position on certain contradictions and admissions by the Claimants and certain other issues discussed during the Hearing on Jurisdiction.
3. The Tribunal may conclude that it lacks jurisdiction to resolve Case ARB/23/33 or that the Claimants’ claims are inadmissible. The Tribunal may find that this case is a clear example of an arbitration that should never have been initiated, against a measure that no longer exists today. In the Respondent’s more than 30 years of experience in investor-state arbitrations, it is difficult to recall a case that presents so many and such obvious jurisdictional deficiencies.

II. THE TRIBUNAL LACKS JURISDICTION OVER THE CLAIM FILED BY THE CLAIMANTS

A. OBJECTION 1: THE TRIBUNAL LACKS JURISDICTION *RATIONE VOLUNTATIS* BECAUSE THE CLAIMANTS KNOWINGLY FAILED TO COMPLY WITH THE MANDATORY 90-DAY WAITING PERIOD BEFORE FILING THEIR REQUEST FOR ARBITRATION

4. Jurisdiction is determined on the date the proceedings are initiated.¹ Consent is the basis for jurisdiction. Under Article 1122, Mexico’s consent is conditional upon the investor’s strict compliance with the procedures for submitting a claim to arbitration set forth in Chapter XI, including the 90-day waiting period under Article 1119.² This is not a mere procedural matter that

¹ NDP Submission of Canada, ¶ 19 (citing other cases).

² See Article 1122: “1. Each Party consents to the submission of a claim to arbitration in accordance with the *procedures* set out in this Agreement.” [Emphasis added]

the Tribunal can overlook, as the Claimants incorrectly argue.³ The Parties to the Treaty are unanimous in this regard.⁴

5. Moreover, other tribunals have reached the same conclusion.⁵ Consequently, for jurisdiction to exist, the Claimants must demonstrate, at the time of filing the Request for Arbitration, that they strictly complied with all required procedures.⁶ A claimant cannot create jurisdiction *ex post facto* by remedying a non-compliance after proceedings have commenced, unless the respondent consents.⁷

³ ENG Tr. Day 1, p. 160.

⁴ Reply on Jurisdiction, ¶¶ 57-60. NDP Submission of the United States, ¶ 30 (“A disputing investor who does not deliver a Notice of Intent at least 90 days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural requirement and fails to engage the respondent’s consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction *ab initio*. A respondent’s consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.”). NDP Submission of Canada, ¶ 17 (“Compliance by the claimant with each of the NAFTA’s prerequisites for submitting a claim to arbitration, including those set out in Articles 1116 to 1121, must be satisfied for a Chapter Eleven Tribunal to have jurisdiction over a claim. This has been confirmed by several NAFTA tribunals and has been the longstanding position of the three NAFTA Parties.”).

⁵ *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award, August 7, 2002, ¶ 120 (“In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied).”). **RL-0029.** *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, Decision on a Motion to Add a New Party, January 31, 2008, ¶ 29 (“The Tribunal has no doubt about the importance of [Articles 1118-1121] and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced. This would be hardly compatible with the requirements of good faith under international law and might even have an adverse on the right of the Respondent to a proper defence.”). **RL-0010.** *Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America and Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6, June 2006, ¶ 171 (“[I]n making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, i.e., ... whether *all pre-conditions and formalities under Articles 1118-1121 are satisfied*.”) (added emphasis). **RL-0051.**

⁶ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, ¶¶ 16-17 (“The literal wording of this Article implies, for the purposes that concern us, that compliance with, among other things, the prerequisites set forth in [Articles 1118-1121] will result in the consent of the parties to the Treaty to the dispute settlement mechanism established in Chapter XI, Section B of NAFTA.”). **RL-0030.**

⁷ NDP Submission of Canada, ¶ 19 (citing other cases).

6. Article 1119 is written in mandatory language: “The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted.” The English version of Article 1119 uses the word “shall,” which is also universally considered a mandatory directive.⁸ The Claimants filed their Notice of Intent on June 28, 2023, and a Request for Arbitration two days later, on June 30, 2023. It is clear that the Claimants failed to comply with Article 1119 and that Mexico did not accept their offer to remedy this failure by suspending the proceedings for 90 days. Therefore, there is no consent and the Tribunal lacks jurisdiction to hear the claim.

7. At the hearing, Dr. Cairns asked the Claimants’ attorneys why they had waited so long to file the Notice of Intent, to which their representatives pointed out that the Claimants spent months determining whether arbitration was worth the cost and whether it “fit into their overall strategy” of seeking recovery under the Notes.

MS. PADGETT: So you’re looking for our -- just our on the record Statement about why it was that we did not file the request until -- the Notice of Intent until the end of June and the Request for Arbitration.

In full transparency, the Claimants here are, you know, there is at least two of them, and the Noteholders are a group of even additional Noteholders.

And there’s a question of identifying the Claim, being the denial of justice that we only learned about at the very earliest end of February, early March, and then assessing as a group where did a potential NAFTA Claim fit into their overall strategy with respect to pursuit of the Indenture Trustees pursuit of the recovery under the Notes [...]

* * *

MS. PADGETT: I would just say that there is -- there is a dispersed group of potential Claimants here and it wasn’t something -- this wasn’t a typical sort of evolution of a NAFTA Claim where they are, you know -- they intentionally want to go after the Government here.

It was -- I think there was a lot of thinking about, is -- do we want to spend the resources to pursue this Claim, frankly, when we have these other issues going on where they were all the same group plus other Noteholders were going after TV Azteca through an involuntary bankruptcy proceeding in New York. And I think there was a weighing of resources, to be frank.

And I think that given between March and June, and -- you know, it is not like we decided on June 15. We had to decide a little bit earlier to actually draft the Notice of Intent, to draft the Request for Arbitration. It just -- we did it as soon as we could once we got the green light from the clients to proceed with the Claim. And we -- it was a practical -- we

⁸ NDP Submission of the United States, ¶ 31.

* * *

ARBITRATOR CAIRNS: The comment was, it was for practical reasons, was it?

MS. PADGETT: Yes.

ARBITRATOR CAIRNS: Okay.

MS. PADGETT: And we tried to make the best of a -- frankly a bad situation where we knew that, once -- because the decision to file came after April 1, that there was no way we were going to make it -- 90 day deadline and still file a request before July 1.⁹

8. The Tribunal cannot ignore the mandatory terms of Article 1119 and exercise jurisdiction without Mexico's consent simply because it was "practical" for the Claimants to wait. Strict compliance with international standards is the standard agreed upon by the NAFTA Parties. The Tribunal cannot "revise treaties or read into them what they do not, expressly or by implication, contain," especially when all three parties to the Treaty agree on the correct interpretation.¹⁰

9. The reality is that the Claimants could have submitted the Notice of Intent in a timely manner and had all the necessary information to submit it at least since February 2023.¹¹ The deadline for submitting the Notice was March 30, 2023 (90 days before the consent expired under Annex 14-C of the USMCA), so they had more than a month to draft the Notice of Intent, which does not require much time considering that only a limited amount of information needs to be explained, in accordance with the NAFTA Free Trade Commission Statement.¹² In fact, the NAFTA Free Trade Commission developed a template to guide investors on how to prepare a notice of intent.¹³

10. This means that, hypothetically, the Claimants could have retained their right to resort to arbitration if they had filed the Notice of Intent by March 30, 2023, at the latest, and then decided

⁹ ENG Tr. Day 1, pp. 249-251.

¹⁰ Reply on Jurisdiction, ¶ 56, citing the ILC, *Draft Articles on the Law of Treaties with commentaries* (1966), commentary to article 27 (equivalent to article 31 of the final text of the VCLT), pp. 220-221. **RL-0050.**

¹¹ The Claimants had "constructive knowledge of the [Mercantile Lawsuit 995/2022] by late February," ENG Tr. Day 1, p. 155: 18-19, which means they could have submitted the notice before April 1, 2023, and still comply with the 90-day waiting period.

¹² The notice shall specify only "(a) the name and address of the disputing investor [...]; (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions; (c) the issues and the factual basis for the claim; and (d) the relief sought and the approximate amount of damages claimed.

¹³ Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration. **RL-0007.**

whether it was worthwhile to pursue the claim by means of a Request for Arbitration, which could be filed by June 30, 2023, at the latest. Instead, they waited four months, which resulted in a breach of basic provisions of Chapter XI of NAFTA.

11. As a result, Mexico's consent was not perfected, which is why the Tribunal must conclude that it lacks jurisdiction.

**B. OBJECTION 2: THE TRIBUNAL LACKS JURISDICTION
RATIONE PERSONAE BECAUSE THE CLAIMANTS CANNOT
BRING CLAIMS UNDER ARTICLE 1116 BECAUSE THEY DID
NOT SUFFER ANY LOSS AND BECAUSE THEY ARE NOT
“INVESTORS”**

12. The simplest way to resolve this objection is to focus on the text of Article 1116, which states in the relevant part: “An investor of a Party may submit [a claim] to arbitration that another Party has breached an obligation [...] and that the investor has incurred loss or damage by reason of, or arising out of, that breach.” The terms “the investor” and “that breach” are used in singular form, and are correlated. Read clearly, Article 1116(1) requires that the investor bringing the claim be the same investor who has suffered loss or damage as a result of the alleged breach.¹⁴ It does not authorize investors to bring claims on behalf of other investors who have suffered loss or damage.¹⁵

13. The Claimants did not identify any losses they had suffered, which is not surprising given that they have no economic interest in the Notes. At the Hearing, the Claimants referred to the “indirect economic interests” held by their “ultimate beneficial owners” (or “ultimate parents,” as they are referred to in the pleadings), referring to Cyrus Capital Partners GP LLP (wholly owned by Stephen Freidheim) and the five individuals at the top of Contrarian's management structure shown below.¹⁶ These management structures prompted a question from President Collins as to whether, in general, a parent company is the legal owner of the assets of a subsidiary company.¹⁷

¹⁴ Memorial on Jurisdiction, ¶ 63.

¹⁵ NDP Submission of the United States, ¶ 22.

¹⁶ ENG Tr. Day 1, pp. 167-168 (“As you can see in this slide, the general partner entity of the Opps II Domestic Feeder Fund owns .2 percent interest in the Opps II Master Fund and, thus, the Notes. Likewise, for Contrarian, its ultimate beneficial owners hold economic States stakes in the Notes through their 6.1 percent, 10.9 percent, and 12.9 percent interest in the general partners to the funds that own Contrarian Funds LLC and, thus, indirectly the Notes owned by Sandpiper.”)

¹⁷ ENG Tr. Day 1, pp. 176-178.

14. It is obvious that a parent company does not directly own the assets of a subsidiary, and there is nothing in the way investment funds are structured that changes that fact. Investment fund structures are created for specific reasons—including limitation of liability and tax purposes—and it is absurd for the Claimants to argue that separate legal personalities should be ignored solely for the purposes of this arbitration.

15. In any event, these issues are not relevant to Mexico’s objection, since the “indirect economic interests” of the “ultimate partners” are not the interests of the Claimants, and the ultimate partners are not participating as claimants in this arbitration. They did not submit consents to arbitration or waivers, and in fact there is no evidence that the Claimants’ attorneys represent those other entities and persons. If the Tribunal ultimately awards costs to the Respondent, those other entities and persons will reject any liability on the grounds that they had nothing to do with the arbitration. The Tribunal cannot render an award in favor of the Claimants based on the “economic interests” of persons who are not participating in ICSID Case ARB/23/33.¹⁸

16. The definition of the phrase “investor of a Party” also supports this reading of Article 1116. An investor of a Party is a “national or an enterprise that [...] seeks to make, is making or has made an investment.” As Mexico explained, the act of making an investment implies a contribution by the investor with an expected return.¹⁹ The Claimants never challenged this legal principle. Nor did they identify any contribution they had made. Again, this is not surprising since the Claimants have no economic interest in the Notes.

17. Throughout this arbitration, the Claimants have sidestepped the clear terms of Article 1116 by focusing on the definition of *investment*. In their view, they qualify as investors because they

¹⁸ An additional point is that Opportunities and Sandpiper have other limited partner investors who ultimately hold most of the economic interests. See ENG Tr. Day 1, p. 174: 6-8 (“Most of the economic interest in the funds is held by the limited partner investors of the Claimants.”). These “limited partner investors” are not identified in the organizational charts provided and could be citizens of other states that are not party to the NAFTA. This would mean that awarding compensation to the Claimants would compensate those “limited partner investors” for their alleged loss, even though the NAFTA does not protect those entities.

¹⁹ Memorial on Jurisdiction, ¶¶ 64-66. Reply on Jurisdiction, ¶¶ 76-75. *Komaksavia Airport Invest Ltd v. The Republic of Moldova*, SCC Case No. 2020/074, Award, August 3, 2022, ¶ 155. **RL-0015**. See also *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, ¶ 222. **RL-0016**.

control the Notes (the investments) through the Noteholders.²⁰ However, the word “control” does not appear in the text of Article 1116. The fact that the Claimants assert control over the “investment” does not mean that they can bring claims on behalf of third parties who have an economic interest in the “investment.” Article 1116 is more limited, as confirmed by the text.

18. Furthermore, the Claimants do not control the Notes because they do not control the Noteholders.²¹ The agreements they presented as evidence of control support Mexico’s position.

19. The Claimants allege that Cyrus controls the Notes as Opportunities’ investment manager. That is false. Opportunities is controlled by a group of directors who are solely responsible for directing Opportunities’ business, including the selection and potential removal of an investment manager.²² The Respondent addressed this issue in the Reply and at the Hearing,²³ but the Claimants never responded. Instead, they referred to Cyrus’s powers under the investment management agreement,²⁴ but those powers are granted by the directors. The agreement states that “the activities engaged in by [Cyrus] on behalf of the Opportunities Fund shall be subject to the policies and control of the respective [Directors] of the Opportunities Funds.”²⁵ In other words, Cyrus’ actions are based on instructions. Mexico also raised this point, and others related to it, in the Reply, but the Claimants did not respond to those points during the Hearing either.²⁶

20. With respect to Contrarian, the Claimants argue that Contrarian controls the Notes held by Sandpiper because Contrarian controls Contrarian Funds LLC, which owns Sandpiper. However, as Mexico explained, and as the evidence demonstrates, Contrarian does not control Contrarian Funds. Contrarian Funds is controlled by its Members, some of which are reflected in the chart below (the four upper green triangles).²⁷ Even the Claimants referred to these Members as

²⁰ The Claimants acknowledge that they do not own the Notes held by Opportunities or Sandpiper.

²¹ The Respondent previously addressed the relevant meaning of “control”. See Reply, ¶¶ 82-87. The Claimants did not dispute that meaning.

²² Articles of Association of Cyrus Opportunities Master Fund II, LTD, p. 45, ¶ 23.1. **C-0071**.

²³ Reply on Jurisdiction, ¶ 88. ENG Tr. Día 1, p. 81.

²⁴ ENG Tr. Day 1, 166: 5-19.

²⁵ Cyrus Investment Management Agreement, p. 4, ¶ 3. **C-0072**.

²⁶ Reply on Jurisdiction, ¶¶ 89-90.

²⁷ All members are listed in Annex A of the document “Sixth Amended and Restated Limited Liability Company Agreement of Contrarian Funds, L.L.C.” **C-0014**.

“owners.”²⁸ Contrarian does not own or control these Members, as evidenced by the investment management agreement between Contrarian and one of those Members, Contrarian Emerging Markets L.P.²⁹ The Members use Contrarian Funds LLC as a “vehicle” to make investments.³⁰ These investments, including the Notes held by Sandpiper, belong to the Members and are ultimately controlled by the Members. Contrarian (the Claimant) is essentially a service provider to these Members.

²⁸ Counter-Memorial on Jurisdiction, ¶ 172.

²⁹ The investment management agreement between Emerging Markets and Contrarian clearly states that Contrarian “no [have] authority to act for, represent, bind or obligate [Emerging Markets].” Contrarian Emerging Markets, L.P. – Contrarian Investment Management Agreement, p. 2. **C-0017**.

³⁰ Sixth Amended and Restated Limited Liability Company Agreement of Contrarian Funds, L.L.C., ¶ 1.03 (“The Company has been formed as an acquisition vehicle in which investment management clients of Contrarian Capital Management, L.L.C. (the “Manager”) may make investments at the direction of the Manager.”). **C-0014**. *See also* ENG Tr. Day 1, 174: 12-19 (“It is like a hedge fund ... it is the idea that there is a really smart investor who doesn’t necessarily have all the money at their disposal, so they collect money from investors, and they pool it together, and then that investment manager goes and takes that money and invests it in different things, including in the Notes.”).

**C. OBJECTION 3: THE TRIBUNAL LACKS JURISDICTION
RATIONE MATERIAE BECAUSE THE CLAIMANTS DO NOT
HAVE A LEGACY INVESTMENT**

21. There is no doubt that consent to initiate an arbitration under Annex 14-C of the USMCA is limited to claims relating to a legacy investment. The question that the Tribunal must resolve at this point is whether the Claimants have a legacy investment. Clearly, they do not.

22. The Respondent has explained that the definition of “legacy investment” in paragraph 6(a) of Annex 14-C of the USMCA uses the phrase “investment of an investor of another Party.” The fact that the word “investment” is immediately qualified by the phrase “of an investor of another Party” means that it must have been the claimant who established or acquired the investment in the host State while NAFTA was in force.³¹ Otherwise, it would be meaningless.

23. At the hearing, the representative of the United States Government confirmed that the definition of legacy investment requires a claimant to demonstrate that it was an investment established or acquired by the claimant investor while NAFTA was in force and in existence on the date of entry into force of the USMCA:

The Consent to Arbitration in Annex 14-C is limited to claims with respect to a legacy investment, which is defined by Paragraph 6(a) of that annex.

That definition requires a Claimant to establish that, as of July 1, 2020, there was an investment within the meaning of NAFTA Article 39. It was an investment that the Claimant established or acquired while the NAFTA was in force and remained in existence when the USMCA came into force, and the Claimant was an investor of another party.³² (Emphasis added)

24. Non-Disputing Party submissions under Article 1128 of NAFTA are sources of interpretation of the Agreement pursuant to Article 31 of the VCLT, and the Tribunal must give them the necessary weight in its analysis.

25. Mexico also explained that this issue was confirmed by the tribunal in *Westmoreland Coal Company v. Canada (III)*, which noted that an investor can only meet the “in existence” condition

³¹ Counter-Memorial on Jurisdiction, ¶¶ 179, 184-189. Reply on Jurisdiction, ¶¶ 100-104.

³² ENG, Tr. Day 1, pp. 12-13.

of paragraph 6(a) if it owns or controls the investment at the time of the entry into force of the USMCA.³³

26. The Claimants seek to differentiate between the facts that led to the decision in *Westmoreland III* and this case in order to convince the Tribunal that that decision is not applicable. To this end, they distinguish between the nature and characteristics of the alleged investments and refer to the decisions in *Fedax v. Venezuela* and *Lion Mexico Consolidated v. Mexico*.³⁴

27. However, the distinction they make between debt instruments and other types of investments is irrelevant. The fact that debt instruments such as the Notes are “tradable commodities” does not exempt them from meeting the requirements of a legacy investment. In fact, the definition of legacy investment includes investments established or acquired by the claimant while NAFTA was in force. It is not disputed that the Claimants acquired the Notes after NAFTA had ended.

28. Furthermore, after a simple reading of those authorities, the Tribunal can confirm that the *Fedax* and *Lion* awards do not support the Claimants’ arguments. In *Fedax v. Venezuela*, the issue decided by the tribunal was whether an investment could exist in the specific case where a company “acquired by way of endorsement the promissory notes issued by the Republic of Venezuela [...]”.³⁵ In other words, whether promissory notes issued by a sovereign state (and not a private company, as in the case of TV Azteca Notes) could be considered investments simply because they were acquired on the secondary market. The tribunal conducted a very specific analysis and concluded that “the argument made by the Republic of Venezuela that the notes were

³³ SPA Tr Day 1, pp. 108-109. Reply on Jurisdiction, ¶105. *Westmoreland Coal Company v. Canada (III)*, ICSID Case No. UNCT/23/2, Award, December 17, 2024, ¶ 161 (“The language in Paragraph 6(a) requiring an investment “in existence” upon the entry into force of the USMCA is a distinct element of the “legacy investment” definition that must be given *effet utile*. In doing so, the Tribunal finds that an investment is “in existence” at a given time if it is owned or controlled by the investor at that time. As explained below and contrary to the Claimant’s view, this interpretation is consistent with the relevant definitions in NAFTA Article 1139; the purpose of the USMCA; the requirement under NAFTA that the investor must hold the investment at the time of the alleged breaches; and it does not yield allegedly “absurd” results, such as “abruptly” leaving investors with no investment protection under NAFTA, in relation to expropriatory measures or generally”) (Added emphasis). **RL-0055**.

³⁴ ENG Tr. Day 1, pp. 181-183.

³⁵ *Fedax NV v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, ¶18. **CL-0029**.

not purchased on the Venezuelan stock exchanges does not take them out of the category of foreign investment [...].”³⁶ The essential point is that the tribunal in *Fedax* did not address the meaning of the term “legacy investment” because Annex 14-C was not applicable.

29. The tribunal in *Lion Mexico Consolidated v. Mexico* also did not address the meaning of “legacy investment” because, again, Annex 14-C did not apply to that case. The *Lion* tribunal’s analysis of debt instruments, for the purposes of that case, is not relevant to determining whether the Notes qualify as a legacy investment. Furthermore, the tribunal in *Lion* at no point “confirmed that a debt security remains a legitimate investment, irrespective of the specific entity holding it.”³⁷ The Claimants do not even cite the decision from which they allegedly obtained that quote. The Respondent invites the Tribunal to carefully analyze the Claimants’ allegations, as they are issues taken out of context or not even addressed by the tribunals. The reality is that the *Westmoreland III* decision is applicable to this case and can serve as a guide for the Tribunal.

30. During their opening statement, the Claimants pointed out that Annex 14-C of the USMCA was designed to protect “existing investors”:

So why did the negotiators bother with an Annex 14-C? Because they wanted to offer a time-limited buffer to protect *existing investors*.³⁸

31. In other words, by using the phrase “existing investors,” the Claimants themselves acknowledge that Annex 14-C only protects an investor who existed under NAFTA, that is, if they were an investor under NAFTA at the time NAFTA was in force.

32. The Tribunal will recall that Opportunities and Sandpiper acquired the Notes after July 1, 2020, the date on which the USMCA replaced NAFTA. Opportunities acquired its Notes on various dates between December 31, 2021, and November 8, 2022.³⁹ Sandpiper acquired its Notes on March 13, 2023.⁴⁰ Even assuming that the Notes were an investment and that the Claimants

³⁶ *Fedax NV v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, ¶40. **CL-0029**.

³⁷ ENG Tr. Day 1, p. 182: 6-9.

³⁸ ENG, Tr. Day 1, p. 150: 16-18.

³⁹ Memorial on Jurisdiction, ¶ 26. *See also*, In re TV Azteca, Declaration of Anthony C. Scire on behalf of Cyrus Opportunities Master Fund II, Ltd. Pursuant to Federal Rule of Bankruptcy Procedure 1003(a), Bankruptcy Case No. 23-10385, ECF 2 (S.D.N.Y.). **Exhibit 8a**.

⁴⁰ Memorial on Jurisdiction, ¶ 26. *See also*, In re TV Azteca, Declaration of Contrarian Capital Management, LLC on behalf of Sandpiper Limited Pursuant to Federal Rule of Bankruptcy Procedure 1003(a), Bankruptcy Case No. 23-10385, ECF 2 (S.D.N.Y.). **Exhibit 8b**.

had control over them (*quad non*), there would be no dispute that neither Opportunities nor Sandpiper were investors under NAFTA during the term of that agreement because they had not yet acquired the Notes.

33. Therefore, the Claimants do not have a legacy investment within the meaning of Annex 14-C of the USMCA, and for that reason, the Tribunal lacks jurisdiction to hear this dispute.

34. During the hearing, Dr. Cairns presented a hypothetical case in which an investment ceased to exist just before the termination of NAFTA and questioned whether that investor would have rights since it did not constitute a legacy investment. Dr. Cairns requested comments from the Respondent and noted that “we seem to get into a situation that, on the case of either of the Parties, [...] Annex 14-C doesn’t really appear to achieve what its objective was, which was to protect investors for a period of -- to establish a transition period for three years. Whether that be only in procedural terms or substantive terms, it doesn’t appear to have achieved either of those objectives.”⁴¹

35. The Respondent agrees with the United States that, if such a situation had arisen, an investor could not submit a claim to arbitration under Annex 14-C of the USMCA, since it would not be a legacy investment. However, this cannot be considered a failure to comply with the objective of Annex 14-C.

36. The Respondent explained that the purpose of Annex 14-C was to provide a transition mechanism for pending claims and legacy investment claims that were not submitted to arbitration before NAFTA ended, and not to protect investors *per se*.⁴² In that regard, the purpose of Annex 14-C was clearly achieved by allowing the possibility of initiating arbitration against measures relating to a legacy investment until June 30, 2023 (i.e., three years after the termination of NAFTA). The reason for this is simply that this was the intention of the USMCA Parties. The limits they imposed on the scope of Annex 14-C were not *ultra vires* under international law.

⁴¹ ENG Tr. Day 1, pp. 242-243.

⁴² ENG Tr. Day 1, pp. 34-36. NDP Submission of the United States, ¶¶ 16-17.

**D. OBJECTION 4: THE TRIBUNAL LACKS JURISDICTION
RATIONE VOLUNTATIS AND RATIONE TEMPORIS BECAUSE
THE ALLEGED VIOLATIONS OCCURRED AFTER THE NAFTA
TERMINATED**

37. The central question for the purposes of this objection is whether the Parties to the USMCA agreed to extend the substantive provisions of NAFTA for an additional three years after its termination, pursuant to Annex 14-C of the USMCA. The answer is no.

38. The Respondent has explained this situation in detail and invites the Tribunal to carefully analyze the Memorial on Jurisdiction and the Reply on Jurisdiction on this issue.⁴³

39. As will be explained below, during the hearing, Mexico demonstrated the importance of the submissions of Non-Disputing Parties for the interpretation of Annex 14-C of the USMCA., its correct interpretation, and the lack of need to resort to the complementary means of interpretation provided for in Article 32 of the VCLT.

**1. The submissions of the Non-Disputing Parties constitute
genuine subsequent practice by the parties for the interpretation
of Annex 14-C**

40. Mexico explained that for the Parties' subsequent practice to amount to an authentic interpretation of a treaty, that practice must reflect their common understanding of its terms and their meaning. In the Reply on Jurisdiction, the Respondent explained that submissions by Non-Disputing Parties and submissions by Parties in a proceeding, even when made in different cases, serve as evidence of subsequent practice.⁴⁴ This point was corroborated at the hearing by the Non-Disputing Parties to this proceeding.

41. During their oral statements, the U.S. and Canadian representatives confirmed that Article 31 of the VCLT is worded in mandatory terms and requires the interpreter to consider any subsequent practice in the application of the treaty:

That paragraph is framed in mandatory terms. It states that Interpreters “shall” take into account any subsequent agreement between the Parties regarding the interpretation of the treaty or 1 the application of its provisions and, B, any subsequent practice in the application of treaty which establishes the Agreement of the Parties regarding its interpretation.⁴⁵

⁴³ Memorial on Jurisdiction, ¶¶ 77-90. Reply on Jurisdiction, ¶¶ 107-155.

⁴⁴ Reply on Jurisdiction, ¶¶ 150-152.

⁴⁵ Oral statement by the representative of the United States. ENG, Tr. Day 1, pp. 10-11.

* * *

So Article 31(3) of the Vienna Convention provides that: “There shall be taken into account, together with the context, subparagraph (b), any subsequent practice and the application of the Treaty which establishes the Agreement of the Parties regarding its interpretation. “The consideration of any subsequent practice establishing the Agreement of the Parties on the interpretation of the Treaty is mandatory, as provided by the verb “shall” in the clause of the Vienna Convention read earlier.⁴⁶

42. The Non-Disputing Parties also confirmed that these positions provide an authentic interpretation, especially when the interpretation relates to legal issues such as consent and jurisdiction. In fact, they confirm that the most natural occasion for the parties to a treaty to provide their interpretation of legal issues is during legal disputes:

It is sometimes suggested that the positions taken by treaty Parties in the course of litigation are only serving defensive purposes and, thus, should be discounted or viewed with skepticism. This is incorrect for three reasons:

First, all treaties, including Investment Agreements, resulted from extensive negotiations between the State’s Parties that balanced a wide range of interests, including defensive ones. State’s Parties have a right to ensure a good faith interpretation and application of the treaty that reflects all of the terms to which they agreed.

Second, it is well-established that the common understanding of the State’s Parties may be evidenced in a variety of ways including to the positions that they take of the course of litigations or arbitrations.

For example, the International Law Commission has stated specifically that subsequent practice under Article 31(3)(b) may include statements in the course of a legal dispute. Investor-State Tribunals, including many applying the NAFTA, have reached a similar conclusion. We provided citations to some of the relevant Tribunal Awards and Decisions in Footnote 24 of our written submission.

Third, particularly when the interpretive questions relate to issues of consent to arbitration and the scope of jurisdiction, there is no cause for skepticism. The State’s Parties provide their interpretations in the course of legal disputes. It is a natural, if not the most natural, occasion on which to address interpretations of treaty provisions dealing with the submission and resolution of claims.⁴⁷

* * *

In fact, the positions that the CUSMA Parties have taken in dispute settlement proceedings are the only way the Parties can put in practice the dispute settlement mechanism of Annex 14-C.⁴⁸

⁴⁶ Oral statement by the representative of Canada. ENG, Tr. Day 1, pp. 45-46.

⁴⁷ Oral statement by the representative of the United States. ENG, Tr. Day 1, pp. 11-12.

⁴⁸ Oral statement by the representative of Canada. ENG, Tr. Day 1, p. 48: 17-20.

43. The importance of the submissions of the parties and Non-Disputing Parties regarding the interpretation of Annex 14-C was recently recognized by the majority of the tribunal in *Access Business Group LLC v. United Mexican States* (ICSID Case No. ARB/23/15). In *Access*, the majority of the tribunal relied on the USMCA Parties’ interpretation of Annex 14-C expressed in other arbitration proceedings, whether as disputing or non-disputing parties, and noted:

*These elements support the conclusion that Annex 14-C does not extend the temporal scope of the substantive investment protections of NAFTA. The Contracting States of the USMCA and NAFTA have all expressed their position in this arbitration, stating that Annex 14-C does not purport to extend the application of Section A of Chapter 11 of NAFTA to any measures post-dating the termination of NAFTA. They have adopted that position throughout other arbitral proceedings, both in their capacity as disputing and as non-disputing parties. Whether these manifestations qualify as a “subsequent agreement” or a “subsequent practice” is immaterial, as in both cases Article 31(3) of the VCLT requires the Tribunal to take the position of the Contracting States into account together with the context of the treaty terms.*⁴⁹ (Emphasis added)

44. Furthermore, the majority of the tribunal in *Access* recognized that, according to the comments to the ILC’s draft conclusions, statements made in the course of a dispute should be taken into account as subsequent practice under Article 31 of the VCLT, a point also explained by the USMCA Parties.⁵⁰

45. Thus, it is clear that the common understanding of the Parties regarding the interpretation of Annex 14-C, even when it is contained in submissions by Non-Disputing Parties, is an authentic subsequent practice within the meaning of Article 31 of the VCLT.

46. The Respondent agrees with Canada that “[t]he Treaty interpreter cannot ignore an agreement of the Parties as established by their subsequent practice.”⁵¹ To do so “would amount

⁴⁹ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶ 192. **RL-0141**. The majority of the tribunal even recognized the importance of the submissions of Non-Disputing Parties and how they can influence the interpretation of NAFTA. (“Article 1128 of NAFTA provides that non-disputing parties “may submit communications to a tribunal on a question of interpretation of this Agreement.” This provision demonstrates that the Contracting States intended the interpretation of the treaty to be influenced by communications from non-disputing parties in contentious proceedings.”). *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶ 193. **RL-0141**.

⁵⁰ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶ 194. **RL-0141**.

⁵¹ Oral statement by the representative of Canada. ENG, Tr. Day 1, p. 46.

to depriving the USMCA Parties of a genuine means of interpretation with respect to the provisions providing for consent to arbitration.”⁵²

2. The correct interpretation of Annex 14-C of the USMCA

47. The Respondent and the other two Parties to the USMCA have explained in this and other proceedings that, through Annex 14-C, Mexico, the United States, and Canada agreed to arbitrate claims under NAFTA for three years, but in no way extended the substantive obligations of Section A of Chapter XI of NAFTA for an additional three-year period. The U.S. and Canadian representatives confirmed this during the hearing:

What the Parties agreed to in Annex 14-C was to allow holders of legacy investments an additional three years to submit claims for 1 breach of certain NAFTA provisions that had allegedly occurred while the NAFTA was in force.

The Parties did not agree that the NAFTA’s substantive investment obligations would continue to bind them during this three-year period.⁵³ (Emphasis added)

* * *

It is therefore clear from the structure and the wording of Annex 14-C that its purpose is to establish the conditions under which the CUSMA Parties consented to the submission of a claim to arbitration.

Annex 14-C addresses dispute settlement, nothing more. It extends recourse to the NAFTA investor dispute settlement for a limited period after the Treaty’s termination. That is all. Nor in the text is there an agreement by CUSMA Parties to extend the substantive obligations of NAFTA.

[...]

In sum, while Annex 14-C undeniably extended the NAFTA Parties’ consent to arbitrate investment claims in accordance with the dispute settlement mechanism of NAFTA Chapter 11, it did not extend NAFTA Chapter 11’s substantive obligations beyond the NAFTA’s termination. Neither Annex 14-C nor the rest of CUSMA nor NAFTA contains any agreement to that effect.⁵⁴

48. The U.S. and Canadian representatives explained that this reflects the ordinary meaning of the terms of the treaty in their context, taking into account their object and purpose. The Respondent does not intend to reiterate the analysis that was explained in detail by the USMCA Parties. Rather, it invites the Tribunal to carefully analyze the consistent interpretation they have

⁵² Oral statement by the representative of Canada. ENG, Tr. Day 1, p. 49.

⁵³ Oral statement by the representative of the United States. ENG, Tr. Day 1, pp. 14-15.

⁵⁴ Oral statement by the representative of Canada. ENG, Tr. Day 1, pp. 44-45.

made in their submissions and which was presented during the hearing, which constitutes an authentic subsequent practice and should be considered by the Tribunal.⁵⁵

49. As pointed out by the U.S. and Canadian representatives, as a result of the termination of NAFTA, no state action can constitute a violation of a treaty obligation if the Parties were no longer bound.⁵⁶

50. The Parties' interpretation of the USMCA is also confirmed by the majority of the *Access* tribunal, which concluded that:

In summary, the application of the primary means of treaty interpretation leads to the conclusion that Annex 14-C did not extend the temporal scope of Section A of Chapter 11 of NAFTA. As explained above, the consent to arbitrate under Article 1116(1) NAFTA is limited to claims for violation of the substantive provisions contained in Section A of Chapter 11 of NAFTA. The measures that the Claimant impugns in this arbitration postdate the expiration of NAFTA and are not thus capable of engaging a violation of NAFTA. The claims are therefore outside the jurisdiction of the Tribunal.⁵⁷ (Emphasis added)

51. To reach that conclusion, the majority of the *Access* tribunal made an interpretation of Annex 14-C in accordance with the VCLT. First, it analyzed the ordinary meaning of that annex. In doing so, it confirmed that Annex 14-C refers three times to Section A of Chapter 11 of NAFTA: *i*) in paragraph 1(a); *ii*) in paragraph 1(c); and *iii*) in footnote 20. The majority of the tribunal noted that there is nothing in the text of Annex 14-C that even suggests the extension of the substantive protections of Chapter 11 of NAFTA:

Giving the words used their ordinary meaning, the Tribunal finds that nothing in the terms of Annex 14-C indicates that the Contracting States extended the application of the substantive provisions of Section A of Chapter 11 beyond the termination of NAFTA.⁵⁸

⁵⁵ Oral statement by the representative of the United States. ENG, Tr. Day 1, pp. 14-23. Oral statement by the representative of Canada. ENG, Tr. Day 1, pp. 38-45. NDP Submission of the United States, ¶¶ 2-15. NDP Submission of Canada, ¶ 4-16. Memorial on Jurisdiction, ¶¶ 77-90. Reply on Jurisdiction, ¶¶ 112-149.

⁵⁶ Oral statement by the representative of the United States. ENG, Tr. Day 1, pp. 14-15. Oral statement by the representative of Canada. ENG, Tr. Day 1, pp. 39-41.

⁵⁷ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶201. **RL-0141.**

⁵⁸ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶183. **RL-0141.**

52. Second, the majority addressed the context of the provisions. Among the elements that were analyzed are: *i*) the five main paragraphs of Annex 14-C; *ii*) other provisions of the USMCA such as Article 34(1)(4); and *iii*) footnote 21 of Annex 14-C. The majority of the tribunal concluded that the context confirms that Annex 14-C did not extend the substantive protections of NAFTA:

The context of the relevant provisions of Annex 14-C confirms that Annex 14-C extends the temporal scope of the consent to arbitrate, rather than the substantive protections of Section A of Chapter 11 of NAFTA.⁵⁹

53. Specifically, with respect to footnote 21, on which the Claimants purport to base their interpretation, the majority of the tribunal in *Access* noted that it remains effective even if Annex 14-C only extended the consent to submit claims to arbitration and does not imply an extension of the temporal scope of application of the substantive protections of NAFTA and the USMCA:

In the Tribunal’s reading, the text of Footnote 21 is clear: it excludes the extension of the consent to arbitration under paragraph 1 of Annex 14-C for certain categories of investors who are eligible to submit claims under Annex 14-E. This exclusion does not necessarily imply that the temporal scopes of application of the substantive protections of NAFTA and the USMCA do coincide. Thus, Footnote 21 retains its utility even if Annex 14-C only extends the consent to arbitrate, and not the substantive protections of NAFTA.⁶⁰

54. In the same way, and as explained *supra*, the majority of the tribunal in *Access* considered the interpretation of the three Parties of NAFTA and the USMCA, and noted that this interpretation supported “the conclusion that Annex 14-C does not extend the temporal scope of the substantive investment protections of NAFTA.”⁶¹

55. Third, *Access* analyzed the object and purpose of the USMCA. The majority of the tribunal examined the preamble to the USMCA and Annex 14-C, considering that Chapter 14 of the USMCA provides a more limited protection for investments compared to that provided by NAFTA. It also recognized that “[t]his language suggests that the States viewed the NAFTA

⁵⁹ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶185. **RL-0141**.

⁶⁰ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶189. **RL-0141**. See also, Reply on Jurisdiction, ¶ 137.

⁶¹ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶192. **RL-0141**.

regime as outdated and in need of replacement, which points against the extension of the NAFTA provisions [...].”⁶²

56. It also considered that the coexistence of the substantive protections of NAFTA and the USMCA would not promote a clear, transparent, and predictable legal framework consistent with the purposes of the USMCA.⁶³ Therefore, it determined that the object and purpose of the USMCA “provide a further indication that the Contracting States did not extend the substantive investment protections beyond the termination of NAFTA, in line with the text and context of the annex.”⁶⁴

57. As explained by the Respondent, the tribunals in *TC Energy v. United States* and *Westmoreland v. Canada (III)* reached the same conclusion that Annex 14-C did not extend the substantive protections of Chapter XI of NAFTA, but merely extended the offer to arbitrate claims under NAFTA.⁶⁵ It is no coincidence that the tribunals that have heard claims addressing this issue have ruled in the same way that the NAFTA and USMCA Parties interpret Annex 14-C.

⁶² *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶198. **RL-0141**.

⁶³ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶199 (“Furthermore, under the Claimant’s interpretation of Annex 14-C, the substantive investment protections of NAFTA, which the Contracting States regarded as outdated, would continue to apply concurrently with the modernized substantive provisions of the USMCA. This coexistence would not promote the establishment of a “clear, transparent, and predictable legal and commercial framework,” which is another purpose listed in the Preamble of the USMCA”). **RL-0141**. See also, Reply on Jurisdiction, ¶¶ 141-142.

⁶⁴ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶200. **RL-0141**.

⁶⁵ Reply on Jurisdiction, ¶¶ 123-124. *TC Energy Corp. et al v. United States of America*, ICSID Case No. ARB/21/63, Award, July 12, 2024, ¶¶ 142, 179, 202 (“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” “[T]he 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...”). **RL-0076**. *Westmoreland*

3. Supplementary means of interpretation

58. Article 32 of the VCLT establishes that supplementary means of interpretation may only be used for two purposes: *i)* to confirm the meaning resulting from the application of Article 31; or *ii)* when the interpretation in accordance with Article 31 is ambiguous or obscure, or leads to a manifestly absurd result. As will be explained below, it is not necessary to resort to supplementary means of interpretation in this case, and in any event, the testimony of Mr. Smith Ramos does not constitute a supplementary means of interpretation.

a. In this case, it is not necessary to resort to supplementary means of interpretation

59. At the hearing, the Claimants stated that there is nothing ambiguous or obscure, or that would lead to an absurd result:

[...] Claimants continue to maintain that a plain reading of the Annex 14 of the USMCA, especially when combined with documentary evidence and the testimony of México's own lead negotiator in connection with the USMCA, demonstrates that México consented to arbitrate Legacy Investment Claims within the three-year transition period.⁶⁶

60. The Tribunal therefore could only rely on supplementary means to confirm the Claimants' interpretation, which in turn would require that the Claimants first convince the Tribunal that the plain meaning of Annex 14-C extends the substantive obligations of NAFTA. As that is not the case, the Tribunal cannot use supplementary means to interpret Annex 14-C.

61. The fact that it is not necessary to resort to supplementary means of interpretation was acknowledged at the hearing by the Non-Disputing Parties. The U.S. representative stated:

Mr. President, Members of the Tribunal, application of the customary international law principles of treaty interpretation reflected in Article 31 of the Vienna Convention unambiguously establishes that Annex 14-C does not extend the NAFTA's substantive investment obligations beyond the NAFTA's termination. There is nothing manifestly absurd or unreasonable about this result, and, accordingly, *there is no need for the Tribunal to consider supplementary means of interpretation under Article 32 of the Vienna Convention.*⁶⁷ (Emphasis added)

Coal Co. v. Canada (III), ICSID Case No. UNCT/23/2, Award, December 17, 2024, ¶ 143 (“[I]t offers investment protection for breaches preceding the USMCA that occurred while NAFTA was still in force.”). **RL-0055.**

⁶⁶ ENG, Tr. Day 1, pp. 192-193.

⁶⁷ Oral statement by the representative of the United States. ENG, Tr. Day 1, p. 23: 11-21.

62. This was also confirmed by the representative of Canada:

Annex 14-C did not extend the substantive obligations of Chapter 11 for three years following the termination of NAFTA. The same interpretation is also consistent with the common understanding of the three CUSMA Parties as demonstrated by their subsequent practice within the meaning of Article 31(3)(b).

So this interpretation does not leave the meaning of Annex 14-C either ambiguous or obscure and certainly does not lead to a manifestly absurd or unreasonable result.

Therefore, there is simply no need to resort to supplementary means of interpretation as provided under Article 32 of the Vienna Convention.⁶⁸ (Emphasis added)

63. Therefore, Mexico, the United States, and Canada agree that the interpretation of Annex 14-C of the USMCA in accordance with Article 31 of the VCLT is clear and does not require the use of supplementary means of interpretation.

b. The testimony of Mr. Smith Ramos is neither relevant nor persuasive.

64. Despite the above, the Claimants present the alleged history of the Parties' negotiation of the text through the testimony of Mr. Smith. However, during the hearing, it was demonstrated that, even if the Tribunal were to resort to supplementary means of interpretation, Mr. Smith's testimony is neither relevant nor persuasive since, *inter alia*, it does not demonstrate the common understanding of the USMCA's Parties.

65. During his cross-examination, Mr. Smith Ramos acknowledged that he did not work alone on the negotiations, but that there were at least 150 people working on the negotiation of the 34 chapters included in the USMCA:

Q. So Mr. Smith, as you affirmed this morning, you didn't work on the USMCA negotiations all by yourself. I think you mentioned you had at least 150 negotiators working on 34 Chapters, I guess, each with its own Working Group; correct?

A. That is correct.⁶⁹

66. Similarly, he explained that each working group was made up of technical experts and acknowledged that he did not personally attend every negotiation meeting on each specific topic:

Q. And presumably those groups included subject-matter Experts for issues like Intellectual Property Law; right? -- for the Intellectual Property Chapter, regulation of medical devices and other technical subjects; correct?

⁶⁸ Oral statement by the representative of Canada. ENG, Tr. Day 1, p. 50: 4-17.

⁶⁹ ENG, Tr. Day 2, p. 275: 15-20.

A. Yes. Each Lead in -- there was a Government official from the Ministry of Trade, and depending on the specific topics, as you mentioned, other Government officials participated from other agencies in the Government.

Q. All right. And you didn't personally attend every negotiation meeting on every subject, did you?

A. I was not present in every single one of the Working Group meetings. [...] ⁷⁰

67. In addition, Mr. Smith Ramos acknowledged that he is not a lawyer and had no experience with the VCLT:

Q. [...] Mr. Smith, you're not a lawyer, are you?

A. I am not.

Q. And you're not an authority on the Vienna Convention on the Law of Treaties, are you?

A. I'm not an Expert in those matters, that is correct. ⁷¹

68. Despite stating in his first witness statement that he had closely followed the various investor-state disputes that arose under NAFTA, allegedly from its entry into force until 2007, Mr. Smith Ramos acknowledged that he had not personally participated in any investment arbitration proceedings:

Q. Thank you. Let's put up your First Statement. We will go to Paragraph 3. And most of the way down there's a sentence that says -- you're talking about your activities -- and you said "this included following closely the different Investor-State disputes that were presented under the NAFTA from the entry into effect of the Agreement in 1994 until 2007."

Do you see that?

A. Yes, I do.

Q. Did you ever personally participate in an arbitration as part of México's legal team?

A. I did not. That was handled by the Legal Counsel Office within the Undersecretary of International Trade Negotiations. ⁷²

69. Mr. Smith Ramos also acknowledged that he was not speaking on behalf of the chief negotiators for the United States and Canadian governments:

Q. Mr. Smith, I know that's your strong feeling now, but let's just be clear: You're not speaking on behalf of former USTR Robert Lighthizer, are you?

⁷⁰ ENG, Tr. Day 2, p. 275-276.

⁷¹ ENG, Tr. Day 2, p. 274: 14-18.

⁷² ENG, Tr. Day 2, p. 277: 7-21.

A. I'm not.⁷³

* * *

Q. [...]. But, again, just to confirm for the record, you're not also speaking on behalf of former Canadian Minister of Trade, Chrystia Freeland, are you?

A. I am not.⁷⁴

70. Furthermore, Mr. Smith Ramos' testimony reveals a fundamental contradiction that undermines his credibility. At the hearing, Mr. Smith Ramos stated that there was never a distinction between substantive provisions and the procedure itself. He uses this to support his alleged interpretation of the extension of substantive provisions of NAFTA through Annex 14-C:

A. -- a proposal to have a three-year extension of NAFTA Chapter 11, we referred, both México, Canada, and the U.S., to the ISDS protection, so the substantive provisions and the procedures to bring claims, as the mechanism. There was never a distinction between a -- substantive provisions versus the procedure itself.⁷⁵

71. However, the documents accompanying his testimony contradict this statement. The investment group's report of February 27, 2018, addressed to Mr. Smith Ramos, makes a clear distinction between Section A of the Investment Chapter ("substantive investment disciplines") and Section B ("ISDS"). In fact, this distinction was made in the progress reports, noting that the potential annex to address the transition from the NAFTA ISDS mechanism to the USMCA was "with regard to ISDS."⁷⁶

Following the Montreal Round agreement, in which the parties decided that there would be no trilateral ISDS (i.e., Section B) and that Canada and Mexico would instead seek to maintain this mechanism on a reciprocal basis, the parties focused on negotiating the substantive investment disciplines (i.e., Section A) "without prejudice."

The negotiations yielded significant progress. Overall:

- The definitions applicable to the investment chapter were reviewed in detail, which had not been done since the start of negotiations;
- All bracketed texts in Section A were reviewed; and
- *With regard to ISDS*, the following were discussed: (i) the US opt-in proposal; (ii) reciprocal ISDS between Canada and Mexico; and (iii) a potential annex to address the transition from the current *ISDS mechanism* in NAFTA 1.0 to NAFTA 2.0. (Emphasis added)

⁷³ ENG, Tr. Day 2, p. 295: 14-17.

⁷⁴ ENG, Tr. Day 2, p. 296: 1-6.

⁷⁵ ENG, Tr. Day 2, p. 293: 11-17.

⁷⁶ Investment group report dated February 27, 2018, p. 2. **KS-003**.

72. The same document is clear and explains that the United States’ proposal to agree on an annex was to “address the transition from the current ISDS mechanism under NAFTA 1.0 to NAFTA 2.0” and explains that “[t]he idea is to extend the validity of the ISDS mechanism once NAFTA 1.0 expires in order to [...] agree that for three years after the termination of NAFTA 1.0, investors will be allowed to resort to the mechanism [...].”⁷⁷

73. Mr. Smith Ramos himself acknowledged at the hearing that he was aware of the difference between Section A (substantive protections) and Section B (dispute settlement mechanism) of Chapter 11 of NAFTA:

Q. [...] So, Mr. Smith, I want to ask you, is there anything in Section A that says anything about a dispute-settlement mechanism or arbitration? 1 And if you want, I’m happy to -- we are happy to go back if you want to look more carefully, but I think you know this document quite well.

A. Chapter 11’s structure is Section A has the rules, the specific commitments on investment protections, and Section B deals with the settlement of disputes and the mechanism for bringing in disputes.⁷⁸

74. Therefore, it is implausible for Mr. Smith Ramos to argue that there was never any distinction between substantive rights and the dispute settlement mechanism, when the very documents accompanying his testimony prove the contrary.

75. The Tribunal will recall that during the hearing, an issue arose regarding Mr. Smith Ramos’ alleged “written notes” that purportedly confirmed the extension of Section A. The Respondent notes to the Tribunal that although Mr. Smith stated that “in preparing [his] [second] witness statement, [he] reviewed arguments presented by Mexico in this arbitration,”⁷⁹ Mr. Smith Ramos did not clarify the situation regarding the existence of said notes, even though the Claimants confirmed that they did not exist, an issue that the Respondent pointed out verbatim in its Reply on Jurisdiction.⁸⁰

⁷⁷ Investment group report dated February 27, 2018, p. 3 (emphasis added). **KS-003**.

⁷⁸ ENG, Tr. Day 2, p. 288-289.

⁷⁹ Second Witness Statement of Smith Ramos, ¶ 8.

⁸⁰ Reply on Jurisdiction, ¶ 146.

76. On the contrary, Mr. Smith waited until the hearing to point out that these notes existed and that he had discussed them with the Claimants’ representatives months before the hearing.⁸¹ The Claimants attempted to counter this situation by pointing out that “[w]e learned of the existence of the notes two days ago when Mr. Smith said that he provided us with the notes.”⁸² The contradiction between the Claimants and their witness is evident.

77. Regardless of who is correct, the reality is that the Claimants and their witness did not provide the documents on which they rely to support their interpretation of Annex 14-C. This fact undermines the credibility of Mr. Smith Ramos’ testimony.

78. In addition, in *Access v. Mexico*, the tribunal also analyzed Mr. Smith Ramos’ testimony and the documents he submitted in this arbitration along with his witness statements. In analyzing the investment group’s report of February 27, 2018 (KS-003), the majority of the tribunal concluded that:

The fact that the US and Mexico have referred to Annex 14-C as a sunset clause in their respective internal communications does not evince that the annex was intended to apply to the substantive provisions. Like the term “grandfathering,” the notion of a “sunset provision” merely suggests that the temporal scope of application of a rule is extended. It says nothing about the content of the rule at stake, and could apply to a procedural or to a substantive rule or to both.⁸³

79. Regarding the investment group’s internal report to Mr. Smith Ramos dated October 16, 2017 (KS-004) and the ’internal report to Mr. Smith Ramos dated May 4, 2017 (KS-002), the majority of the *Access* tribunal determined:

Some internal Mexican documents show that, at one point in the negotiations, Mexico’s representatives may have understood that the US was proposing to “extend the validity of the investment chapter for three years after the expiration of NAFTA.” While the document indeed refers to a proposed temporal extension of the entire investment chapter of NAFTA, this merely shows how the Mexican officials understood the US proposal at a specific time of the negotiations. In any event, the document adds that Canada and Mexico have not accepted this proposal, as their representatives had no

⁸¹ ENG, Tr. Day 2, p. 287: 5-8 (“I have since provided ... *over the last few months*, the information specifically on the notes, and then I have those notes myself. I have provided a copy of the notes that I have to Counsel.”)

⁸² ENG, Tr. Day 2, p. 336: 5-7.

⁸³ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶205. **RL-0141**.

mandate to this effect. *These documents are thus equally inconclusive.*⁸⁴ (Emphasis added)

80. Finally, the tribunal concluded that the testimony of Mr. Smith Ramos “is not, however, a contemporaneous position expressed in an official capacity. At most, it shows Mr. Smith Ramos’s personal recollection of his position at the time of the negotiations of the USMCA. From his evidence, it was clear that it was the recollection of someone who, in his capacity as chief negotiator of a major treaty, supervised a significant number of different work streams each involving numerous sometimes complex issues, and who, by the nature of his position, did not have detailed direct knowledge of all the discussions occurring among negotiating delegations.”⁸⁵ For this reason, the majority of the *Access* tribunal considered that Mr. Smith Ramos’ testimony had limited probative value.

81. The Respondent invites the Tribunal to consider the analysis of the *Access* tribunal and confirm that the interpretation of the Respondent and the other two Parties to the USMCA is correct.

82. Finally, the Respondent highlights the fact that Mr. Smith is a paid witness, which further undermines his credibility. His claim that he does not remember how much he was paid for his testimony in the other two cases in which he participated is not credible.⁸⁶

**E. OBJECTION 5: THE TRIBUNAL LACKS JURISDICTION
RATIONE MATERIAE BECAUSE THE CLAIMANTS DO NOT
HAVE AN INVESTMENT WITHIN THE MEANING OF ARTICLE
25 OF THE ICSID CONVENTION**

83. The Claimants sought to demonstrate that the *Salini* test does not apply to them, and that, even if it did, their “investment” complies with that test.⁸⁷ As explained below, this is not the case.

84. *First*, the Respondent has already explained that the legal relevance of the *Salini* test for proving the existence of an investment under Article 25 of the ICSID Convention has been

⁸⁴ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶205. **RL-0141**.

⁸⁵ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Award, 21 November 2025, ¶205. **RL-0141**.

⁸⁶ ENG, Tr. Day 2, p. 299-300.

⁸⁷ ENG, Tr. Day 1, p. 209-210, 213-214.

established by previous tribunals on multiple occasions, despite the Claimants’ disagreement.⁸⁸ As noted by the tribunal in the *Hassan Awdi* case, one of the cases on which the Claimants rely to argue that the *Salini test* does not apply,⁸⁹ that standard is relevant for describing the characteristics of an investment.⁹⁰ The Claimants do not dispute this.

85. *Second*, “Chapter 11 of NAFTA did not nullify the ordinary meaning of the word “investment,” which has several inherent characteristics.⁹¹ These characteristics are precisely those defined in the *Salini test*, which include entailing risk and implying a contribution to the State. The definition of “investment” in Article 1139 is consistent with the concept of “investment” in Article 25 of the ICSID Convention.⁹²

86. During the hearing, the Claimants pointed out that in the case of *Finley et al. v. Mexico*, the Respondent allegedly argued that “*Salini* does not apply in that case, and, instead, the Tribunal should look to the text of NAFTA”⁹³ This is incorrect.

87. In the *Finley* case, as in the Case ARB/23/33 case, the Respondent argued that the *Salini test* is relevant to establishing an investment under Article 25 of the ICSID Convention, and that the NAFTA Article 1139 definition of investment coexists in cases where a claimant initiates arbitration under both NAFTA and the ICSID Convention, requiring a claimant to meet both definitions. The Respondent also argued in the *Finley* case that the *Salini test* was not applicable to satisfy the Article 1139 definition of investment. Mexico’s rejoinder in *Finley et al. v. Mexico* does not constitute a legal exhibit in this arbitration. It is a public document, and a simple reading of Mexico’s arguments makes it clear that the Claimants’ statement is incorrect.

⁸⁸ Reply on Jurisdiction, ¶ 161. See also *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, May 5, 2022, ¶ 562. **RL-0100**. *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, May 4, 2021, ¶ 665. **RL-0103**. *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, July 2, 2018, ¶ 243 **RL-0105**. *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, October 30, 2017, ¶ 6.50. **RL-0123**. *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, ¶ 74 **RL-0124**.

⁸⁹ ENG, Tr. Day 1, p. 207: 8-16.

⁹⁰ *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶ 197. **CL-0021**.

⁹¹ Oral statement by the representative of the United States. ENG, Tr. Day 1, p. 13.

⁹² Reply on Jurisdiction, ¶ 159.

⁹³ ENG, Tr. Day 1, p. 213: 4-10.

88. An investment implies an assumption of investment risk.⁹⁴ However, the Claimants have not demonstrated that such a risk existed in their case. To date, the Claimants have not addressed the absence of investment risk (which implies the lack of certainty regarding the return on their investment).⁹⁵ This case involves merely a commercial risk, specifically a risk of a breach of a contract regarding the payment obligation on the part of TV Azteca.

89. The Respondent reiterates that the risk that the Notes could decrease in value had already materialized at the time Opportunities and Sandpiper acquired the Notes. Therefore, there never was a “participation in the risk of the transaction.”⁹⁶

90. Furthermore, there is no doubt that the contribution to a country’s economic development is a basic element for constituting an investment under Article 25 of the ICSID Convention, which is part of the *quid pro quo* for accessing the protection of an investment treaty.⁹⁷ The concept of investment must be analyzed in accordance with the object and purpose of the ICSID Convention, which in its preamble indicates that said treaty was agreed upon “[c]onsidering the need for international cooperation for economic development and the role played in that field by international private investment.”

91. In addition to the above, in 1964 the Executive Directors of the World Bank further elaborated on this point by stating the following:

*In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.*⁹⁸

⁹⁴ Oral statement by the representative of the United States. ENG, Tr. Day 1, p. 13. See also Zachary Douglas, “*The International Law of Investment Claims*,” CUP (2009), p. 191. **RL-0002**.

⁹⁵ *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, November 26, 2009, ¶¶ 229-230. **RL-0014**.

⁹⁶ See *Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 16, 2001, ¶ 52. **RL-0022**.

⁹⁷ Zachary Douglas, “*The International Law of Investment Claims*,” CUP (2009), p. 135 (“The principal objective of an investment treaty is to stimulate the flow of private capital into the economies of the contracting states.”) **RL-0002**.

⁹⁸ *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, March 18, 1965, ¶ 9. **RL-0125**.

92. In this case, the contribution element is not met because, as Mexico has explained, there is no connection whatsoever between the “investment” and Mexico. The Claimants attempt to remedy this by pointing out that TV Azteca, one of the parties to the *Indenture*, has a commercial presence in Mexico, stating that “there is no question here that TV Azteca is intertwined with the territory of Mexico.”⁹⁹

93. However, this argument fails because it ignores the main point at issue: the link to Mexico must be with the Notes, not TV Azteca. The Notes are governed under New York law; listed for trading in Singapore; not the Mexican stock market, much less were registered in the National Securities Registry of the Mexican National Banking and Securities Commission, nor were they taxed in Mexico. In clear terms: TV Azteca is not the Claimants’ alleged investment.

94. The Claimants failed to demonstrate any link between the Notes and Mexico, much less with its economic development. Finally, the Claimants point out that Mexico “did not dispute the contribution.”¹⁰⁰ This is false. The Respondent clearly objected to it in the written phase¹⁰¹ and in the Hearing.¹⁰²

**F. OBJECTION 6: THE TRIBUNAL LACKS JURISDICTION
RATIONE TEMPORIS BECAUSE CONTRARIAN ACQUIRED ALL
THE NOTES AFTER THE ALLEGED VIOLATION, WHILE
CYRUS ACQUIRED SOME NOTES AFTER THE ALLEGED
VIOLATION**

95. The Tribunal lacks jurisdiction *ratione temporis* over the alleged “investments” acquired *after* the alleged violation occurred.¹⁰³ The Claimants did not challenge this legal principle in their pleadings or at the hearing.

⁹⁹ ENG, Tr. Day 1, p. 217.

¹⁰⁰ ENG, Tr. Day 1, p. 214.

¹⁰¹ Reply on Jurisdiction, ¶ 165.

¹⁰² ESP, Tr. Day 1, pp. 137-138.

¹⁰³ Memorial on Jurisdiction, ¶¶ 109-115. NDP Submission of Canada, ¶ 23 (“If the investor of a Party did not exist or did not have an investment at the time of the challenged measure, then the threshold connection between the challenged measure and a claimant under Article 1101(1) cannot be met, and there are no substantive obligations in Section A that apply with respect to that claimant and its investments.”). See also *Renée Rose Levy y Gremcitel S.A. v. the Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 147 (“Since the BIT is both an instrument that creates the substantive obligation that forms the basis of the claim before the Tribunal and the instrument that confers jurisdiction on the Tribunal, a

96. In the case of Cyrus, Opportunities acquired certain Notes on October 26, 2022, and November 8, 2022, and after the September 22 Injunction. Cyrus did not own or control those Notes before Opportunities acquired them. Therefore, the Tribunal lacks jurisdiction *ratione temporis*.

97. In the case of Contrarian, there is no doubt that Sandpiper acquired its Notes after the September 2022 Injunction. But according to the Claimants, jurisdiction *ratione temporis* continues to exist because of Contrarian’s “unbroken chain of control” over these Notes at the time of the Injunction and thereafter.¹⁰⁴ Specifically, they allege that, at the time of the Injunction, “Contrarian controlled the Notes through another of its controlled entities, an affiliate and partial owner of Sandpiper, Contrarian Emerging Markets.”¹⁰⁵

98. The evidence presented by the Claimants contradicts their position. The investment management agreement between Emerging Markets and Contrarian clearly states that Contrarian has “no authority to act for, represent, bind or obligate [Emerging Markets].”¹⁰⁶ In other words, Contrarian does not control Emerging Markets.

99. Mexico addressed this text in its Reply, but the Claimants never responded.¹⁰⁷ Instead, they noted that Contrarian can invest assets on behalf of Emerging Markets.¹⁰⁸ However, that does not equate to control. According to the investment management agreement, all investment decisions must be by Contrarian pursuant to the instructions of Emerging Markets’ limited partners.¹⁰⁹

claimant who submits a claim under a Treaty obligation must have owned the investment or had control over it at the time that the obligation was allegedly breached.”). **RL-0026**.

¹⁰⁴ ENG Tr. Day 1, p. 169: 13-16.

¹⁰⁵ Rejoinder on Jurisdiction, ¶ 165.

¹⁰⁶ Contrarian Emerging Markets, L.P. – Contrarian Investment Management Agreement, p. 2. **C-0017**.

¹⁰⁷ Reply on Jurisdiction, ¶ 92.

¹⁰⁸ ENG Tr. Day 1, p.170: 7-16.

¹⁰⁹ Contrarian Emerging Markets, L.P. – Contrarian Investment Management Agreement, p. 2. (“All investments of the Feeder Fund and the Master Fund shall at all times conform to and be in accordance with the requirements imposed by (i) any provision of applicable law, (ii) the provisions of the Articles, (iii) the provisions of the Partnership Agreement, and (iv) the provisions of the applicable Memoranda, each as amended from time to time, and delivered to the Investment Manager.”). **C-0017**. The “Memoranda” is provided to Contrarian by the “limited partners” of Emerging Markets and the “shareholders” of a separate fund called “Feeder Fund”

Contrarian can also be removed as investment manager at any time, another fact that the Claimants never addressed.¹¹⁰ In sum, Contrarian follows the instructions of other entities and therefore does not control Emerging Markets. This means that Contrarian did not control the Notes held by Emerging Markets at the time of the Injunction.

100. For the reasons stated above and in the previous pleadings, the Tribunal lacks jurisdiction *ratione temporis* over Contrarian's claim and part of Cyrus's claim.

**G. OBJECTION 7: THE TRIBUNAL LACKS JURISDICTION
RATIONE VOLUNTATIS BECAUSE THE WAIVERS SUBMITTED
BY THE CLAIMANTS WERE DEFICIENT**

101. The Respondent has been clear in stating that compliance with the requirements set forth in Article 1121 of NAFTA is not a trivial issue, which the Claimants conceded.¹¹¹ Mexico's consent to arbitration is conditioned on the requirement that a claim be submitted "in accordance with the procedures" of Chapter 11,¹¹² which includes the submission of the corresponding waivers by the investor.

102. A simple reading of the waivers submitted by the Claimants confirms that they do not satisfy the requirements of Article 1121 of NAFTA. Far from waiving the right to "initiate or continue any proceeding with respect to the allegedly violating measure,"¹¹³ the Claimants expressly limited their waivers of claims¹¹⁴ and, furthermore, they explicitly excluded "any current or future proceeding in Mexico... including File No. 995/2022 itself."¹¹⁵ It is evident that these waivers preserve the possibility of continuing or initiating new local proceedings on the same facts that supports this claim, which is contrary to the meaning of Article 1121.

103. During the Hearing, the Claimants admitted that they were aware of the need to file a valid waiver, but that they had deliberately limited its scope so as not to prevent them from initiating

¹¹⁰ See Memorial on Jurisdiction, ¶ 92. See also Contrarian Emerging Markets, L.P. – Contrarian Investment Management Agreement, p. 9. **C-0017**.

¹¹¹ SPA Tr. Day 1, p. 231: 9-10.

¹¹² Reply on Jurisdiction, ¶ 179.

¹¹³ Article 1121(2)(b) of NAFTA.

¹¹⁴ Cyrus Capital Partners waiver. **Exhibit 6**. Contrarian Capital Management waiver. **Exhibit 7**.

¹¹⁵ Cyrus Capital Partners waiver. **Exhibit 6**. Contrarian Capital Management waiver. **Exhibit 7**.

other cases in the future. Thus, when questioned by Dr. Cairns as to whether it would have been more appropriate to replicate the language of Article 1121 of NAFTA, the Claimants responded:

MR. PATERNO: Well, I think the Claimants could have done that, Your Honor, but I think here it was an attempt to be more specific. And, obviously, *this waiver isn't only at play here in this case, but it would -- it could be used against Claimants outside of this for whatever reason.* So I think the point of Claimants' attempt was to be very specific about what the Measure of México was that they are -- that they consider to be a breach and that they are waiving.¹¹⁶ (Added emphasis)

104. In particular, Dr. Cairns cautioned that the chosen wording “would leave open, for example, proceedings against México based on some other theory, other than the wrong of the judge.”¹¹⁷

105. As the Respondent has explained above, the waiver should encompass its “right to initiate or continue any proceedings with respect to the measure of the disputing Party that is allegedly one of the violations referred to in Article 1117 before any administrative or judicial tribunal pursuant to the law of either Party or other dispute settlement procedures.”¹¹⁸ The waivers submitted by the Claimants clearly do not meet this requirement.

106. In summary, regardless of any arguments they may attempt to develop, it is clear that the Claimants failed to comply with the consent requirement of Article 1121(2)(b) of NAFTA by limiting the scope of their waivers. As has been consistently recognized by NAFTA tribunals, a defective waiver can't be remedied without the express consent of the State,¹¹⁹ consent that Mexico has not granted, making it defective from the outset.¹²⁰ For all the reasons stated above, the Tribunal lacks jurisdiction *ratione voluntatis* to hear the Claimants' claims.

¹¹⁶ ENG Tr. Day 1, pp. 230-231.

¹¹⁷ ENG Tr. Day 1, pp. 229: 16-18.

¹¹⁸ Article 1121(2)(b) of NAFTA.

¹¹⁹ Reply on Jurisdiction, ¶ 202. See *KBR Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Award, April 30, 2015, ¶ 148. **RL-0112**. See also *KBR Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Submission of the Government of Canada, July 30, 2014, ¶ 6 (“A claimant cannot ex post facto cure Article 1121 jurisdictional defects absent the express consent of the responding NAFTA Party.”) (citing *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008, ¶ 61). **RL-0104**.

¹²⁰ See *The Renco Group, Inc. c. the Republic of Peru* [I], ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, ¶ 142. **RL-0004**. See also Reply on Jurisdiction, ¶ 203.

H. OBJECTION 8: CONTRARIAN DOES NOT HAVE STANDING TO FILE A CLAIM FOR DENIAL OF JUSTICE UNDER ARTICLE 1116, SINCE IT WAS NOT A PARTY TO THE MEXICAN PROCEEDINGS IN QUESTION

107. Contrarian lacks standing to bring a claim for denial of justice, as neither Contrarian nor Sandpiper were parties to Mercantile Lawsuit 995/2022. Neither entity suffered any loss when the Injunction was issued. The Respondent explained the legal principles on which this objection is based,¹²¹ and the Claimants never challenged them.

108. Instead, the Claimants recycled their flawed argument about Contrarian's control over Emerging Markets.

MS. PADGETT: [...] México's Objection 8 similarly fails because Contrarian controlled the Notes that it controls now, through Sandpiper, at the time the September 2022 proceedings commenced and when the denial of justice occurred.

Contrarian Emerging Markets LP was a named defendant in the September 2022 proceedings based on its status as a Noteholder.

Contrarian controls Contrarian Emerging Markets LP by virtue of the Investment Management Agreement. That Agreement vests Contrarian with the authority to, among other things "open, maintain, and close in the name of the Feeder Fund and the Master Fund, to invest and reinvest the assets of the Feeder Fund, including money borrowed, in Master Fund; to purchase, hold, sell, and otherwise deal in securities and financial instruments, to execute instruments of transfer."¹²²

109. The argument fails for several reasons. First, the fact that Emerging Markets was a party to Mercantile Lawsuit 995/2022 does not give Contrarian standing to bring a claim under Section 1116. As explained above, Section 1116 requires that the investor bringing the claim be the same one who suffered losses or damages as a result of the alleged violation. It does not authorize another investor to bring a claim on behalf of the investor who suffered the loss or damage as a result of the alleged violation.¹²³

110. Second, as explained above, Contrarian did not control Emerging Markets when the Injunction was issued. Contrarian acts on the instructions of Emerging Markets' "limited

¹²¹ Memorial on Jurisdiction, ¶ 130 ("To bring a claim for denial of justice under customary international law, the claimant must have been a party to the proceedings in which the alleged denial of justice occurred."). See also ENG Tr. Day 1, pp. 123-125.

¹²² ENG Tr. Day 1, pp. 169-170.

¹²³ NDP Submission of the United States, ¶ 22.

partners.”¹²⁴ In that respect, Contrarian was merely a collateral entity of Emerging Markets. Any effect the Injunction had on Contrarian (if any) stemmed from its relationship with Emerging Markets, not from the Injunction itself. Consequently, Contrarian lacks standing to bring the claim under NAFTA.

III. THE CLAIM OF DENIAL OF JUSTICE IS INADMISSIBLE BECAUSE THE INJUNCTION CLAIMED HAS CEASED TO EXIST

111. The Respondent clearly explained that, as of June 30, 2023, the time of filing of the Request for Arbitration, the measure was being challenged before Mexican courts and for this reason its sole claim of denial of justice would be inadmissible since it was not “ripe.”¹²⁵ As the Respondent pointed out, in order to assert a claim of denial of justice, the necessary ordinary remedies must first be exhausted.¹²⁶

112. At the Hearing, the Claimants maintained that the denial of justice claim was admissible at this stage and that they would argue at the merits stage that any appeal was futile.¹²⁷ However, the appeal was not in vain. The Respondent explained that on October 22, 2025, it became known that the 10th Collegiate Court had ordered the resolutions confirming the Injunction to be set aside. As will be explained below, due to this, in November 2025, the Third Chamber revoked the Injunction, which resulted in the measure challenged by the Claimants in this arbitration becoming moot.¹²⁸ For the Tribunal’s convenience, the Respondent will now briefly recall the relevant facts:¹²⁹

- In September 2022, TV Azteca filed Mercantile Lawsuit 995/2022.
- On September 27, 2022, the then 63rd Civil Court (now assigned to the 38th Civil Court as Mercantile Lawsuit 203/2025) admitted the lawsuit and issued the Injunction challenged by the Claimants in the arbitration.

¹²⁴ See Contrarian Emerging Markets, L.P. – Contrarian Investment Management Agreement, p. 2. **C-0017**. See also Reply on Jurisdiction, ¶ 92.

¹²⁵ Memorial on Jurisdiction, ¶¶ 210-212.

¹²⁶ SPA Tr. Day 1, p. 152: 15-20. (“[...] el inversionista demandante debe agotar todos los recursos legales posibles para poder presentar una reclamación por denegación de justicia porque aparentemente todo el aparato judicial del Estado demandado falló, fracasó”).

¹²⁷ ENG Tr. Day 1, p. 238: 4-5. ENG Tr. Day 1, p. 239: 6-8.

¹²⁸ SPA Tr. Day 1, p. 155-156.

¹²⁹ See Reply on Jurisdiction, § II. E.

- On March 31, 2023, BNYM and BNYM LB filed Appeal 1186/2023 against the Injunction, which was resolved by the Third Chamber on July 8, 2024, which refused to terminate the Injunction (“Appeal 1186/2023”).
- On May 16, 2023, BNYM and BNYM LB filed an incidental motion to revoke the Injunction. In January 2024, the 63rd Civil Court rejected the motion. Against this rejection, on February 8, 2024, BNYM and BNYM LB filed Appeal 694/2024, which was rejected by the Third Chamber in July 2024 (“Appeal 694/2024”).
- Against Appeal 1186/2023 and Appeal 694/2024, BNYM and BNYM LB filed Indirect Amparo 1009/2024 before the 14th District Court. In January 2025, the 14th District Court denied the amparo, whereupon BNYM and BNYM LB filed Appeal for Review 71/2025 before the 10th Collegiate Court.
- On October 22, 2025, the judgment of the Appeal for Review 71/2025 was issued, which revoked the judgment of Indirect Amparo 1009/2024.¹³⁰ The judgment of Appeal for Review 71/2025 was made public weeks later, but at the end of October 2025, the media began to comment on the way in which it was resolved.

113. Through the judgment of Appeal for Review 71/2025, the 10th Collegiate Court revoked the amparo judgment that had been challenged and rendered ineffective the judgment of Appeal 1186/2023 and the judgment of Appeal 694/2024:

“VI. DECISION

91. Consequently, since the grievances raised by the cross-appellant are unfounded and inoperative, and those expressed by the principal appellant are well-founded for the reasons set forth in this ruling, **the appealed judgment is revoked**, and given the defects observed in the challenged resolutions relating to improper substantiation and motivation, the Justice of the Union **grants amparo and protection to the complaining party** so that the challenged resolutions confirming the granting of the aforementioned precautionary measures [the Injunction] are rendered null and void.”¹³¹
[Original emphasis]

114. Based on the judgment of Appeal for Review 71/2025, on November 5, 2025, the 14th District Court required both the Third Chamber and the 38th Civil Court to comply with the resolution,¹³² that is, to revoke the judgments of Appeals 1186/2023 and 694/2024.

115. On November 11, 2025, the Third Chamber issued a new ruling on Appeal 1186/2023, re-evaluating the September 2022 Injunction, to verify its correctness. The Third Chamber indicated that the Injunction should be revoked along with its legal effects:

¹³⁰ Judgment of Appeal for Review 71/2025, October 22, 2025. **R-0043.**

¹³¹ Judgment of Appeal for Review 71/2025, October 22, 2025, pp. 54-55. **R-0043.**

¹³² Order of the 14th District Court requesting the Third Chamber and the 38th Civil Court to comply with the Judgment of Appeal for Review 71/2025, November 5, 2025. **R-0044.**

“Therefore, the grounds for appeal under review **are well-founded**, and the appropriate course of action is to **modify the challenged order to revoke the precautionary measures** [the Injunction] **granted therein to the plaintiff**.

[...] II. In light of the foregoing, **the appropriate course of action is to modify the challenged order to read as follows:**

[...] **Regarding the PRECAUTIONARY MEASURES** [the Injunction] **requested by the plaintiff, they SHALL NOT BE GRANTED** [...].¹³³
(Original emphasis)”

116. The foregoing confirms what the Respondent stated repeatedly and during the Hearing:¹³⁴ the precautionary measure was not final and was subject to challenge, so there was a possibility that the defendants in Mercantile Lawsuit 203/2025 would obtain a favorable judgment that would revoke the Injunction, as in fact happened.

117. It is unreasonable to maintain arbitration proceedings, either at the Jurisdiction stage or at the Liability and/or Quantum stage, regarding a measure that no longer exists. Furthermore, the Tribunal considered that these recent Judicial Resolutions formed part of the *factual matrix* of the case and that it would be unrealistic to ignore them.¹³⁵

118. The fact is that the Injunction has ceased to exist is sufficient reason to render the present arbitration moot. The Respondent reiterates that the arbitration was filed prematurely, and therefore the Claimants’ claims must be considered inadmissible.¹³⁶

IV. COSTS

119. Pursuant to Section 9.1 of Procedural Resolution No. 1 and Rule 52(1) of the ICSID Arbitration Rules, the Respondent requests the Tribunal to order the Claimant to pay in full the costs and expenses incurred by Mexico as a result of this arbitration, including:

- the Tribunal’s fees and expenses;
- the ICSID’s administrative costs;
- the fees and expenses of the attorneys representing Mexico; and
- any additional expenses related to these proceedings that Mexico may reasonably incur until the issuance of the Award.

¹³³ New Appeal 1186/2024, issued by the Third Chamber, November 11, 2025, pp. 53-60. **R-0045**.

¹³⁴ SPA Tr. Day 1, p. 153-56.

¹³⁵ Letter from the Tribunal, January 21, 2026.

¹³⁶ SPA Tr. Day 1, p. 156: 6-7.

120. This arbitration was not properly filed, and the claim was not ready for consideration. It is clear that the Claimants filed their claim to exert pressure on the Respondent to obtain a favorable outcome in a private dispute. The Respondent has been compelled to respond to a claim that was clearly premature and no longer exists. Furthermore, the Tribunal lacks jurisdiction over the claim for the reasons stated above.

121. The Respondent notes that ICSID and non-ICSID tribunals have adopted a costs-follow-the-event approach when rejecting claims for lack of jurisdiction.

122. Furthermore, the Claimants have increased the duration and cost of this proceeding. As an example, in its Reply on Jurisdiction, the Respondent informed the Claimants that the claim was premature.¹³⁷ The Claimants ignored the advice and proceeded with their claim to put pressure on Mexico.

123. Furthermore, the Tribunal will recall that the Respondent requested that the Hearing be held remotely. The Claimants refused, although days later they requested that the sole witness in the arbitration (Mr. Smith) appear remotely. Ultimately, the Respondent was forced to bear the unnecessary costs of a hearing held in-person.

124. These examples demonstrate a dilatory procedural strategy designed to increase costs and pressure the Respondent. Such conduct constitutes sufficient grounds for the Claimant to be ordered to pay all costs.

125. Accordingly, Mexico requests the Tribunal:

- Order the Claimants to pay all costs and expenses of this arbitration;
- Include in said order any additional expenses related to this proceeding that Mexico may reasonably incur until the issuance of the Award; and
- Order that such sums accrue compound interest from the date of the Award until their full payment, at a reasonable commercial rate determined by the Tribunal.

V. PRAYER FOR RELIEF

126. For all the foregoing reasons, the Respondent requests this Tribunal to dismiss the Claimant's claim in its entirety, with the corresponding award of costs in favor of the Respondent.

¹³⁷ See Reply on Jurisdiction, § IV.

Respectfully submitted,

[illegible]

General Counsel for International Trade
Alan Bonfiglio Ríos