INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TC Energy Corporation and TransCanada Pipelines Limited

v.

United States of America

(ICSID Case No. ARB/21/63)

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

Date: 12 July 2024

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

2. I respectfully disagree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. [redacted]

16. [redacted]

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

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4 R-119, [redacted]

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

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

19. Then, [redacted]

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

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6 See Exhibit R-140, [redacted]

7 C-205, [redacted]

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

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

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

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

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

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8 C-143, [redacted]

9 C-206.

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

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

26. Exhibit C-143, [redacted]

27. [redacted]

28. [redacted]

29. [redacted]

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

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

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

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

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

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

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

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

[signed]

Henri C. Alvarez
Arbitrator
Date: 12 July 2024