**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Access Business Group LLC**

**v.**

**United Mexican States**

**ICSID Case No. ARB/23/15**

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# CLAIMANT'S POST-HEARING MEMORIAL [ENGLISH]

**May 27, 2025**

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## LIST OF ABBREVIATIONS

CE – Cross-Examination

CMOJ – Claimant's Counter-Memorial on Jurisdiction

ECT – Energy Charter Treaty

ICJ – International Court of Justice

IDNS – Internal Documents not Shared

ISDS – Investor-State Dispute Settlement

Mexico – The United Mexican States or Respondent

RMOJ – Respondent's Memorial on Jurisdiction

SMI – Supplementary Means of Interpretation

TER – Tams Expert Report

VCLT – Vienna Convention on the Law of Treaties

WS – Witness Statement

## I. WHAT WEIGHT UNDER THE VCLT IS TO BE ACCORDED TO DOCUMENTS GENERATED BY A CONTRACTING STATE DURING THE NEGOTIATING PERIOD, BUT NOT SHARED WITH THE OTHER CONTRACTING STATES?

1. The objective and academic answer to this question is that *it depends on the quality of the evidence*. There is no formula. The quality of the evidence in turn depends on the (i) authenticity of the document, (ii) when the document was generated[1], (iii) the purpose for which the document was written, (iv) the standing of the author,[2] (v) reliability, (vi) content, and (v) the relationship of the document to other documents, i.e., consistency[3] of subject matter and text.

2. As set forth, in part, in ¶¶ 149-167 and nn. 124-147 CMOJ citing to authority, documents generated by a Treaty Party during the negotiating period and not shared with other Treaty Parties may be accorded *decisive weight* in the interpretive process. The ICJ has been categorically clear on this point. *See, e.g., The Land and Maritime Boundary, between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)* (cited and analyzed in CMOJ, p. 58, n. 133)[4]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*[5] (adopting an internal UK unclassified document dated 23 and 24 September 1965 [record of UK-US talks on defence facilities in the Indian Ocean, United Kingdom FO 371/18529]), "the governments of the United Kingdom and the United States considered that, rather than attaching the islands of the Chagos Archipelago from Mauritius and the islands of Aldabra, Farquhar and Desroches from Seychelles in two separate operations, their interests would be better observed by carrying out that detachment 'as a single operation' in order to avoid 'a second row' in the United Nations," ¶ 96); *ICJ Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*[6] (noting that "the Court considered as *travaux* a note sent by the UN-Mission

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1 *See infra* Section B, 2.

2 *See infra* Section B, 4.

3 *See infra* Section B, 6.

4 The Land and Maritime Boundary, between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), ICJ Reports, Judgment, October 10, 2002 **(CL-0256-ENG)**.

5 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 – ICJ Advisory Opinion of February 25, 2019 **CL-0264-ENG.**

6 Dörr, p. 622, ¶ 15, n. 23, *citing to ICJ Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, February 2, 2017, ¶ 104 **(CT-0061-ENG)**.

of Norway to the UN-Secretariat, since Norway had been involved by giving administrative assistance to Somalia"); *Oil Platforms case* (*Islamic Republic of Iran v United States of America*) [7] (finding persuasive material of unilateral origin for purposes of treaty interpretation). Prof. Dörr observes that in the *Oil Platforms case*, "the ICJ referred to the silence of the *travaux*, i.e., to the fact that a certain view had never been expressed during the negotiations, and based its rejection of the interpretation put forward by Iran on that [proposition]."[8] Prof. Dörr further notes:

> In the *Oil Platforms* case, the ICJ did admit and consider unilateral documents of the US Administration (a memorandum sent by the State Department to the US Embassy in China, and the message of the Secretary of State transmitting several treaties to the US Senate for consent to ratification) in order to confirm an interpretation of the bilateral treaty of friendship with Iran which it had found before. [N. citation omitted.] From the sequence of argument of the Court it can be deduced that it admitted the documents under Art. 32 [N. citation omitted] although it did not explicitly characterize them as preparatory work (which they clearly were not). (Parenthetical in original.)[9];

*accord* Gardiner, *Treaty Interpretation* p. 120[10]; *Territorial Dispute* (*Libyan Arab Jamahiriya v. Chad*)[11] (using Libyan Minutes of the negotiations covering statements made by the Libyan Prime Minister and the French Ambassador as part of the treaty interpretive process and finding that "[i]t is clear from these minutes that the Libyan Prime Minister expressly accepted the agreement of 1919, the 'implementation' of the agreement to be left 'to the near future'; and in this context, the term 'implementation' can only mean operations to demarcate the frontier on the ground," ¶ 56); *Delamination of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau)*[12] (using an internal note from the French Ministry of Foreign Affairs)

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7 OLIVER DÖRR, "Article 32," VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (2nd ed. Springer, 2019), p. 632, ¶ 39, n. 75, *citing to ICJ Oil Platforms (Iran v United States)* (Preliminary Objection) [1996] ICJ Rep pp. 803, 812-15 **(CT-0061-ENG)**.

8 *Id.*, *Oil Platforms,* p. 803, ¶ 29 **(CT-0061-ENG)**.

9 Dörr, p. 622, ¶ 15 **(CT-0061-ENG)**.

10 Gardiner, *Treaty Interpretation,* **(CL-0024-ENG)** p. 400, **(CL-0048-ENG)** pp**.** 47-51, **(CL-0057-ENG)** p. 168, **(CL-0058-ENG)** p. 354; **(CL-0223-ENG)** p. 254; **(CL-0266-ENG)** p. 120.

11 Territorial Dispute (Libyan Arab Jamahiriya v. Chad) – ICJ Judgment of February 3, 1994 **CL-0262-ENG.**

12 Delamination of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau), Award, February 14, 1985; XIV – UNRIAA 149; 25 ILM 252 **CL-0260-ENG.**

[unofficial translation from French to English; for a complete discussion, please see article by Vid Prislan, *Domestic Explanatory Documents and Treaty Interpretation* (2017) 66, pp. 933-934, 946] ¶¶ 61, 68, 70); *Aegean Sea Continental Shelf (Greece v. Turkey)*[13] (taking note of an exchange of notes between the two governments and a declaration made before the Turkish Parliament; considering internal Greek documents for the purpose of confirming the Greek government's motive behind its reservation (¶¶ 63-67)); *accord* Oliver Dörr & Kristen Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*[14]; *Dispute between Argentina and Chile concerning Beagle Channel (Chile/Argentina)*[15] (considering public speeches made by the Chief Negotiator of treaty to evidence Argentina's understanding of the treaty; an official published map prepared by the same Negotiator; and diplomatic exchanges between the Negotiator and a British diplomat (¶¶ 112-130 for full analysis)); *Sovereignty Over Certain Frontier Land (Belgium/Netherlands)*[16] (considering unilateral material in the form of a letter [among other things] from the President of The Netherlands Commission of 16 December 1841 to The Netherlands Foreign Minister viewed as "[providing] clear contemporaneous evidence of the nature of the task on which the Mixed Boundary Commission was engaged" (pp. 220-221, 223-226) (concerning an analysis of unilateral material in consideration of whether a mistake was made)); *Anglo-Iranian – Oil Company Case*[17] (considering unilateral material citing post-signing and pre-ratification of domestic law to confirm interpretation (pp. 106-107); and *International Status of Southwest Africa*[18] (considering unilateral material and according weight to unilateral statement in finding that there was no agreement between the Union and the United Nations (pp. 46-47)).

3. The Tribunal respectfully is invited to review Claimant's analysis of the WTO's appellate body's observations in *European Communities-Customs Classification of Frozen*

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13 Dörr, p. 625, ¶ 22, n. 42, *citing to Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of December 19, 1978, 1978 ICJ 3 ¶¶ 100-102 **(CT-0061-ENG)**.

14 Dörr, pp. 617-625 **(CT-0061-ENG)**.

15 Dispute between Argentina and Chile concerning Beagle Channel (Chile/Argentina), Award, February 18, 1977, XXI – UNRIAA 57 **CL-0259-ENG.**

16 Sovereignty Over Certain Frontier Land (Belgium/Netherlands), Judgment of June 20, 1959 **CL-0258-ENG.**

17 Anglo-Iranian – Oil Company Case (United Kingdom v. Iran), Judgment of 22 July 1952 (1952), **CL-0268-ENG.**

18 International Status of Southwest Africa – ICJ Separate Opinion by Judge Read, July 1950 **CL-0257-ENG.**

*Boneless Chicken Cuts*[19] set forth in CMOJ ¶¶ 162-167 including nn. 142-147 addressing an approach to factors to be considered in allocating weight to SMI (WTO jurisprudence, historical materials, backgrounds, provisions in the predecessor agreement, and unilateral acts and materials can all be considered as circumstance of a treaty's conclusion). Also helpful on this issue are *Churchill Mining v. Indonesia*[20] (CMOJ ¶ 155, n. 134); *Hicee B.V. v. Slovak Republic*[21] (CMOJ ¶¶ 156-161, n. 136-140); and *Mondev v. USA*[22] (finding internal document explaining signatory government's position to its own internal legislature accepted as shedding light on the purposes and approaches taken to the treaty, regardless of whether such document constituted preparatory work).

4. Where the evidence is found to be qualitatively reliable, as determined by consideration of the non-exhaustive factors referenced,[23] the cited authority accords to such *internal* documents (i) SMI status and (ii) a *decisive role* in the treaty interpretive process. Prof. Dörr echoes this view. He observes that "it will **normally be a matter of discretion** [emphasis in original] to have recourse to the supplementary means and to give them the *decisive role in determining the meaning of the treaty clause under consideration* [emphasis supplied]. The only requirement which the interpreter will have to fulfil is to explain that step with the unsatisfactory results of applying the General Rule."[24] Moreover, Prof. Dörr contends that "any specific *interpretation of terms* of the treaty recorded *during the negotiations will usually lend considerable force* to a corresponding interpretation of the treaty." (Emphasis supplied.)[25]

5. The Arbitral Tribunal respectfully is invited to consider concluding that *all* of the

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19 European Communities-Customs Classification of Frozen Boneless Chicken Cuts (Chicken Cuts, AB-2005-5 (September 12, 2005)) **(CL-0185-ENG)**.

20 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 (Professor Gabrielle Kaufmann-Kohler, Michael Hwang S.C., Professor Albert Jan van den Berg), Decision on Jurisdiction, February 24, 2014, **(CT-0067-ENG)**.

21 *Hicee B.V. v. Slovak Republic*, PCA Case No. 2009-11 (Sir Franklin Berman KC MG QC, Judge Charles N. Brower, Judge Peter Tornka), Partial Award, May 23, 2011, CL-0224-ENG **(CL-0224-ENG)**.

22 *Mondev Int'l. v. United States of America,* (Sir Ninian Stephen, Professor James Crawford, Judge Stephen M. Schwebel) ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 110-111 **(CL-0163-ENG)**.

23 *Supra* ¶ 1.

24 Dörr, p. 630, ¶ 35 **(CT-0061-ENG)**.

25 *Id*. p. 632, ¶ 39.

documents identified in Section V, pp. 65-124 CMOJ (i) constitute SMI pursuant to Art. 32 VCLT, and (ii) are to be accorded *decisive weight* as part of the treaty evidential interpretive process. Likewise, the weight to be accorded to the referenced documents should be further bolstered by the documents that Respondent itself authored and produced at this Tribunal's invitation.

6. Additionally, the conceptual and textual consistency of the documents proffered comport with the settled practice of extending decisive interpretive weight to such evidence.

## A. The Conceptual and Textual Consistency of the Proffered Supplemental Means of Interpretation Compel According Determinative Interpretive Weight to the Proffered Evidence

7. Section V, pp. 64-130 of CMOJ contains an analysis of sixteen documents plus Mr. Smith's WS[26]. Moreover, pp. 130-134 analyze the legal term "grandfathering" in the context of public international law and the domestic law of the Treaty Parties. The Tribunal respectfully is urged to review these analyses because they address the *quality* of the proffered evidence. In turn, the quality of the SMI determines the *weight* to be accorded. Commencing on CMOJ ¶180 through ¶256, the consistencies in this evidence are underscored.

### 1. Conceptual and Textual Consistency in Salient Documents during Negotiating Period

8. Conceptual and textual consistency bookends the initial version of the proposed Annex 11-D and the final iteration, as set forth below.[27]

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**IMAGES (Composite C-0113-4A-ENG), (Composite C-0113-4B-ENG)**

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[26] **(CWS-0005-ENG)**

[27] **(Composite C-0113-4A-ENG), (Composite C-0113-4B-ENG)**

NAFTA 2.0 Investment Chapter - TPSC memo.docx

**TPSC 2017-XXX**

**NAFTA Negotiation – Investment Chapter**
**Proposed Text**

**ISSUE**

USTR seeks TPSC approval of the attached proposed text for tabling at the third round of the NAFTA Renegotiation, September 23-27.

**RECOMMENDATION**

That the TPSC approve the proposed text.

**BACKGROUND**

The proposed Investment Chapter Text builds off the text agreed in TPP but significantly modifies the U.S. approach to investor-State dispute settlement (ISDS) to address concerns regarding the protection of U.S. sovereignty. Major differences from the TPP text include:

- **Articles 11.19.1 (Consent to Arbitration) and 11.20.1-3 (Conditions and Limitations on Consent).** This proposal adopts an "opt-in" approach to ISDS. Under this approach, each Party may decide whether to allow investors of other Parties to initiate ISDS claims.
  - If a Party does not opt in, no ISDS claims may be submitted against that Party.
  - If a Party opts in, investors of the other Parties are limited to bringing claims with respect to treatment of existing investments. Investors may not bring claims challenging pre-establishment treatment/market access.
  - If a Party opts in but later opts out, a claim may be submitted only with respect to covered investments established or acquired on or after the date of the opt-in and prior to the date of the opt-out, subject to certain exceptions.
- **Annex 11-D (Legacy Investments).** This proposal grandfathers the right to initiate ISDS claims for three years with respect to investments established or acquired between the entry into force of NAFTA 1.0 and the entry into force of NAFTA 2.0. For these claims, the opt-in approach does not apply. Rather, consent to ISDS for these claims is mandatory.
- **Article 11.21.6 (Selection of Arbitrators).** This proposal requires ISDS arbitrators to comply with the International Bar Association's rules on arbitrator ethics, subject to any supplemental rules or guidelines adopted by the NAFTA Free Trade Commission and the applicable arbitral rules regarding arbitrator impartiality and independence.
- **Article 11.28.1: footnote (Awards).** This proposal confirms that an ISDS tribunal is prohibited from overruling a law or regulation adopted by a Party. A tribunal may only award monetary compensation.
- **Article 11.1 (Definition of "investment agreements").** This proposal reverts to the Model BIT approach to the scope of "investment agreements" that may be subject to ISDS. Unlike the Model BIT, TPP covered only new investment agreements and included carve-outs for Mexican energy and telecom agreements, amongst others. This definition incorporates some of the negotiated clarifications included in TPP, however.
- **Article 11.10.1(c) (Performance Requirements).** Consistent with NAFTA 1.0, this proposal prohibits requiring investors, as a condition of investing, to purchase, use, or accord a preference to local services, in addition to local goods. TPP only addressed such requirements with respect to local goods. This proposal was previously cleared in the U.S.-China bilateral investment treaty (BIT) negotiations.
- **Article 11.10.2(e) (Performance Requirements).** This proposal prohibits using incentives such as tax credits and subsidies to pressure investors to favor local technology (*i.e.*, "technology localization"). TPP addressed technology localization requirements, but not incentives. This proposal was previously cleared in the China BIT negotiations.

**CONGRESSIONAL AND STAKEHOLDER VIEWS:** The proposed Investment Chapter text adopts a new approach to ISDS to address concerns shared by some Members of Congress and stakeholders regarding the protection of U.S. sovereignty. There are also opposing views that favor maintaining the general approach to ISDS in TPP and other recent U.S. agreements.

**Annex 11-D – Condition Precedent to Presenting at Round 3 – September 23-27-2017 – (*Composite C-0113-4C-ENG*)**

~~This document contains NAFTA Foreign Government Information (FGI)~~
~~Classified CONFIDENTIAL, MODIFIED HANDLING AUTHORIZED~~
~~(C/FGI-MOD)~~

ANNEX 11-B

Commented [A3]: Three-year ISDS grandfather for NAFTA 1.0-era investments.

LEGACY INVESTMENTS

1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration under Section B in accordance with this Annex alleging breach of an obligation under:

   (a) Section A of Chapter 11 of [NAFTA 1.0];

   (b) Article 1503(2) (State Enterprises) of [NAFTA 1.0]; and

   (c) Article 1502(3)(a) (Monopolies and State Enterprises) of [NAFTA 1.0] where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 of [NAFTA 1.0].[20]

2. The consent under paragraph 1 and the submission of a claim to arbitration under Section B in accordance with this Annex shall be deemed to satisfy the requirements of:

   (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

   (b) Article II of the New York Convention for an "agreement in writing"; and

   (c) Article I of the Inter-American Convention for an "agreement".

3. A Party's consent under paragraph 1 shall expire:

   (a) three years after [the date of entry into force of NAFTA 2.0]; or

   (b) when the Party provides a notification of consent under Article 11.19.1 within three years of [the date of entry into force of NAFTA 2.0].[21]

4. For the purposes of this Annex:

[20] For greater certainty, the relevant provisions in Chapters 14, 17, 21, and Annexes I-VII of [NAFTA 1.0] shall apply with respect to such a claim.

[21] If a Party provides a notification of consent under Article 11.19.1 but withdraws or terminates its consent before three years have elapsed from [the date of entry into force of NAFTA 2.0], the Party shall be deemed to consent under paragraph 1 for the remainder of the three-year period.

9-37

~~This document contains NAFTA Foreign Government Information (FGI)~~
~~Classified CONFIDENTIAL, MODIFIED HANDLING AUTHORIZED~~
~~(C/FGI-MOD)~~

(a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and [the date of entry into force of NAFTA 2.0], and in existence on [the date of entry into force of NAFTA 2.0];

**Annex 11-D – Proposed Language (*Composite C-0113-4B-ENG*)**

ANNEX 14-C

LEGACY INVESTMENT CLAIMS AND PENDING CLAIMS

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

   (a) Section A of Chapter 11 (Investment) of NAFTA 1994;

   (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and

   (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.[20, 21]

2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:

   (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

   (b) Article II of the New York Convention for an "agreement in writing"; and

   (c) Article I of the Inter-American Convention for an "agreement".

3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.

4. For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

[20] For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.

[21] Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

14-C-1

5. For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

6. For the purposes of this Annex:

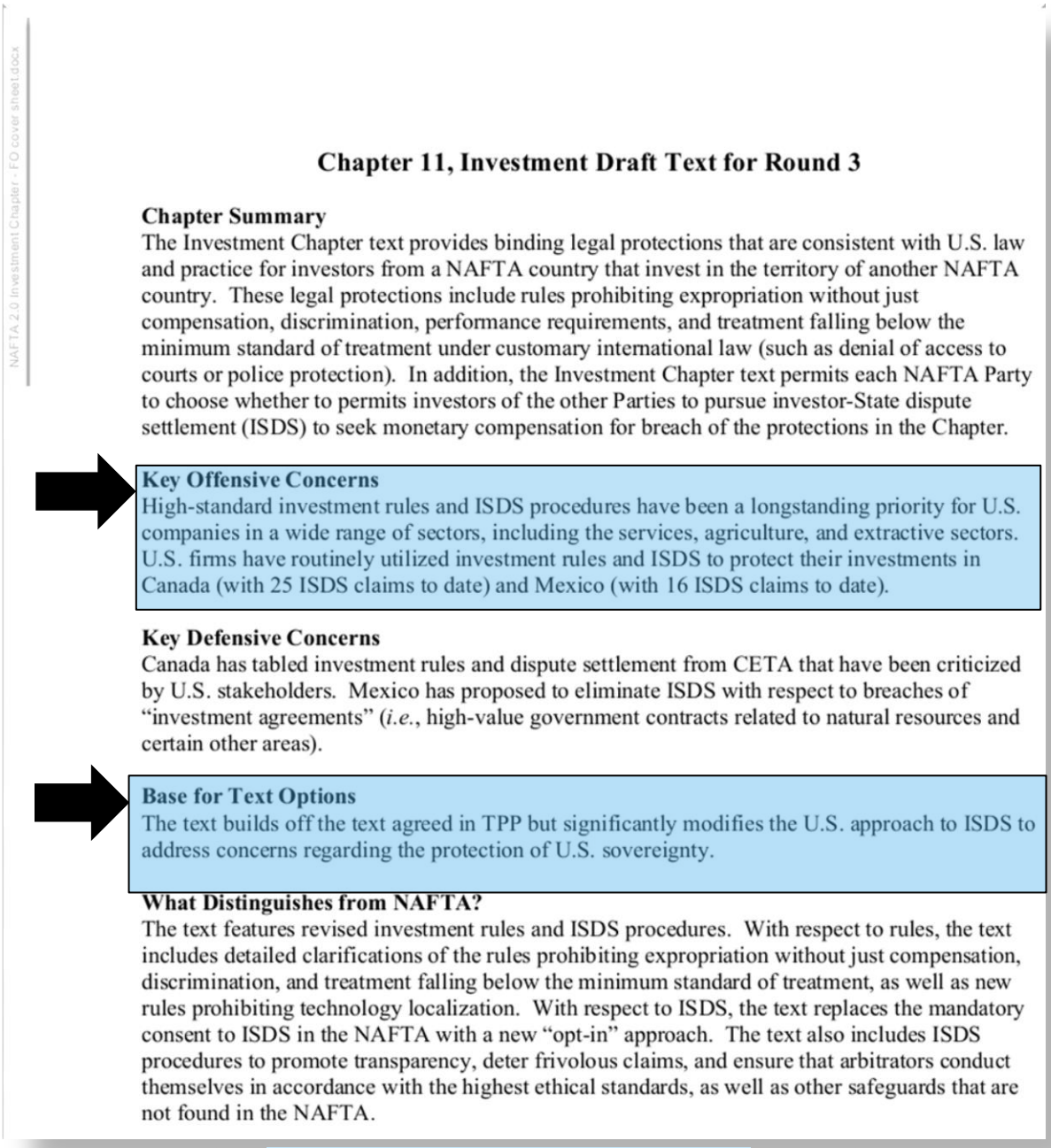
   (a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;

   (b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994; and

   (c) "ICSID Convention", "ICSID Additional Facility Rules", "New York Convention", and "Inter-American Convention" have the meanings accorded in Article 14.D.1 (Definitions).

**Annex 14-C – November 30, 2018**

9. Notably, under the heading "*Key Offensive Concerns*" reference is made to "high-standard investment rules and ISDS procedures," as general Investment Chapter policies to be pursued.[28]



NAFTA 2.0 Investment Chapter - FO cover sheet.docx

**Chapter 11, Investment Draft Text for Round 3**

**Chapter Summary**
The Investment Chapter text provides binding legal protections that are consistent with U.S. law and practice for investors from a NAFTA country that invest in the territory of another NAFTA country. These legal protections include rules prohibiting expropriation without just compensation, discrimination, performance requirements, and treatment falling below the minimum standard of treatment under customary international law (such as denial of access to courts or police protection). In addition, the Investment Chapter text permits each NAFTA Party to choose whether to permits investors of the other Parties to pursue investor-State dispute settlement (ISDS) to seek monetary compensation for breach of the protections in the Chapter.

**Key Offensive Concerns**
High-standard investment rules and ISDS procedures have been a longstanding priority for U.S. companies in a wide range of sectors, including the services, agriculture, and extractive sectors. U.S. firms have routinely utilized investment rules and ISDS to protect their investments in Canada (with 25 ISDS claims to date) and Mexico (with 16 ISDS claims to date).

**Key Defensive Concerns**
Canada has tabled investment rules and dispute settlement from CETA that have been criticized by U.S. stakeholders. Mexico has proposed to eliminate ISDS with respect to breaches of "investment agreements" (*i.e.*, high-value government contracts related to natural resources and certain other areas).

**Base for Text Options**
The text builds off the text agreed in TPP but significantly modifies the U.S. approach to ISDS to address concerns regarding the protection of U.S. sovereignty.

**What Distinguishes from NAFTA?**
The text features revised investment rules and ISDS procedures. With respect to rules, the text includes detailed clarifications of the rules prohibiting expropriation without just compensation, discrimination, and treatment falling below the minimum standard of treatment, as well as new rules prohibiting technology localization. With respect to ISDS, the text replaces the mandatory consent to ISDS in the NAFTA with a new "opt-in" approach. The text also includes ISDS procedures to promote transparency, deter frivolous claims, and ensure that arbitrators conduct themselves in accordance with the highest ethical standards, as well as other safeguards that are not found in the NAFTA.

**Chapter 11 Investment Draft Text**
**Round 3 – Proposed Language**
**(*Composite C-0113-4A-ENG*)**

[28] (**Composite C-0113-4A-ENG**)

10. On October 16, 2017, Respondent memorializes its understanding of the US Negotiators' proposal (Round 4) in simple terms; "the temporal continuity (3 years) of the protection to investors and investments in keeping with the NAFTA (legacy investments)." This conceptual approach and understanding of the proposed Annex never changes. Likewise, there is no evidence proffered by Respondent suggesting the conceptual approach and workings of the Annex changed prior to the USMCA's signing on November 30, 2018.[29]

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**IMAGE (R-0012-SPA)**

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[29] **(R-0012-SPA)**

CONFIDENCIAL

**NAFTA 2.0**

**4° RONDA DE NEGOCIACIÓN**

**MEMORANDUM**

**Fecha:** 16 de octubre de 2017

**Para:** Kenneth Smith

**De:** Guillermo Malpica Soto / Aristeo López Sánchez
**Cc:** JCB, SB, CNnafta2.0@naftamexico.net
**Grupo:** INVERSIÓN
**Tema:** REPORTE A CN



## I. DISCUSIÓN DEL TEMA

EE.UU. presentó su propuesta para la Sección B, basada en los siguientes pilares:

a. La voluntariedad del consentimiento para el arbitraje ("opt-in / opt-out").
b. La imposición de límites a la aplicación del mecanismo de solución de controversias mediante la exclusión (carve-out) de las siguientes disposiciones:
   1. Trato Nacional, Trato de la Nación más Favorecida y Requisitos de Desempeño, en lo referente al pre-establecimiento;
   2. Nivel Mínimo de Trato;
   3. Expropiación y Compensación, en lo referente a la expropiación indirecta, y,
   4. Requisitos de Desempeño.
c. La continuidad temporal (3 años) en la protección de los inversionistas y las inversiones al tenor del TLCAN 1.0 (legacy investments).
d. La Denegación de Beneficios a terceros y a nacionales de los países receptores (host Party).

Esta propuesta y la propuesta de Canadá fueron ampliamente discutidas.

Se revisó la Sección A y hubo un ligero avance en la limpieza de diversos artículos. Sin embargo, las discusiones se enfocaron particularmente en el análisis de las propuestas de Canadá en los artículos "Ámbito de Aplicación", "Acceso a Mercados", "Trato Nacional", "Trato de la Nación más Favorecida", "Nivel Mínimo de Trato / Trato a los Inversionistas y a las Inversiones Cubiertas".

## II. DESCRIPCIÓN DE ASUNTOS

**FOCOS ROJOS**

- **Propuesta de Estados Unidos sobre el mecanismo de solución de controversias Inversionista-Estado, en la que se estableció la voluntariedad del consentimiento para el sometimiento al arbitraje ("opt-in / opt-out").**
- **Estados Unidos prefiere el enfoque "opt-out".**

**FOCOS AMARILLOS**

- **Propuesta de Canadá sobre Acceso a Mercados.**
- **Propuesta de Canadá sobre Nivel Mínimo de Trato.**

**FOCOS VERDES**

- **Ligero avance en limpiar disposiciones de la Sección A.**

## III. COMPROMISOS ACORDADOS PARA LAS PRÓXIMAS RONDAS

- Se acordó reunirse durante la quinta ronda para continuar con la discusión.
- Se acordó trabajar de manera intersesional para avanzar en la Sección A.

**Excerpt from October 16, 2017 *Memo to Kenneth Smith Ramos from Guillermo Malpica Soto / Aristeo López Sánchez* titled: NAFTA 2.0 4° RONDA DE NEGOCIACIÓN MEMORANDUM (*R-0012-SPA* at page 2)**

11. Respondent articulates its understanding of the US proposal with respect to the Annex even more eloquently in its memorialized statement regarding Round 4 of the Negotiations on February 27, 2018.[30]

12. Respondent writes that the Round 7 Negotiations yielded "important advances," and "in general" mentions a "potential Annex to address the ISDS mechanism in force in the NAFTA for transition to the USMCA." Most importantly, Respondent's Negotiators in the following page of the same February 27, 2018, Round 7 Memorandum (i) explained that the US proposal is the *same* as that discussed in Arlington (Round 4), and (ii) proceeds to define what is meant by "addressing the transition of the ISDS mechanism in force in the NAFTA to the USMCA." The text demonstrates that what is meant is to have an Annex that operationally will work the same as a sunset clause in a BIT, i.e., providing the protections of the terminated Treaty during the sunset period of 3 years. The text does *not restrict* or *qualify* the workings of a sunset clause.

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[30] **(R-0013-SPA)**

R-0013-SPA

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**NAFTA 2.0**

**7MA RONDA DE NEGOCIACIÓN**

**MEMORANDUM**

| | |
|---|---|
| **Fecha:** | 27 de febrero de 2018 |
| **Para:** | Kenneth Smith |
| **De:** | Guillermo Malpica / Aristeo López |
| **Cc:** | JCB, SB, CNnafta2.0@naftamexico.net, Virginia.olalde@economia.gob.mx |
| **Grupo:** | REPORTE DEL GRUPO DE INVERSIÓN |
| **Tema:** | REPORTE INTERNO |

## I. DISCUSIÓN DEL TEMA

Las reuniones del grupo de inversión tuvieron lugar del 22 al 24 de febrero en Washington D.C. Estas reuniones estuvieron precedidas por una inter-sesional el 16 de febrero en la Embajada de Canadá en D.C.

Derivado del acuerdo de la Ronda de Montreal en el cual las partes decidieron que no habría ISDS trilateral (i.e. Sección B), y que en su lugar Canadá y México buscarían mantener dicho mecanismo de manera recíproca, las partes se enfocaron a la negociación "sin perjuicio" ("without prejudice") de las disciplinas sustantivas de inversión (i.e. Sección A).

La negociación reportó avances importantes. En general:

- Se revisó de manera detallada las definiciones aplicables al capítulo de inversión, lo cual no había ocurrido desde el inicio de las negociaciones;
- Se revisaron todos los textos encorchetados de la Sección A; y
- Con respecto a ISDS, se discutieron (i) la propuesta *opt-in* de EE.UU.; (ii) ISDS recíproco entre Canadá y México; y (iii) potencial anexo para atender la transición del mecanismo ISDS vigente del TLCAN 1.0 al TLCAN 2.0.

Para un detalle de las disposiciones sobre las cuales se reportaron avances importantes, véase el reporte del grupo de inversión a los Jefes Negociadores.



**Excerpt from February 27, 2018 *Memo to Kenneth Smith Ramos from Guillermo Malpica Soto / Aristeo López Sánchez* titled:**
**NAFTA 2.0**
**7° RONDA DE NEGOCIACIÓN MEMORANDUM**
**(*R-0013-SPA first page*)**

**FOCOS AMARILLOS**

- **Propuesta de EE.UU. para acordar un anexo para atender la transición del mecanismo ISDS vigente del TLCAN 1.0 al TLCAN 2.0. hasta ahora no ha llamado la atención esta propuesta que EEUU presentó desde la Ronda de Arlington cuando introdujo su posición sobre ISDS. La idea es extender la vigencia del mecanismo de ISDS una vez que termine la vigencia del TLCAN 1.0 para (i) permitir que las disputas en curso continúen hasta si conclusión conforme a las reglas del TLCAN 1.0; y (ii) acordar que por 3 años después de la terminación del TLCA 1.0 se permita a los inversionistas recurrir al mecanismo (lo que se conoce en los APPRIs como una cláusula "sunset" que tradicionalmente tiene una vigencia de 10 años a partir de que concluye la vigencia del APPRI). Sobre el primer componente de la propuesta (i.e. punto (i)) todos estuvimos de acuerdo en que es razonable; sobre el punto (ii) Canadá expresó que lo considerará pero no lo ve en principio aceptable. En nuestro caso, expresamos que lo revisaríamos. Se sugeriría tener una discusión interna para analizar este punto.**

- **Propuesta de Canadá para excluir los DPI de la disciplina de expropiación. Actualmente el capítulo de inversión prevé que no se considerarán expropiatorias las medidas en materia de DPI que no sean incompatibles con el capítulo de DPI del TLCAN. Canadá propone ir más allá, haciendo una exclusión automática. EE.UU. ha manifestado que no hay manera que acepten esta propuesta. En el caso de México, la posición ha sido también de oposición dado que nuestra preferencia es mantener el estándar de TLCAN.**

- **En el plano bilateral con Canadá, estamos definiendo la negociación del mecanismo ISDS bilateral. En principio la opción que parece más viable sería negociarlo a través de un Anexo al capítulo de inversión. Sin embargo, EE.UU. ha manifestado que no acepta el enfoque de Anexo.**

**IV. MATRIZ**

| CONSOLIDADO - TLCAN 2.0 | | | | | |
|---|---|---|---|---|---|
| | Temas pendientes | | BALANCE | | |
| Grupo de Trabajo | % de Avance | Temas Álgidos | Propuestas EEUU | Propuestas Canadá | Trade Off - México |
| Inversión | 70% (Sección A) | • Ver focos rojos y amarillos | • Opt-in<br>• Sunset clause<br>• Ámbito de aplicación del | • Excclusión de DPI en expropriación. | |

**Excerpts from February 27, 2018 *Memo to Kenneth Smith Ramos from Guillermo Malpica Soto / Aristeo López Sánchez* titled:**
**NAFTA 2.0**
**7° RONDA DE NEGOCIACIÓN MEMORANDUM**
**(*R-0013-SPA pages 2 - 3*)**

13. Respondent's Negotiators on April 20, 2018 *again* reiterate their understanding of the operative concept underlying the workings of the proposed Annex as one that functionally is no different than a sunset clause.[31]

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[31] **(R-0014-SPA)**

**R-0014-SPA**

CONFIDENCIAL

**NAFTA 2.0**

**REUNIONES DE TRABAJO ABRIL 2018**

**MEMORANDUM**

| | |
|---|---|
| **Fecha:** | 20 de abril 2018 |
| **Para:** | Kenneth Smith |
| **De:** | Guillermo Malpica y Aristeo López |
| **Cc:** | JCB, SBL, CNnafta2.0@naftamexico.net |
| **Grupo:** | INVERSIÓN |
| **Tema:** | REPORTE DE SESIÓN |



## I. DISCUSIÓN DEL TEMA

El Grupo de Inversión se reunió del 17 al 19 de abril en las instalaciones del USTR, en las que se continuó trabajando sobre el texto consolidado de la sección A. Los temas que se discutieron fueron:

- Definición de inversión;
- Inversión cubierta;
- Empresa;
- Empresa de una Parte;
- Ámbito de aplicación;
- Acceso a Mercados;
- Requisitos de Desempeño;
- Uso de incentivos;
- Medidas Disconformes;
- Denegación de Beneficios;
- Inversión y Medio Ambiente, Salud y otros Objetivos Regulatorios;
- Responsabilidad Social Corporativa; y
- Anexo de ISDS de EE.UU.

**Excerpt from April 20, 2018 *Memo to Kenneth Smith Ramos from Guillermo Malpica Soto / Aristeo López Sánchez* titled:**
**NAFTA 2.0**
**REUNIONES DE TRABAJO ABRIL 2018**
**MEMORANDUM**
**(*R-0014-SPA first page*)**

**R-0014-SPA**

Canadá quiere incluir en el título del artículo y en el primer párrafo el término "safety", sin embargo, EE.UU. y México mostraron su inconformidad con la propuesta toda vez que podría tener un traslape con Medio Ambiente y Laboral.

*Responsabilidad Social Corporativa*

Las Partes acordaron incluir guías y principios en áreas sobre "labor, environment, [CA: gender equality], human rights, [CA: indigenous and aboriginal peoples´ rights], community relations, and corruption." Dejando fuera, por el momento, las cuestiones de género y derechos indígenas.

*Anexo ISDS de EE.UU.*

EE.UU. propone un Anexo con sunset clause para ISDS, el cual dejará vigente el ISDS de TLCAN 1.0 por un periodo de tres años. México y Canadá mostraron su rechazo a este anexo ya que si la intención de EE.UU. es no tener ISDS este anexo solo sería en beneficio de sus inversionistas.

EE.UU. respondió que podría generarse en su Congreso un entendimiento que dicho país sí propuso un ISDS con opt-in/opt-out, pero las otras Partes negaron dicho mecanismo.

**Excerpt from April 20, 2018 *Memo to Kenneth Smith Ramos from Guillermo Malpica Soto / Aristeo López Sánchez* titled:**
**NAFTA 2.0 REUNIONES DE TRABAJO ABRIL 2018 MEMORANDUM**
**(*R-0014-SPA page 3*)**

14. The consistency of Respondent's Negotiators in memorializing their understanding of the US proposal is unswerving. One month later, on May 4, 2018, the workings of the proposed Annex are described as "a 3 year grandfathering of NAFTA ISDS."[32] This "3 year grandfathering of NAFTA 1.0 ISDS" is defined as "the US proposal to extend the viability of the ***Investment Chapter*** 3 years after the termination of the NAFTA's viability." The term "*Capítulo de Inversión*" is used without qualification. There is conceptual and textual consistency in this reporting on Mexico's part.

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**ON FOLLOWING PAGES]**

[32] **(R-0015-SPA)**

**R-0015-SPA**

INFORMACIÓN RESERVADA

**Nota**

**De:** **Guillermo Malpica y Aristeo López**

**Para:** **Ken Smith y Salvador Behar**

**Fecha:** **4 de mayo de 2018**

**Asunto:** **Reporte del grupo de inversión (2 y 3 de mayo, 2018)**

Les informamos que ayer concluimos las reuniones de inversión que teníamos programadas para esta semana.

Los resultados son alentadores. Para los temas pendientes de resolver se lograron acordar LZ que están siendo consultadas internamente. Además de estos LZ los temas pendientes a nivel técnico que continúan pendientes de resolver serían:

1- *Use of incentives*
**(este tema se atribuye a Canadá, sin embargo no ha presentado texto aún. No ha dado mucha explicación Canadá del detalle pero su idea es incluir una disposición que contrarreste la actual política de EE.UU. de desincentivar que sus inversiones (e.g. sector automotriz) vaya a México o Canadá. Parece que este es un tema más político que técnico, pues Canadá parece que quiere mantener una señal.)**

2- *Public Debt Annex*
**(este tema es de México, y la discusión se encuentra a nivel técnico. A nivel técnico EE.UU. es el que ha manifestado mayor preocupación pero hasta el momento está abierto a buscar alguna alternativa de redacción. Este tema aún requiere trabajo técnico pero es de suma importancia para la autoridades financieras de México.)**

3- *3 year grandfather NAFTA 1.0 ISDS*
**(Propuesta de EE.UU. para extender la vigencia del capítulo de inversión 3 años después de que termine la vigencia del TLCAN. México y Canadá hemos expresado que no tenemos mandato para aceptar esta propuesta.)**

4- *Local/other governments*
**(Propuesta de Canadá que atiende a una preocupación horizontal por referirse de manera correcta a sus gobiernos locales. Canadá propone "Other", pero México y EE.UU. proponen mantener el término "local", entre otras cosas por consistencia.)**

Por lo anterior, en caso de aceptarse las LZ el capítulo de inversión (sin ISDS) tendría un avance cercano al 90%.

**Excerpt from May 4, 2018 *Memo to Kenneth Smith Ramos and Salvador Behar from Guillermo Malpica Soto / Aristeo López Sánchez* titled:**
**Reporte del grupo de inversión (2 y 3 de mayo, 2018)**
**(*R-0015-SPA first page*)**

15. Just four months later, on September 27, 2018, the ITAC10[33] Report mirrors the consistent understanding that the proposed Annex as functionally equivalent to a typical ten-year sunset clause in "terminated BITs," except that "ISDS claims under the original NAFTA [would be] limited to three years from date of NAFTA termination."

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**ON FOLLOWING PAGE]**

[33] **(C-0113-11-ENG)**

A Trade Agreement with Mexico and potentially Canada

Report of the
Industry Trade Advisory Committee on Services

September 27, 2018

2018-9-27_A Trade Agreement with Mexico and potentially Canada Statutory Report-ITAC 10-Final.docx

- Exclusions from ...s and investors do not have access t... ...nimum standard of treatment ("MST... ...propriations, and transfers. These carve-outs from ISDS do not make sense and must be reconsidered.

  First, the carve-outs undermine enforcement of these disciplines, as there will not be meaningful recourse for violations. Specifically, without ISDS, investors and financial institutions will have to rely on government to government dispute settlement where violations occur. As a practical matter, as discussed above (in Section A. Cross Cutting Issues – Investment), the U.S. government is extremely unlikely to take up an individual case/claim, for myriad reasons, including resource constraints and reasons of comity. Second, on the chance that an individual claim is pursued by an Administration, it is not clear how the affected investor/financial institution would be "made whole" – as there is no known mechanism for the U.S. government to transfer an arbitral award to a private claimant. Third, the rationale the Administration used to provide other sectors (energy, telecom, etc.) with recourse to ISDS for the full suite of investment protections, applies equally to investors in financial institutions and financial institutions. (The rationale included: (1) the sectors must establish physical operations in a foreign market to access that market; (2) the sectors are highly regulated; and (3) the sectors require a significant capital investment.) Specifically, the Committee notes that regulators require financial institutions to physically operate in a jurisdiction to directly serve consumers – i.e., consumer facing businesses simply cannot be conducted on a cross border basis. Additionally, financial institutions are highly regulated (like telecom). Finally, like the other sectors which enjoy more robust ISDS protections, financial institutions are required to make significant capital investments (i.e., regulatory capital requirements) in order to operate in a jurisdiction.

  If the limitation on use of ISDS is maintained, the Committee notes two issues with respect to treatment of legacy cases. First, under Annex 11-C, the transition period for bringing ISDS claims under the original NAFTA is limited to 3 years from the date of NAFTA termination. The 3 year window is short compared to the 10 year period typically provided under terminated BITs. Second, Annex 11-C Footnote 20 applies the legacy claims provision to the financial services sector. However, the Financial Services Chapter, including Annex 14-C, does not appear to explicitly reference Annex 11-C. Specific reference may be helpful to avoid any confusion.

- Investment Protections Against Performance Requirements. The Trade Agreement does not incorporate the Investment Chapter's prohibitions on performance requirements in the Financial Services Chapter. This omission is significant with respect to the prohibitions included in Article 11.10.1 (f) and (h), which prohibit technology transfers and the requirement to utilize specific technologies. Such prohibitions are particularly important for financial services companies, which face such requirements in other markets, including China.

- Government Procurement. Under NAFTA, the Financial Services Chapter did not exclude government procurement. The Trade Agreement includes a clear carve out, which means important rules requiring non-discriminatory treatment, as well as the incorporated

**Excerpt from September 27, 2018 *Report of the Industry Trade Advisory Committee on Services (ITAC10)***
**(*C-0113-11-ENG page 19*)**

16. The reference in the second point to Footnote 20 and the Financial Services Chapter, further bolsters the conceptual approach of the Annex providing substantive and procedural NAFTA Chapter 11 protection to claims pertaining to legacy investments.

17. The US-Canada Closing Term Sheet dated September 29, 2018,[34] references the "3-year *grandfathering* of ISDS." (Emphasis supplied.) It does so without qualification and using the "grandfathering" concept pervading the gamut of proffered SMI. The meaning, and specifically Canada's understanding of a "3-year grandfathering of ISDS," is elucidated in the *trilaterally accepted* and ratified October 18, 2018[35], "Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings."

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[34] **(C-0113-7-ENG)**

[35] **(OW-0014-ENG)**

US-CAN CLOSING TERM SHEET – NON AG

**Non-Agricultural:**

1. Sunset: Agreement to US/Mex Text

2. Chapter 19: Canada and US will maintain status quo from NAFTA.

3. Section 232: Canada gets side agreement equivalent to what the US has agreed to for Mexico—exclusion for current production (with adjustments) for passenger vehicles and parts; US agrees not to apply 232 to light trucks.

   [Canadian proposal to come after discussion with the US]

4. De minimis: Agreement to raise level for taxes to $40 (CAD); and level for duties to $150 (CAD); agreement to ensure no collection of taxes or duties at the point of importation and to allow 90 days for assessment of taxes and duties.

5. Wine: US to agree to maintain NAFTA status quo for Canada. Canada to agree to side letter to address BC grocery sales with a deadline of implementation of November 1, 2019.

6. Non-market economy: Agree to US proposal of September 28, 2018 with one revision: insert "pursuant to the regular NAFTA withdrawal article" in para. 4 following "six-month notice".

US-CAN CLOSING TERM SHEET – NON AG

8. Government Procurement: There shall be no GP provisions in the agreement binding the US and Canada. But each shall continue to enjoy reciprocal GP access pursuant to the WTO GP Agreement.

9. Rebroadcast: US drops rebroadcast annex.

10. Services and Investment: Canada agrees to 3-year grandfathering of ISDS.

For placement in ANNEX 11 C: LEGACY INVESTMENT CLAIMS AND PENDING CLAIMS

New paragraph:

4. Notwithstanding paragraph 3, for existing or directly related claims by Exxon Mobil with respect to the Guidelines for Research and Development Expenditures, 2004 as they apply to the Hibernia and Terra Nova projects, Canada's consent under paragraph 1 shall expire after a period of six years following the date of the termination of NAFTA 1.0.

For placement in 'Canada Annex I Reservation I-C-14'

Under 'Measures', inclusion of: "*Guidelines for Research and Development Expenditures, 2004*" and the related description under paragraph 7.

**Excerpt from Can Term Sheet dated September 29, 2018 as attachment to email from Steven Verheul to C.J. Mahoney Subject: *Non-Agricultural Issues***
**(*C-0113-7-ENG page 2*)**

18. It specifically provides that as to legacy investments, investors "can continue to bring ISDS claims under the NAFTA *rules* and *procedures* with respect to those 'legacy investments' for three years after the termination of the NAFTA." (Emphasis supplied.)

19. Significantly, what is meant by "investment rules" is defined in the fifth talking point as treatment protection standards. Therefore, it is inarguable that since the very initial proposal of the concept of the Annex in Round 4 (October 16, 2017), through October 18-19, 2018 (one month before the November 30, 2018, signing of the USMCA) the US Annex proposal consistently was described as a concept pursuant to which upon termination of the NAFTA a special class of investors being those who acquired or established investments during the life of the NAFTA, would be able to assert claims arising from measures affecting legacy investments during the three-year transition period. The similitude between the first iteration of what became Annex 14-C, and the final Annex 14-C is not accidental. It reflected a consistent understanding of a concept that sought to grandfather the NAFTA Investment Chapter so that the Annex would work as a sunset clause with respect to a very special and specific class of investments. This understanding is further bolstered by contemporaneous emails from Lauren Mandell to Michael Tracton, with the subject "*OECD Week Item."*

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**Talking Points on USMCA Investment Chapter**
**for OECD Investment Committee Meetings**

*General Talking Points*

- The United States is pleased to report the September 30th completion of the negotiation to replace the North American Free Trade Agreement (NAFTA) with the United States-Mexico-Canada Agreement (USMCA). The text of the agreement can be found online at www.ustr.gov.

- The leaders of Mexico, the United States, and Canada plan to sign the USMCA before December 1. In the interim, the agreement is in the process of translation and legal scrub.

- The USMCA features a chapter on investment, Chapter 14, which I will briefly describe.

- The Investment Chapter updates both the investment rules and investor-State dispute settlement (ISDS) procedures in the NAFTA.

- With respect to investment rules, the agreement contains all the core protections found in the NAFTA, including rules prohibiting (1) expropriation without prompt, adequate, and effective compensation; (2) discrimination; (3) performance requirements; (4) nationality-based requirements on the appointment of senior management; (5) restrictions on the transfer of investment-related capital; and (6) denial of justice and other breaches of the customary international law minimum standard of treatment (MST).

- The Agreement also includes new rules to address evolving investment barriers. In particular, the Agreement includes the most advanced rules that have ever been negotiated in a trade agreement, prohibiting "technology localization," *i.e.*, policies requiring or incentivizing investors to use or favor local technology.

- In defining these rules, the Parties built on some of the prior work by the United States, Canada, and Mexico in the TPP negotiations. In particular, the Agreement includes clarifications to rules regarding expropriation, national treatment and most-favored-nation treatment, and MST, to provide guidance to investors, arbitral tribunals, government regulators, and interested third parties.

- With respect to ISDS, the Investment Chapter departs significantly from the prior practices of the three Parties, however.

- First, investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those "legacy investments" for three years after the termination of the NAFTA.

**Excerpt from Internal USTR October 18, 2018 Email Thread and attachments from Lauren A. Mandell to Michael K. Tracton Subject: *Re: OECD Week Item, String Email, and Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings***
**(*OW-0014-ENG first page*)**

# RE: OECD Week Item

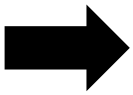
**From:** "Mandell, Lauren A. EOP/USTR" <lauren_a_mandell@ustr.eop.gov>

**To:** "Tracton, Michael K" [EXEMPTION 6]@state.gov>

**Date:** Fri, 19 Oct 2018 16:39:22 -0400

**Attachments:** OECD TPs on USMCA Investment Chapter (10-19-18) (final).docx (18.01 kB)

Thanks, Mike, for the helpful edits. I have accepted all in the attached.



As you may have seen, Vern from Canada okayed our approach this afternoon. I'm expecting to talk to Mexico about other things today, and I will seek their confirmation as well.

Best,
Lauren

**From:** Tracton, Michael K[EXEMPTION 6]state.gov>
**Sent:** Friday, October 19, 2018 10:45 AM
**To:** Mandell, Lauren A. EOP/USTR <Lauren_A_Mandell@ustr.eop.gov>
**Subject:** RE: OECD Week Item

Lauren, Thanks for sharing. Looks good to me. It probably doesn't matter as you will be the one speaking, but caught one or two typos, and you might want to flip the order of the two points in response to the if-raised question on exhaustion.

Just curious, did you hear anything (positive or negative?) on the idea of doing this from Mexican and Canadian counterparts?

I did advise the OECD secretariat that it looks like we'll be going ahead with this, so they will make time on Tuesday afternoon as requested.

We may be in touch again, but safe travels!

Thanks,

Mike

**Excerpt from Internal USTR October 19, 2018 Email Thread and attachments from Lauren A. Mandell to Michael K. Tracton Subject: *Re: OECD Week Item, String Email, and Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings***
**(*OW-0014-ENG*)**

# RE: OECD Week Item

**From:** "Mandell, Lauren A. EOP/USTR" <lauren_a_mandell@ustr.eop.gov>

**To:** "Tracton, Michael K" EXEMPTION 6 state.gov>

**Date:** Sat, 20 Oct 2018 16:01:04 -0400

FYI, Mexico okayed our approach.

**From:** Tracton, Michael K EXEMPTION 6 state.gov>
**Sent:** Friday, October 19, 2018 10:45 AM
**To:** Mandell, Lauren A. EOP/USTR <Lauren_A_Mandell@ustr.eop.gov>
**Subject:** RE: OECD Week Item

Lauren, Thanks for sharing. Looks good to me. It probably doesn't matter as you will be the one speaking, but caught one or two typos, and you might want to flip the order of the two points in response to the if-raised question on exhaustion.

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We may be in touch again, but safe travels!

Thanks,

Mike

Official
UNCLASSIFIED

**Excerpt from Internal USTR October 20, 2018 Email Thread and attachments from Lauren A. Mandell to Michael K. Tracton Subject: *Re: OECD Week Item, String Email, and Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings***
**(*OW-0014-ENG*)**

## B. Cross-examination Establishes That Prof. Tams' Expert Report is Unreliable and Otherwise Based upon Reluctantly-Obtained Admissions That Should Be Construed as Supporting Claimant's Evidential Position

20. Claimant respectfully invites the Tribunal to consider concluding that the TER[36] and Prof. Tams' testimony must be construed as supporting Claimant's analytical approach to Arts. 31 - 32 VCLT, and to the proffered evidence based upon the following *40* propositions.

### 1. Prof. Tams on His Standing to Opine on the Evidence Dating to the Negotiating Period That Claimant *and* Respondent Have Proffered

21. First, Prof. Tams admits he is not in a position to render an opinion on the evidentiary value of internal documents authored by Mexico's Lead Investment Chapter Negotiators, Guillermo Malpica Soto and Aristeo López Sánchez for Kenneth Smith's review regarding the interpretation of Annex 14-C.[37]

22. Second, Prof. Tams admits that he cannot testify to "an abstract proposition as to the value," to be ascribed to the testimony of former Mexican government officials responsible for negotiating the USMCA's Investment Chapter.[38]

23. Third, Prof. Tams admits that documents authored by government officials during the negotiating period but not shared with the other Treaty Parties have evidentiary value.[39]

### 2. Prof. Tams' Expert Report and Testimony Regarding Art. 32 VCLT Non-Preparatory Works Supplementary Means of Interpretation Are Flawed Because They Misconstrue Prof. Dörr's Writings and Are the Product of Selective Citation

24. Fourth, at the very commencement of his CE Prof. Tams asserted that IDNS do

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36 *Id.*

37 *Q. Are you in a position to render an opinion on the evidentiary value that you would ascribe to this document* **(R-0015-SPA)** *for purposes of interpreting Annex 14-C?*

*A. Well, I think I would first need to – so at this stage, no.*

For context *see* TR. p. 474, lines 20-22; p. 475, lines 1-20 (R-0015-SPA, p. 4).

38 TR p. 365, lines 15-22, p. 366, lines 1-4.

39 TR p. 478, lines 21-22, p. 479, lines 1-9.

not constitute SMI under Art. 32 VCLT.[40]

25. During the latter part of the CE, Prof. Tams adopted the diametrically opposite proposition, as we have seen, and admitted that IDNS do constitute SMI under Art. 32 VCLT.[41]

26. Fifth, Prof. Tams ascribes to Prof. Dörr the proposition that IDNS do not constitute SMI.[42]

27. Prof. Tams, however, misstates Prof. Dörr's position and, therefore, Prof. Tams is incorrect in his attribution on (at least) four grounds. First ground, Prof. Dörr was referring to statements by government or government representatives "*outside treaty negotiations*."[43] Prof. Dörr simply was not referring to IDNS generated during the Negotiating Period.

28. Second ground, Prof. Dörr explicitly was referring to *preparatory works* and not to other (non-preparatory work) SMI, as is here the case.[44]

29. Third ground, Prof. Dörr in stark contrast to Prof. Tams' inaccurate representation, did not state that such statements did not constitute SMI, but rather *preparatory works* because

---

40 *Q. That such statements do not even qualify to be considered as supplementary means under Article 32 because they have not been shared with other States during the negotiation, that's your position; right?*

*A. That is my position, as I expressed it in Paragraph 117.*

TR p. 371, lines 19-22, p. 372, lines 1-2.

41 *See* ¶¶ 79 and 82.

42 *Q. That such statements do not even qualify to be considered as supplementary means under Article 32 because they have not been shared with other States during the negotiation, that's your position; right?*

*A. That is my position, as I expressed it in Paragraph 117.*

*Q. And this position of yours, as we can see from Paragraph 115 of your Report, refers to Prof. Dörr's commentary at CT 0061; correct?*

*A. Yes, that's the reference to Prof. Dörr's commentary.*

TR p. 371, lines 19-22, p. 372, lines 1-9.

43 *Q. Thank you. If we start from the top of Paragraph 115 of your Report, you wrote that: 'International jurisprudence urges particular caution in appraising the role of 'documents from unilateral source, such as statements of individual governments or State representatives outside treaty negotiations''; correct?*

*A. Yes, that's the quote.*

TR p. 372, lines 10-17.

44 Dörr, p. 621, ¶ 15 **(CT-0061-ENG)**.

they had not even been shared with the other Treaty Parties.[45]

30. Fourth ground, in the context of paragraphs 114 and 115 of the TER[46] regarding Art. 32 VCLT SMI, *and not specifically preparatory works,* Prof. Tams engages in selective citation and less than clear language (timeframe not disclosed) in citing to *Canfor Corporation v. USA,*[47] for the proposition that "[i]nvestment tribunals, including those acting under NAFTA, have also rejected material where these comprise 'internal' documents not shared with the other NAFTA parties.'"[48] It *must* be observed that the IDNS in this case *all* date to the Negotiating Period. Prof. Tams conflates IDNS *outside* of the Negotiating Period with those generated during the Negotiating Period.

31. Additionally, the Tribunal in *Canfor* did not at all discuss in the award, let alone in the Procedural Order on which Prof. Tams *exclusively* relies, the extent to which IDNS within the Negotiating Period *or* beyond the Negotiating Period constitute non-preparatory work SMI within the meaning of Art. 32 VCLT.

32. Indeed, the Procedural Order speaks to the extent to which such documents (IDNS) are discloseable in the context of Claimant's document demand in that case and Respondent's privilege objection. The actual language contained in ¶ 19 of the Procedural Order (the text of which Prof. Tams does not recite) compels this Tribunal's consideration in assessing the credibility of Prof. Tams' methodology and conclusions regarding the admissibility, relevance, and weight to be accorded to IDNS generated during the Negotiating Period:

> 19. The Tribunal notes that the Respondent's arguments concern primarily the second category of materials, *i.e.* internal documents not shared with the other NAFTA Parties. The Respondent has in particular argued that these documents reflect the unilateral intent of one party to the negotiations rather than the common intent of all NAFTA Parties **and that they are privileged from disclosure (Respondent's second letter of April 9, 2004)[*].** The Tribunal accepts the Respondent's position and considers that the internal

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45 *Id.*

46 **(RER-0001-ENG)**

47 Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America, UNCITRAL, *Procedural Order No. 5*, 28 May 2004, ¶ 19, cited in TER ¶ 115, n. 95 **(RER-0001-ENG) (CT-0065-ENG)**.

48 TER ¶ 115 **(RER-0001-ENG)**.

> materials of an individual NAFTA Party established solely for that Party and not communicated to the other Parties during the negotiations of the Agreement do not reflect the common intention of the NAFTA Parties in drafting, adopting, or rejecting a particular provision.
>
> (Emphasis supplied.)[49]

33. Indeed, the second April 9, 2004 letter referenced in ¶ 19 of PO No. 5 in *Canfor Corporation*, which Prof. Tams cites to without actual citation to the text, further makes clear that the second April 9, 2004 letter fully briefed the issue in the context of an evidence gathering dispute where Claimant's request was characterized as "a broad-based 'fishing expedition' type of discovery that cannot be satisfied in the context of an international arbitral proceeding." That letter also states that "the bulk of the documents sought by Claimant" were "privileged from disclosure under United States law."[50]

34. In contrast to Prof. Tams' representation, *Canfor Corporation* is extrinsic to the admissibility, relevance, and weight to be accorded to IDNS generated during the Negotiating Period. Likewise, the Procedural Order referenced in that case has nothing to do with the extent to which IDNS generated during the Negotiating Period constitute SMI within the meaning of Art. 32 VCLT.[51]

35. Sixth, Prof. Tams' Art. 32 SMI analysis is flawed because he only partially explains two "restrictive purposes" that Prof. Dörr identified,[52] while referencing Prof. Dörr's understanding of Art. 32 VCLT as having a supporting role in an Art. 31 VCLT treaty interpretive analysis. Prof. Tams' analysis of Prof. Dörr's restrictive qualifications omits articulating Prof. Dörr's view that Art. 32 VCLT "is supposed to assume its interpretive function only after the application of the general rule," under Art. 31. Prof. Tams admitted as much in CE.[53]

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49 *Canfor Corporation*, PO No. 5, 28 May 2004, ¶ 19. **(CT-0065-ENG)**.

50 *See id.*, ¶¶ 9 and 19.

51 For the sake of completeness, the Tribunal is reminded that Mr. Smith testified that USTR IDNS in many instances actually were shared with the Negotiators of the other Treaty Parties. *See* **(CWS-0005-ENG)**, ¶ 28 **(Composite KSR-0003-ENG)**.

52 TR p. 374, lines 18-22, p. 375, lines 1-5.

53 TR p. 379, lines 12-18.

36. Seventh, Prof. Tams failed to disclose, and actually *disagreed* with Prof. Dörr's understanding that:

> What is restrictive by the Vienna Rules, however, is to actually base a finding on such material at the outset of the process of interpretation. And they do so in order to prevent that Agreement of the Parties from being replaced by the content of unconsummated exchanges of proposals and arguments that preceded the finalization of the treaty.[54]

37. Prof. Dörr adds:

> Thus, preparatory work is designed to determine the meaning of a treaty provision only when certain qualifying conditions are met. And Article 32 contains a procedural restriction in that the interpretive means which are only 'supplementary' may not be employed first but only after the General Rule laid down in Article 31 has been applied.[55]

38. Indeed, Prof. Dörr concludes that, "[o]ther than that, the rule gives the interpreter considerable freedom to make use of supplementary means."[56] Prof. Tams, however, engages in selective citation and fails to disclose Prof. Dörr's view that a restrictive purpose in a supportive role actually refers to a *sequential restriction only* pursuant to which supplementary means should not be employed first but only after the application of the General Rule laid down in Art. 31 VCLT. Prof. Tams' textual and conceptual omissions misconstrue Prof. Dörr's actual writings on the subject.

39. Eighth, Prof. Tams admits, when pressed and retracting his earlier testimony, that Art. 32 VCLT in fact can *displace* or materially modify an Art. 31 VCLT initial interpretation.[57]

40. Ninth, Prof. Tams admits, when pressed this time by Madam President Kaufmann-Kohler, that Art. 32 VCLT can be used to confirm a meaning reached through Art.

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54 TR p. 380, lines 3-12.

55 TR p. 380, lines 14-22, p. 381, line 1.

56 TR p. 381, lines 2-6.

57 *Q. So your opinion is that those supposed restrictions indicate that Article 32 cannot be relied upon for the purpose of displacing the meaning resulting from Article 31?*

*A. Well, I mean, I think that is too categorical. I wouldn't put this in those terms.*

TR p. 383, lines 9-14.

31.[58] And also, Prof. Tams finally admitted that Art. 32 can be used to determine the meaning of a provision where an Art. 31 VCLT analysis renders the provision ambiguous or obscure, or unreasonable or manifestly absurd.[59]

41. Tenth, Prof. Tams excluded disclosing from the very Chapter of Prof. Dörr's Commentary on which Prof. Tams relied, and admitted disagreeing with, Prof. Dörr's paramount conclusion regarding the workings and *pari materia* status between Arts. 31 and 32 VCLT:

> *Q. Prof. Dörr then concluded in Paragraph 32 that: 'In this view, it is difficult to imagine situations where preparatory work, or, indeed, all means covered by Article 32, may not be employed in the process of interpretation. And it also becomes clear that the confirmative mode of using supplementary means of interpretation possesses in the system of the Vienna rules de facto a relevance similar to that of the General Rule of Interpretation.'*
>
> *Do you see that?*
>
> *A. I see that.*
>
> *Q. Stopping here, just under confirmatory role of supplementary means, instead of saying that the use of supplementary means to confirm a meaning cannot displace the meaning resulting from Article 31, Prof. Dörr is actually saying the opposite. He said that the supplementary means in this rule can lead to the revitalization of the text under the approach of Article 31; correct?*
>
> *A. I mean, this seems to be what is said here. It is a separate matter whether I consider it an accurate position to be taken.*[60]
>
> ***
>
> *Q. If say the Tribunal adopts Prof. Dörr's Opinion here, even on the confirmatory role of supplementary means, the exploration of such means could still have the effect of displacing the meaning arrived at from the initial application of Article 31.*
>
> *You agree?*
>
> *A. ... But, yes, the assumption being if the Tribunal were to be guided by what is said here, then there would be a broader room for the use of -- well, then I think that the limiting condition would be read differently than Article 32 seems to put there.*[61]

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58 TR p. 386, lines 3-13.

59 TR p. 386, lines 3-17.

60 TR p. 389, lines 9-22, p. 390, lines 1-9.

61 TR p. 391, lines 9-14, p. 392, lines 5-10.

42. When pressed on whether his answer is an affirmative "yes," Prof. Tams finally admits in no uncertain terms, "[t]hat seems be Prof. Dörr's view, but it is not my own."[62]

43. Eleventh, contrary to his initial testimony in cross-examination, Prof. Tams when pressed admitted that Prof. Dörr states that "the consideration of supplementary means for confirmation may lead to a conclusion that there is an ambiguity that has gone unnoticed from the initial application of Article 31."[63] Prof. Tams specifically responds to this proposition; "*A. Yes. That's the phrase before Footnote 60, it seems.*"[64]

44. Twelfth, Prof. Tams contradicts his earlier testimony and finally admits that "the exploration of supplementary means would transform [it] into one of determination of meaning." Prof. Tams reacts to this proposition: "*A. That seems to be his [Prof. Dörr's] position taken in this section, yes.*"[65]

45. Thirteenth, Prof. Tams omitted citation to material language comprising Prof. Dörr's commentary on the use of SMI, literally skipping over these propositions, in order to engage in selective citation. Indeed, Prof. Tams admitted to disagreement with Prof. Dörr's use of the term "subjective" in citing to the opinion of Sir. Humphrey Waldock, the UN Special Rapporteur under the Law of Treaties from 1962 to 1966:

> *Q. If we then go back to Prof. Dörr's commentary, this time to Paragraph 35, Prof. Dörr endorses the opinion of Sir Humphrey Waldock the UN Special Rapporteur under Law of Treaties from 1962 to 1966, that: 'The rule on the use of preparatory works is inherently flexible, since the question whether the text can be said to be clear is in some degree subjective.'*
>
> *Do you see that?*
>
> *A. I see that.*
>
> *Q. Prof. Dörr then went on and explained that: 'It is regularly in the eye of the interpreter, i.e., subjective, whether applying the General Rule of Interpretation, the meaning of the Treaty is clear or ambiguous. Thus, it will normally be a matter of*

62 TR p. 390, lines 10-19.

63 TR p. 391, lines 3-8.

64 TR p. 391, lines 9-10.

65 TR p. 391, lines 14-15.

*discretion to have recourse to the supplementary means* ***and to give them the decisive role in determining the meaning of the Treaty clause under consideration****.'*

*Do you see that?*

*A. I see that.*

*Q. So whether we should use determinative mode, according to Prof. Dörr, that is very much dependent on the interpreter's subjective view.*

*Do you agree?*

*A. I think, subjective I would, perhaps, not use the term.*

(Emphasis supplied.)[66]

46. Fourteenth, Prof. Tams admits the Commentary that Prof. Dörr articulates regarding the methodology and weight of an Art. 32 VCLT analysis as susceptible to displacing the original Art. 31 interpretation, is contrary to the proposition that Prof. Reisman presumably articulated in the Report filed in the *Pac Rim* case.[67] Prof. Tams, when pressed, admits to cherry-picking from different Expert Opinions:

*Q. Going back to my line of questioning here, Prof. Tams, Prof. Dörr's commentary that you cited in your Report does not support Prof. Reisman's proposition. To the contrary, he opined that, even under the confirmatory mode, supplementary means can be used to displace the original meaning arrived at through an initial application of Article 31; correct?*

*A. Well, with the caveat that we have different positions on displacing, I think I agree that Prof. Dörr in the sections from Paragraphs 31, 32, showed to me had a broader room for, I would say, the determining mode, not the 'displacing.' But I think that is right, yeah.*[68]

47. Fifteenth, Prof Tams admits having engaged in the selective citation of the ILC Commentary,[69] omitting the passages confirming that Arts. 31 and 32 VCLT are not to be applied in a rigid sequential manner.[70]

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66 TR p. 395, 1-22, p. 396, 1-5.

67 **(CT-0062-ENG)**

68 TR p. 402, lines 2-14.

69 **(CL-0056-ENG)**

70 TR p. 406, lines 20-22, p. 407, lines 1-14. And for greater context *see* pp 402-407.

*Q. Prof. Tams, you didn't think it was helpful to cite the ILC?*

*A. I made no conscious choice not to cite it. I think I refer to writings and decisions -- I make no conscious decision against it.*

### 3. Prof. Tams on Resources Not Consulted: Documents and Evidence

48. Sixteenth, Prof. Tams admits the Mexican government did not offer its lead Investment Chapter USMCA Negotiators, Messrs. Malpica and López Sánchez, as resources for preparation of the TER[71] or testimony.[72]

49. Seventeenth, Prof. Tams admits that in preparing the TER,[73] he did not petition Respondent to provide him with access to Respondent's Investment Chapter USMCA Negotiators.[74]

50. Claimant respectfully invites the Tribunal to consider concluding from this factual premise that Respondent intentionally deprived its Expert of access to key USMCA Investment Chapter Negotiators: namely, Messrs. Malpica and López.

51. Eighteenth, Prof. Tams admits that he never reviewed any of the documents attached to and referenced in the CMOJ presumably because Prof. Tams at the time understandably did not have access to the CMOJ.[75]

52. This assertion, however, is questionable, at least, for two reasons. First, the documents that the Respondent's Investment Chapter Negotiators prepared were not contingent on the submission of the CMOJ.

53. Second, the CMOJ was filed on March 7, 2025, over one month prior to the April 14-15, 2025 Jurisdictional Hearing. Prof. Tams had ample opportunity to review the entire

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*See as well:* TR p. 413, lines 2-6.

71 **(RER-0001-ENG)**

72 TR p. 364, lines 9-15.

73 **(RER-0001-ENG)**

74 TR p. 364, lines 16-22, p. 365, lines 1-6.

75 TR p. 370, lines 19-22, p. 371, lines 1-8.

evidentiary proffer prior to the hearing, much as he did with Prof. Schreuer's Supplemental Expert Report, which was submitted together with the CMOJ. Hence, his professed inability to comment on this evidence, including the five documents that Respondent was invited to produce, can only be understood as the strategic decision of an advocate and not that of an academic clinically analyzing evidential proffers within the framework of VCLT Arts. 31 and 32 analyses. Alternatively, Respondent elected to keep its own expert only selectively informed.

54. Nineteenth, Prof. Tams admits not having reviewed the documents that Respondent produced in this proceeding, as well as not having considered them in preparing the TER[76] or in testifying.[77] And Prof. Tams did not seek the documents that Respondent produced at any time prior to at or about when the documents were to be produced. Adding that he "did not study them in detail."[78]

55. On the question of when the documents that the Respondent produced were first seen by him, Prof. Tams was inconsistent.[79]

56. Twentieth, Prof. Tams admits not having reviewed any documents that *any* of the three NAFTA Parties generated during the Negotiation Period.[80]

57. Twenty-first, Prof. Tams admits that his "real engagement" with Kenneth Smith's WS and the documents produced in this proceeding was on April 14, 2025, the first day of the Hearing on Jurisdiction.[81]

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76 **(RER-0001-ENG)**

77 TR p. 434, lines 16-18 and p. 436, lines 18-22, p. 437, lines 1-3.

78 TR p. 436, lines 20-22, p. 437, lines 1-2.

79 *See, e.g.*, TR at p. 436, lines 9-22, p. 437, lines 1-22, p. 438, lines 1-5.

80 *Q. So you were not provided with any documents generated by any of the three NAFTA Parties during the Negotiation Period; correct?*

*A. No.*

TR p. 437, lines 14-17.

81 *Q. Sir. Have you read Ken Smith Ramos' Witness Statement?*

*A. I read it and I followed the testimony yesterday. Thanks.*

*Q. When did you recall first reading it?*

58. The Tribunal respectfully is invited to consider concluding from this factual predicate that Respondent kept relevant documents from Respondent's Expert.

### 4. Prof. Tams on the International and Domestic Concept of Grandfathering Legal Rights

59. Twenty-second, Prof. Tams admits not having analyzed the legal concept of "grandfathering rights" for purposes of the TER.[82]

60. Twenty-third, Prof. Tams admits not having consulted ISDS cases addressing the concept of grandfathering rights in the context of ISDS awards.[83]

61. Twenty-fourth, Prof. Tams admits not having researched the domestic law of the NAFTA Parties regarding the concept of grandfathering legal rights.[84]

### 5. Prof. Tams' Material Admissions Regarding Documentary Evidence

62. Twenty-fifth, Prof. Tams admits that documents prepared by a State Treaty signatory during the Treaty's Negotiating Period, but not shared with the other Treaty Parties, can still be considered SMI under Art. 32 VCLT.[85]

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*A. I don't recall. I think it was part – I mean, it would have been part of the documents that were shared with me in the run-up to the Hearing, but it may have been the week before or ten days before. I don't know. But I think – I mean, it's a bit as with the documents you were taking me to. My real engagement with them, I have to be honest, began yesterday, when I saw the Witness Statement presented and shown onscreen and then discussed.*

*Q. So two weeks ago, when you testified in the Coeur Mining Case, you had not reviewed his Witness Statement?*

*A. Well, I mean, this is difficult to answer because, of course, in the Coeur Mining Case, I had the benefit of listening to the testimony of Mr. Smith Ramos in that case.*

TR p. 468, lines 18-22, p. 469, lines 1-17.

82 TR p. 471, lines 3-21.

83 TR p. 471, line 22, p. 472, lines 1-6.

84 TR p. 472, lines 10-15.

85 *Q. Documents that have been prepared by a State Party but not shared with other State Parties may not be preparatory work, but they can still be considered as supplementary means.*

*You agree?*

*A. I think, if you go back can I take you to Paragraph 15 again?*

*Q. You can, but -- and, certainly, I don't want to limit or modify your response, but I would like a yes or no answer if possible. If you can answer it yes or no, and then you can explain all you want.*

*A. Okay. I think the short response is, indeed, paragraph -- sorry, Article 32 is a non-exclusive list, and the preparatory work of the Treaty is a prominent -- and, perhaps, the most prominent example, but it is not exclusive.*

63. Twenty-sixth, Prof. Tams admits the February 27, 2018 Memorandum that Respondent's Lead Negotiators for the USMCA's Investment Chapter prepared regarding Round 7 **(R-0013-SPA)** memorializes Respondent's understanding at that time (February 27, 2018) that the US Negotiators and proponents of Annex 14-C intended for the Annex "to operate like a sunset clause."[86]

64. Twenty-seventh, Prof. Tams admits with respect to the February 27, 2018 Memorandum that Mexico's Lead Negotiators for the Investment Chapter USMCA drafted for Kenneth Smith[87] the weight to be accorded to the document would depend on whether "different

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*So it could be possible to treat material that doesn't qualify as preparatory work of the Treaty as another supplementary means within the limits of Article 32. That is correct.*

TR p. 374, lines 8-22, p. 375, lines 1-5.

86 *Q. However, this memorandum **(R-0013-SPA)** records the U.S.'s proposal with respect to Annex 14 C in February 2018. Their intention was for it to operate like a sunset clause; do you agree?*

*A. Well, they use the term. I don't think they specify exactly. **So I think they use the term, yes. That is correct.***

*Q. Okay. At the very least, that's México's understanding of the U.S. proposal. You agree?*

*A. That is, México -- I mean, I think the question is always what 'sunset clause' means and --*

*Q. No, no, that, sir --*

*A. -- yeah, but of course -- yeah, yeah. But I think the **-- I mean, I think I agree. I mean, from the document you showed me, the U.S. proposes sunset clause -- something with the sunset clause and México records it in the internal document. That is also my reading of the document.***

*Q. The internal document that México records is one where their understanding of the proposition tabled or stated is that the Annex would work as a sunset clause; correct?*

*A. Well, I mean, I think you have to look to the -- I mean, maybe this is a quibble for language, but, of course, the text here in (2) describes the working as resort to the mechanism and then has the reference in the bracket. **But I think, yes,** that is, perhaps, a quibbling for fine -- I mean, that is maybe half --*

*Q. We'll get to that.*

*A. Yeah.*

*Q. Please finish. Anything else you want to say?*

*A. No, no. I think that's the only -- I mean, that's the only -- **that seems to me the way México in this internal memorandum recounts the U.S. proposal**. But again, I would need to know more about the context of the document or the background for the document to express a firmer view.*

(Emphasis supplied.)

TR p. 442, lines 9-12, p. 443, lines 1-22, p. 444, lines 1-15.

87 **(R-0013-SPA)**

terms were used" in the latter rounds.[88]

65. As has been established in Section I, Subsection A, ¶¶ 7-22 above, throughout the course of the negotiating history, it is inarguable that the Treaty Parties referred to Annex 14-C on a consistent basis as operationally tantamount to (i) a sunset clause, (ii) a clause grandfathering rights, and (iii) a clause extending NAFTA protections to investments and investors to the USMCA for a limited timeframe. The documents that Respondent was invited to produce are textually and conceptually consistent on this point.

66. Twenty-eighth, when questioned on the Respondent-generated internal report to Mr. Smith,[89] Prof. Tams admits that as of Round 4 (October 16, 2017) when the US Negotiators introduced the Annex 11-D precursor to Annex 14-C, the Mexican Negotiators understood the US proposal to consist of an "unqualified term" that would "put in place a temporary continuity of the protections under NAFTA."[90]

67. Twenty-ninth, Prof. Tams admits the role and qualification of the author(s) of internal documents prepared during the Negotiation Period by a Treaty Party is a factor to consider in according evidentiary weight to SMI of this ilk.[91]

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88 *Q. So the fact that it says Seventh Round of negotiation, that it's smack in the heart of the negotiating period and that it's from the lead floor negotiators to the chief of the USMCA process, that is not enough to accord significant evidentiary value to this document in your opinion; correct?*

*A. Well, I think, I mean, just to perhaps to just take those points because I don't want to -- perhaps my first comment was a bit flippant. When I said 'Seventh Round,' I was only expressing a view that I'm not familiar of how many rounds there were, whether -- so far, we have looked at this.* ***A lot would depend on whether in the Eighth Round different terms were used. In the Ninth Round this was confirmed.***

*So these are all factors on which so far there seems to be no -- I mean, I have not been briefed on this. You have not told me about this. This is why I mentioned. I cannot really say whether Seventh Round means a lot or little.*

(Emphasis supplied.)

TR p. 447, lines 9-22, p. 448, lines 1-6.

89 **(R-0012-SPA)**

90 TR p. 453, lines 14-18.

91 *Q. And Guillermo Malpica, his position would be a factor, too; right?*

*A. I think you mentioned it was said yesterday that he was the negotiator for the investment group or investment section. I think it was mentioned yesterday.*

*Q. So that would be a factor; correct?*

68. Thirtieth, Prof. Tams admits the timing of the drafting of internal government documents during the Negotiating Period is a factor to be considered in allocating weight to SMI.[92]

69. Thirty-first, Prof. Tams admits the involvement in the negotiation of the author of an internal government document is a factor to consider in allocating weight to SMI.[93]

70. Thirty-second in response to Arbitrator Prof. Ferrari, Prof. Tams admits that as to internal documents drafted during the Negotiating Period but not shared with the Treaty Parties, Prof. Tams "wouldn't be comfortable saying that they have no evidentiary basis or no evidentiary value."[94]

71. Thirty-third, Prof. Tams admits that the September 29, 2018 US-Canada Closing Term Sheet[95] (circulated only two months before the USMCA's trilateral signing) reflects Canada's position that at the time on non-agricultural issues, "Canada agrees to three years grandfathering of ISDS."[96]

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*A. Well, it would be. I mean, the involvement in negotiations might be a factor.*

TR p. 456, lines 14-22.

92 *Q. No. Thank you, sir. That's a great answer. Respectfully, I just want an answer to the question.*

*In your opinion, this is not a supplementary means of interpretation; correct?*

*A. Well, it is not a supplementary means as an internal document that would be accorded, in my view, significant weight. But I have to -- again, the qualifier that I made in respect to the previous document, unlike the documents I was commenting on in my Report, it does seem to be a document that comes from the time of the negotiation. It's not a post facto comment on the content. And I would recognize that that's, perhaps, a relevant -- that's a factor.*

TR p. 455, line 22, p. 456, lines 1-13.

93 TR p. 456, lines 20-22, p. 457, lines 1-2 and lines 6-22, p. 458, lines 1-3.

94 Question posed at TR p. 477, lines 16-22, p. 478, lines 1-8. Answer at TR p. 478, lines 9-22, p. 479, lines -9.

95 **(C-0113-7-ENG)**

96 *Q. Applying your Article 32, your opinion on Article 32 that we have discussed before at the beginning of our conversation today, this term sheet and, specifically, the Statement that Canada agrees to three year grandfathering of ISDS, that can be considered supplementary means of interpretation; correct?*

*A. It seems to emanate from the negotiation context. And, on that basis, it is different from the documents I looked at in my Report. And then the question is what it means, yes.*

*Q. So your answer is yes; correct?*

*A. Again, as I said, Article 32 imposes limitations. We were discussing at the beginning, but, yes, it can be considered as supplementary evidence. I mean, within the limits of Article 32.*

72. Thirty-fourth, Prof. Tams testifies that as to the US-Canada Closing Term Sheet "the interpretation of this ["Canada agrees to three-years grandfathering of ISDS."] would have to depend on what is meant or how grandfathering of ISDS is to be understood."[97]

73. Prof. Tams, however, as here demonstrated, elected not to research the concept of "grandfathering rights" in any context.[98] Likewise, Respondent elected not to brief the concept of grandfathering rights in any context. Claimant, however, extensively analyzed this concept (i) in the context of ISDS non-ECT awards, (ii) within the framework of ECT awards, (iii) under US law across seven different industry sectors, and (iv) pursuant to Canadian law.[99]

74. Thirty-fifth, Prof. Tams admits that as of October 19, 2018 (one month before the USMCA's trilateral signing) (and in the context of the "OECD Talking Points"[100]), Mexico and Canada approved "the US approach" to allow for legacy investment claims "under the NAFTA **rules** and **procedures** with respect to those legacy investments for three years after the termination of the NAFTA."[101] (Emphasis supplied.)

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TR p. 487, lines 8-22, p. 488, line 1.

In terms of a probative evidential assertion, Prof. Tams admitted that the US-Canada Closing Term Sheet is probative of Canada's understanding of the US position, and accepting of that proposition, just one month before the signing of the USMCA.

*Q. Yes, of course. This term sheet shows that Canada's position in understanding with respect to Annex 14 C, at least as of September 8, 2018, is that a three year grandfathering of ISDS under NAFTA would ensue; correct?*

*A. I mean, yes, that is the language here, yes.*

TR p. 488, lines 2-7.

97 TR p. 488, lines 8-20.

98 *Supra* Subsection B, 4.

99 CMOJ Section V, Subsection D.

100 **(OW-0014-ENG)**

101 *Q. Okay. So stopping there, we can conclude that México and Canada were told of, as Mr. Mandell put it in his email, the U.S.'s approach to the OECD meetings.*

*Do you agree?*

*A. Yes.*

TR p. 498, lines 4-12.

*See also,*

75. Thirty-sixth, also in the context of the Talking Points, Prof. Tams agrees that the term "procedure" in the "Talking Points"[102] refers to ISDS processes.[103] And Prof. Tams further admits that "rules" refers to "substantive" treatment protection standards in Section A, NAFTA Chapter 11.[104]

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*Q. If we go to the last bullet point on this page, that reads: 'First, investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those legacy investments for three years after the termination of the NAFTA.'*

*Do you see that?*

*A. I see that, yes.*

*Q. So here this description does refer to a temporal limit of 'the lifetime of the NAFTA.'*

*Do you agree?*

*A. The lifetime of the NAFTA. Yeah. I mean, I think -- the lifetime of the NAFTA is for the establishment of the investments, and then the temporal point is three years after the termination. Yes, I agree.*

*Q. And in that description, the sole focus of that temporal limit is, again, as we have seen before, on the investments.*

*Do you agree?*

*A. The sole focus. You mean the sole focus when investments were established?*

*Q. The lifetime of NAFTA, yes.*

*A. Yes. Yes. That is -- yes.*

TR p. 499, lines 15-22, p. 500, lines 1-17.

[102] **(C-0113-9-SPA)**

[103] TR p. 503, lines 16-21.

[104] TR p. 503, line 22, p. 504, lines 4-7. **(C-0113-9-SPA)**

*See also,*

*Q. Let's continue then and see if maybe we'll learn something. If we keep reading in this second paragraph here, it uses the word 'rules' to describe 'post establishment National Treatment, post establishment Most Favored Nation Treatment, and direct expropriation.' Is that correct?*

*A. Let me check.*

*Yes. It uses that I think in the way you have described it, yes.*

*Q. So 'rules' in this document must mean substantive protections.*

*You agree?*

*A. Well, it seems to refer to this here, yeah.*

*Q. So like the draft proposed terms of Annex 14 C, the finalized terms of Annex 14 C and the previous documents from the U.S. Canada México we looked at, there is no explicit temporal restrictions with respect to violations or measures; correct?*

*A. I think that is right. There is no temporal limitation that is expressly imposed, yes.*

*Q. In fact, these documents specifically refer to 'investors being able to bring claims under NAFTA rules being the substantive protections with respect to those legacy investments for three years.'*

**6. Prof. Tams Engages in Selective Citation of the USMCA Protocol and Can Point to No Authority Supporting His Novel and Unique Exegesis of Paragraph 1 of the USMCA's Protocol**

76. Thirty-seventh, Prof. Tams admits engaging in the selective citation of the USMCA Protocol. This problem is compounded because his statement that the USMCA Protocol constitutes what has been described as a "fundamentally cooperative" termination of a treaty, misstates in absolute terms the authority on which Prof. Tams relies for such an assertion:

> *Q. Here you wrote: 'Paragraph 1 of the USMCA Protocol unequivocally stipulated that 'upon entry into force of this Protocol, the USMCA shall supersede the NAFTA.' In my view this constitutes a textbook example of what commentators have described as a 'fundamentally cooperative' termination of a treaty.'*
>
> *That's your opinion; correct?*
>
> *A. Yes. I see that, yes.*
>
> *Q. However, if we go to the USMCA protocol at CL-0003, that's not at all what Paragraph 1 says.*
>
> *Can you read it out for me?*
>
> *A. Yes, I will. It says: 'Upon entry into force of this Protocol, the CUSMA, attached as an annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the CUSMA that refer to provisions of the NAFTA.'*
>
> *Q. Now, you omitted the second part of that important operative part of the protocol in Paragraph 59 of your Report; right?*
>
> *A. Well, I think -- you're right. It is not cited here. There are the three dots. I think I would need to verify. I'm pretty sure that I have cited the paragraph in full elsewhere. Let me perhaps -- just one clarification.*
>
> *Q. Professor, I'm not asking whether you cited it elsewhere. I just want to ask you one question at a time.*
>
> *A. Okay.*
>
> *Q. If you don't mind.*

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*Isn't that correct.*

*A. Well, I mean, the points -- the passages you've taken me to do use rules and procedures, yes.*

TR p. 504, lines 17-22, p. 505, lines 1-21.

*A. Of course not.*

*Q. So instead of citing the totality of the Protocol in Paragraph 59, you divided your discussion of this sentence and only discussed the second part of it in Paragraphs 91 and 92 of your Report; is that correct?*

*A. Let me just check this.*

*Q. Please.*

*A. Yes. Yes, I see it now. Thank you for drawing my attention to that.*[105]

77. Prof. Tams' statement that paragraph 1 of the USMCA Protocol "constitutes an example of what commentators have described as a 'fundamentally cooperative' termination of a treaty," misapprehends in its entirety the authority upon which Prof. Tams relies. Specifically, in paragraph 59, n. 32, Prof. Tams cites to[106] Laurence Helfer "Terminating Treaties" in Duncan Hollis (ed.), *The Oxford Guide to Treaties* (2nd ed., Oxford University Press, 2020), at p. 637-638. That authority, however, is inapposite.

78. Unlike paragraph 1 of the USMCA's Protocol containing a "without prejudice" clause that saves "those provisions set forth in the CUSMA that refer to provisions in the NAFTA," what Prof. Helfer identifies as treaties that are "fundamentally cooperative in nature" are those "that supersede earlier agreements on the same topic [and] require ratifying States to denounce the earlier agreements as a condition of membership. Such paired treaty actions [denouncement of one treaty and entering into force and membership of another] update a State's international obligations without diminishing its overall level of commitment."[107]

79. Indeed, Prof. Tams can point to no authority in support of the proposition that a comparable "without prejudice" clause does not provide for an agreement to apply specific provisions of the terminated treaty in particular sections or annexes of the new treaty. Likewise, Prof. Tams can point to no authority that would diminish the binding nature of NAFTA Art. 1131.1 contained in Section B, NAFTA Chapter 11 or the explicit reference to Section A, NAFTA Chapter 11 in paragraph 1 of Annex 14-C, as well as in Footnote 20 of that paragraph.

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105 TR p. 413, lines 19-22, p. 414, lines 1-22, p. lines 1-13.

106 **(CT-0028-ENG)**

107 *Id.*, p. 638.

80. Thirty-eighth, Prof. Tams admits the termination of NAFTA does not affect those provisions of the USMCA that would refer back to NAFTA.[108]

81. Thirty-ninth Prof. Tams cannot cite to any authority, beyond his personal opinion, in support of his assertion that "Claimant had placed undue emphasis on the term of this part of paragraph 1 [the without prejudice clause] of the Protocol and ignored 'the central element of paragraph 1 of the USMCA Protocol, which is to ensure that USMCA will supersede NAFTA.'"[109]

82. Fortieth, Prof. Tams' contention that his theory that a non-textual temporal third requirement is not being placed on Annex 14-C because no NAFTA-based substantive obligation survives the NAFTA's termination assumes, among other things, that (i) the USMCA's Chapter 1 Protocol "without prejudice" clause is tantamount to not having any effect on Annex 14-C except for the importation of procedural rights in the form of Section B, NAFTA Chapter 11, without ascribing any operative effect to Art. 1131.1 contained in that Section.

83. Based upon the *40* propositions immediately set forth above, this Tribunal respectfully is invited to consider concluding that Prof. Tams' TER[110] and testimony are to be construed with skepticism with the exception of the articulation of substantive admissions against interest arising from Prof. Tams' CE.

## II. WHAT WEIGHT UNDER THE VCLT, IF ANY, SHOULD THE TRIBUNAL ACCORD TO CONVERSATIONS, STATEMENTS OF FORMER PUBLIC OFFICIALS WHO WERE INVOLVED IN THE NEGOTIATIONS OF THE TREATY AND ISSUED STATEMENTS AFTER THEY LEFT OFFICE? SPECIFICALLY THE TRIBUNAL IS REFERRING TO MR. KENNETH SMITH'S ORAL TESTIMONY (AND WITNESS STATEMENT SUBMISSION), AND THE DOCUMENTARY EVIDENCE OF MR. MANDELL

84. Legally and conceptually the analysis is no different from the approach to the weight to be accorded to documentary SMI. The admissibility of such statements is inarguable because there is no rule of law that aprioristically provides that such statements are proscribed, irrespective of factual particularities. Therefore, at issue only is the question of weight. The

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108 TR p. 417, lines 11-22, p. 418, line 1.

109 TR p. 416, lines 5-13, *see also* TER ¶¶ 91-92 **(RER-0001-ENG)** (bereft of authority).

110 **(RER-0001-ENG)**

quality of the evidence is determinative in either direction. And it is premised on a case-by-case analysis.

85. As to Mr. Mandell's statement and Mr. Gharbieh's acceptance of Mr. Mandell's (i) answer and (ii) explanation, an evidential analysis is set forth in ¶¶ 252-300, pp. 105-121 of the CMOJ. Claimant respectfully invites the Tribunal to consider that (i) the USTR's Deputy Assistant for Investment, Mr. Gharbieh, *undertook the initiative* to reach out to Mr. Mandell, and (ii) Mr. Mandell authored the March 2, 2021 answer *and* explanation to Mr. Gharbieh's query without the constraints of pending litigation or those of institutional policies. The Tribunal is invited to consult ¶ 297 together with n. 249, CMOJ.

86. An evidential discussion of Mr. Smith's WS testimony is set forth in CMOJ ¶¶ 301-316, pp. 121-129. Notably, as Claimant underscored at the close of the Jurisdictional Hearing on April 15, 2025, Respondent has not proffered *any* witness for purposes of *factually*, from an evidentiary perspective, challenging Mr. Smith's written and oral testimony, notwithstanding that Messrs. Malpica and López, who reported to Mr. Smith, (i) served as the Lead "Floor" USMCA Investment Chapter Negotiators for Mexico, and (ii) reside in Mexico.

87. The Tribunal respectfully is invited to consider concluding that consonant with legal authority and settled doctrine, Mr. Mandell's written communication of March 2, 2021 and Mr. Smith's written and oral testimony

(i) have not been factually challenged by evidence alleged to have undermined their respective factual proffers,

(ii) the particular factual circumstances pertaining to Mr. Mandell's written communication of March 2, 2021, and Mr. Smith's oral and written testimony constitute reliable and credible evidence in support of the interpretive proposition asserted,

(iii) because Mr. Mandell's written statement and Mr. Smith's oral and written testimony constitute credible and reliable evidence, such finding serves as a reasonable basis from which it should be concluded that this evidentiary proffer is of significant quality, and

(iv) evidence of significant quality shall be accorded determinative weight.

88. This approach to the WS of the USTR's Lead Negotiator-Investment for the USMCA's Investment Chapter, and Respondent's Lead Negotiator for the USMCA to whom the Line Negotiators for the Investment Chapter reported, comports with the ICJ's longstanding rulings on this issue. *See, e.g., Case Concerning Armed Activities on the Territory of the Congo (Dem Rep. Congo v. Uganda)*, ICJ Rep. 2005, Judgment of December 19, 2005, ¶¶ 59-61[111] ("As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value. In accordance with its prior practice, the Court will explain what items it should eliminate from further consideration …. The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. *It will prefer contemporaneous evidence from persons with direct knowledge*. It will give particular attention to reliable evidence acknowledging facts or conduct unfavorable to the State represented by the person making them …. The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. *The Court moreover notes that evidence obtained by examination of persons directly involved, who are subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits a special attention.*" (Emphasis supplied.)); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of June 27, 1986, ICJ Reports 1986, ¶¶ 64-69[112] (emphasizing that statements by high-ranking officials, including Ministers and Heads of States, have particular probative value when they acknowledge facts or conduct unfavorable to their own State: "In the general practice of courts, two forms of testimony regarded as *prima facie* superior credibility are, first the evidence of a disinterested witness – one who is not a party to the proceedings and stands to gain or lose nothing from its outcome – and secondly so much of the evidence of a party as is against its own interest.").

89. The Tribunal is invited to note that the *Sempra Energy Intl. v. Argentine Republic*

111 **CL-0263-ENG**

112 **CL-0261-ENG**

case,[113] ¶ 145 (stating that "the opinion of those who were responsible for the drafting and negotiation of a State's bilateral treaty [is not] irrelevant, in that it serves, precisely to establish original intention"), is analyzed in the CMOJ on pp. 61, 164, 165 ¶¶ 161, 395. The ruling in *Sempra* on this issue accords with Shirlow, Esmé & Waibel, Michael, *A Sliding Scale Approach to Travaux in Treaty Interpretation: the Case of Investment Treaties*, British Yearbook of International law, 2021, p. 12[114] ("Again, however, other tribunals have adopted a more permissive approach to the use of materials that have been generated after a treaty's conclusion. *A number of tribunals have, for example, encompassed within the concept of 'preparatory work' evidence in the form of oral and written testimony from persons who attended the treaty negotiations on behalf of one or other of the negotiating parties* [*citing to* the referenced language in *Sempra*."]); *see also,* Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, (2d ed. (1984)), pp. 117-130[115] ("It has also been suggested that uncontested interpretations given at a conference by, for example, the Chairman of a Drafting Committee may constitute an 'agreement' forming part of the 'context' of the treaty which is being concluded. This is debatable. There can be no doubt that *considerable weight* should be attached to such interpretations (as also to explanatory statements given by an expert consultant at the codification conference when he is elucidating proposals made by the International Law Commission); but the better view may well be that such interpretive or explanatory statements simply constitute part of the *travaux préparatoires* of the treaty, but a part whose significance in the interpretive process is greatly enhanced by the *authority of the person making the statement*." (Emphasis supplied.) (Footnote omitted.)).

90. The Tribunal respectfully is invited to consider that significant, if not determinative weight, should be accorded to the factually unrebutted statements of Messrs. Mandell and Smith.

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113 Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, (Professor Francisco Orrego Vicuña, Hon. Marc Lalonde, P.C., O.C., Q.C., Dr. Sandra Morelli Rico) Decision on Objections to Jurisdiction, May 11, 2005 **(CL-0184-ENG)**.

114 **CL-0267-ENG**

115 **CL-0265-ENG**

## III. QUESTION 3: THE EFFECT OF ANNEX 14-C, PARAGRAPH 3

91. The tribunal has asked the parties:

> What is the effect of Paragraph 3 of Annex 14-C? … Does Paragraph 3 extend the three-year statute of limitations of NAFTA that we find in 1116(2)? … If the answer is yes, then is there a document in the record that confirms this understanding? If the answer is no, then what is the use of Paragraph 3? Because would it not have been sufficient to simply have the statute of limitation of NAFTA apply which would put an end to possible claims[?]

92. As reflected by their respective counsel's statements during the hearing, the parties are in agreement that Paragraph 3 does not serve to extend the NAFTA statute of limitations.[116] This is also reflected by the March 2, 2021 email exchange between Lauren Mandell and Khalil Gharbieh shortly after the USMCA entered into force. In that exchange, Mr. Mandell, who had served as the lead U.S. Negotiator of the Investments Chapter of the USMCA, explained to Mr. Gharbieh, the serving Deputy USTR-Investment, that,

> 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 Section 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.*
>
> (Emphasis supplied.)[117]

Significantly, Mr. Gharbieh's response on the same date agreed with Mr. Mandell's analysis.[118]

93. Indeed, Paragraph 3's language differs from the limitations provisions of NAFTA Articles 1116(2) and 1117(2), USMCA Article 14.D.5(1)(c), and USMCA Annex 14-E(4)(b) in two important respects, each of which reflects that Paragraph 3 does not provide a limitations period for the assertion of an investor's claim. First, Paragraph 3 is phrased in terms of general consent to arbitration as opposed to when a particular claim may be submitted to arbitration.

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116 TR pp. 562, 592.

117 **(C-0121-ENG) p. 3.**

118 *Id.*

Second, Paragraph 3's timing is tied to the USMCA's entry into force, as opposed to when an investor knew or should have known of the breach of a treaty provision and resulting injury in connection with its claim. These differences in language reflect that Paragraph 3 is designed to accomplish a different purpose, consistent with Mr. Mandell's email.

94. One of the reasons why reading Paragraph 3 as extending the three-year NAFTA limitations period would not "make a lot of sense" is that such a reading would lead to anomalous results. An investor learning of a treaty breach and resulting loss on June 30, 2020 would have until June 30, 2023 – a period of three years – to bring its claim. But an investor that learned of a treaty breach and resulting loss on July 2, 2017, and for which the statute of limitations would have nearly run by the USMCA's entry into force on July 1, 2020, would also be given until June 30, 2023 – a period of nearly six years – in which to bring its claim under this reading of Paragraph 3. There is no rational purpose for nearly doubling the limitations period applicable to such an investor, and no evidence in the record suggests that the parties had any intention of doing so. Rather, as the record reflects, the parties consented to arbitration under NAFTA by legacy investors alleging a violation of NAFTA Chapter 11 Section A, and "intended the annex to cover measures in existence before AND after USMCA entry into force."[119]

95. Paragraph 3 is an important provision for the USMCA parties precisely *because* they agreed to grant to legacy investments grandfathered access to NAFTA Chapter 11 for a period of exactly three years. Under paragraph 3, the period of grandfathered access to Chapter 11 (*i.e.*, the transition period) ends three years after USMCA's entry into force. Absent the restriction imposed by Paragraph 3, the NAFTA Chapter 11 limitation period, which runs from an individual investor's discovery or imputed discovery of the breach, would apply, and investors discovering a breach belatedly could have access to NAFTA Chapter 11 rules and procedures well beyond the three-year transition period. In short, Paragraph 3 establishes a clearly defined transition period within which all holders of legacy investments would have continued access to NAFTA Chapter 11 and after which the State parties need not extend Chapter 11 protections to *any* investors.

119 *Id.*

96. Claimant's interpretation of Paragraph 3 and, more broadly, Annex 14-C is confirmed by another document prepared by the United States (itself the proponent of Annex 14-C) in October 2018, just one month before the USMCA was signed. This document, contained in an October 9, 2018 internal USTR email from Lauren Mandell to C.J. Mahoney, sets out a potential revision to the Annex's definition of legacy investment in light of "stakeholder concerns."[120] Under that potential revision, the definition of "legacy investment" would have been narrowed from an investment "established or acquired between January 1, 1994 and the date of termination of NAFTA 1994" to one "established or acquired between January 1, 1994 and the date of signature of this Agreement, and in existence on the date of entry into force of this Agreement."[121] Thus, had the proposed revision been adopted, legacy investments would need to have been acquired by November 30, 2018 (USMCA's signature date), rather than by July 1, 2020 (USMCA's entry into force).

97. If Annex 14-C Paragraph 3 were simply intended to extend the NAFTA limitations period, the revised definition of "legacy investment" being considered by the United States in October 2018 would make little sense, as it would lead to highly anomalous discrepancies in the application of that limitations period. An investor that had acquired its investment by November 30, 2018 would have the statute of limitations for *all* claims (including, arguably, already-expired claims) extended, as described above, all the way through July 1, 2023. In contrast, an investor acquiring its investment on or after December 1, 2018 – while NAFTA was still fully in force – would have only nineteen months or less (until July 1, 2020) to bring *any* claims that might arise under NAFTA, because its investment would not qualify for the extended period under Annex 14-C. The irrationality of such a discrepancy of treatment suggests that the proposed revision was not intended to dramatically extend the limitations period for one class of NAFTA investors while drastically shortening it for another class – which, in turn, confirms that Paragraph 3 is not a limitations-extending provision. Rather, the proposed revision (which was ultimately not adopted) was intended to restrict the class of investors who would have grandfathered access to NAFTA Section 11 during the transition period to only those investors who had acquired their investments before the USMCA text had been finalized and

120 **(C-0113-8-ENG)**

121 *Id.* p. 2.

signed by the parties.

98. If the language of the potential revision were not sufficiently clear to show this, the USTR's description of the proposed change, under the heading "Narrow coverage of the three-year ISDS grandfather clause", leaves no room for doubt:

> *Description:* Under the ISDS grandfather clause, investors can bring ISDS claims under NAFTA 1994 for three additional years with respect to investments established or acquired between January 1, 1994 and the date of the termination of NAFTA 1994 (*i.e.*, the lifetime of NAFTA 1994). Under the revised approach, investments established or acquired after signature of the USMCA, but before the termination of NAFTA 1994, would be excluded from the grandfather clause.[122]

99. The language of the proposed revision considered by the USTR's office also confirms that the primary temporal limits applicable to Annex 14-C, other than the three-year transition period established by Paragraph 3, were directed to the definition of "legacy investment" and not to the date on which a challenged State measure would occur. The proponents of Annex 14-C did not approach defining the Annex's proposed reduced jurisdictional scope in terms of "State measures", "alleged violations", "accrual of claims", or even "legacy claims." Rather, the very temporal metric for the diminution, maintenance, or extension of the Annex's jurisdictional scope was defined in terms of a "legacy investment", *i.e.*, a qualifying *investment.*

100. In short, Annex 14-C left in effect NAFTA's limitations periods for claims brought under the Annex. It added two additional temporal qualifications: the expiration of consent to arbitrate as provided in Paragraph 3, and the definition of "legacy investment" as provided in Paragraph 6(a). It did not impose any other temporal restrictions, and in particular did not do so with respect to State measures giving rise to legacy investment claims.

## IV. QUESTION 4: THE PURPOSE OF FOOTNOTE 21

101. The tribunal formulated its fourth inquiry to the parties as follows:

> If, assuming Annex 14-C does not cover claims arising out of measures taken during the three-year transition period, what is the use of Footnote 21 by which the U.S. and Mexico

[122] *Id.*

> exclude the application of Annex 14-C to investors who were eligible to submit claims under 14-C (14-E?)?
>
> And a subquestion is: Was the purpose of Footnote 21 to avoid giving access to multiple fora to investors who complained of a continuous breach that would straddle over the transition period? And if that is the purpose, then is there a document in the record that would point to it?

102. The short answers to Question 4 are that (i) Annex 14-C *does* cover claims arising out of measures taken during the transition period, (ii) Footnote 21 would have no meaningful purpose otherwise, and (iii) Mexico's continuous breach theory is both incorrect and unsupported by any evidence in the record.

103. The purpose of footnote 21 is to provide that investments relating to covered government contracts are not subject to the transition period established under Annex 14-C. There is no need for such investments to receive the protection of the transition period, because under Annex 14-E investors are able to assert claims involving the full scope of investment protections under USMCA. In other words, the protection of their investments is not materially reduced by the USMCA, so a transition period is unnecessary for them.

104. On the other hand, owners of legacy investments that do not fall within Annex 14-E receive much less protection under USMCA Annex 14-D than under NAFTA. Under NAFTA, such investors are able to assert claims under the full panoply of investment protections, whereas Annex 14-D permits arbitration only of national-treatment, most-favored-nation, and direct expropriation claims. In light of this reduction, Annex 14-C provides legacy investments and investors with a three-year transition period during which legacy investments continue to receive protection under NAFTA Chapter 11's provisions before being limited to the more narrow protections afforded by Annex 14-D.

105. Lauren Mandell's March 2, 2021 email to Khalil Gharbieh is quite explicit on this point:

> The whole point of [footnote 21] 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.[123]

106. In contrast to Mr. Mandell's straightforward explanation, Mexico has been unable to articulate, in any definitive sense, the utility of Footnote 21 under its own interpretation of Annex 14-C. Indeed, it noted in paragraph 101 of its Memorial that "[t]he Respondent does not propose *to speculate* on all of the factual circumstances that could give rise to the triggering of Footnote 21." (emphasis supplied). As one of the parties to USMCA who participated in its drafting, Mexico ought reasonably to have been able to explain the purpose of its own treaty provision without recourse to speculation.

107. Similarly, Mexico's counsel Mr. Hohnstein emphasized during the hearing that "we don't have a factual matrix to permit a fulsome debate over how Footnote 21 should be interpreted and applied as a practical matter." He sought to rephrase the question of the footnote's purpose as "[c]an we think of a situation, a theoretical situation in which Footnote 21 would have *effet utile*?" and "[c]an we elucidate a purpose that is consistent with the Respondent's interpretation of Annex 14-C?"[124] Given that Mexico was reduced to speculating over *potential* purposes for the inclusion of Footnote 21 in its own Treaty, it is unsurprising that its counsel sought to minimize the importance of the question by urging that "the interpretation of Footnote 21 is not directly before the Tribunal in this Jurisdictional Objection", and that "[t]he interpretation of Paragraph 1 of Annex 14-C must not be held hostage to a narrow theoretical interpretation of Footnote 21, absent contextual facts, especially when the provision is not an issue in this dispute, and there are no relevant facts to apply it to."[125]

108. Mexico's expert, Prof. Tams was similarly unable to identify the actual reason for the inclusion of Footnote 21. Lacking any information from Mexico about the footnote's purpose, he cautioned that "it does not seem to me appropriate to speculate about the motives that might have prompted the United States and Mexico to include footnote 21."[126]

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123 **(C-0121-ENG)** p. 3.

124 TR p. 572.

125 TR pp. 564-566.

126 (**RER-0001-ENG)**, ¶ 98.

109. Prof. Tam's suggestion that a "plausible explanation" for Footnote 21 would be the parties' "wish to clarify situations of continuous or composite breaches,"[127] echoed by Mexico in its suggestion that "an apparent scenario in which footnote 21 may have been triggered is a continuing act or fact (e.g., a government measure) traversing the termination of the NAFTA and the entry into force of the USMCA"[128] is implausible for at least four reasons.

110. First, like the rest of Mexico's position concerning Annex 14-C, its "continuing breach" theory of Footnote 21 is of quite recent vintage – post-dating the assertion of Annex 14-C claims against Mexico – and unsupported by any evidence in the record (in contrast to, for example, the March 2, 2021 Mandell correspondence explaining the footnote's true purpose).

111. Second, the subject of a continuing breach is not at all addressed by the footnote's actual text, which, as Mexico notes, "focuses on investor eligibility and not on the temporal scope of the substantive obligations."[129]

112. Third, precisely because its terms focus on investor eligibility and not on temporal scope, Footnote 21 could at best serve as only an incidental and partial means of regulating claims for continuing breaches as posited by Mexico. Where a breach began under NAFTA and continued under the USMCA, an eligible investor that brought its first claim prior to the USMCA's entry into force would be perfectly free to bring a second claim under USMCA Annex 14-E. In such circumstances, the investor would have no need to rely on Annex 14-C's transition period, and thus footnote 21 would not apply to bar the NAFTA claim. It is implausible that the US and Mexico would have chosen such a haphazard and tangential means of regulating only some claims involving continuous breaches.

113. Fourth, Mexico's theory cannot explain why the parties would seek to treat investors eligible under Annex 14-E differently from (and less favorably than) other investors with access to Annex 14-D in connection with continuing breaches. Under Mexico's theory, the covered-government-contract investor with a continuing breach claim under Annex 14-E would

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127 *Id.*

128 RMOJ ¶ 102.

129 RMOJ ¶96, *citing* TER, **(RER-0001-ENG)** ¶¶ 94-95.

be forced by Footnote 21 to make its claim only under USMCA pursuant to Annex 14-E, without access to Annex 14-C. However, Footnote 21 would not prevent a similarly-situated investor whose investment did *not* fall under Annex 14-E from asserting claims under Annex 14-C for pre-USMCA measures and under Annex 14-D for measures taken under USMCA.

114. As Mr. Mandell's email notes, such discrimination against Annex 14-E investors would "just be punishing keyhole investors, which is contrary to the clear intentions of the whole keyhole framework."[130] Rather than seeking to discriminate against Annex 14-E investors in the specific context of a continuing breach, Footnote 21 excludes them from Annex 14-C's provision of continued access to NAFTA Chapter 11 during the transition period precisely because they have no need for it given their continued protection under USMCA.

115. Despite having negotiated the USMCA, Mexico is unable to identify even a *hypothetical* purpose for Footnote 21 that would be consistent with its restrictive interpretation of Annex 14-C. Annex 14-E applies only to measures occurring after USMCA's entry into force; therefore there can be no overlap with Annex 14-C for Footnote 21 to address unless Annex 14-C can *also* apply to measures during that timeframe.

116. Mexico's proposed reading of Footnote 21 is even less plausible when viewed against the backdrop of the other provisions of the USMCA, in particular (i) Paragraph 1 of the USMCA Protocol, reflecting that the USMCA's superseding of NAFTA was "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA", (ii) Annex 14-C's provision for the application of NAFTA Chapter 11 Section B procedures, including NAFTA Article 1131(1)'s choice of NAFTA as the governing law, and (iii) Footnote 20 to Annex 14-C, providing that, "[f]or greater certainty, the relevant provisions in … Chapter 11 (Section A) (Investment) … of NAFTA 1994 apply with respect to such a claim." Each of these provisions supports Claimant's interpretation of Annex 14-C, lending further support to Mr. Mandell's explanation of the operation of Footnote 21 and rendering even less plausible Mexico's "continuing breach" theory of the footnote.

130 **(C-0121-ENG)** p. 3.

## V. CONCLUSION

117. For the stated reasons and authority, Claimant, Access Business Group LLC, respectfully requests for this Tribunal to deny Respondent's jurisdictional challenge and to award Claimant reasonable attorneys' fees and costs arising from contesting Respondent's jurisdictional challenge based on the scope of USMCA Annex 14-C, and insufficiency of waiver under Art. 1121 NAFTA.

Dated: May 27, 2025.

Respectfully,
Pedro J. Martínez-Fraga
C. Ryan Reetz
Kevin Cheung
Pushkal Mishra
Bryan Cave Leighton Paisner LLP
(BCLP)
200 S. Biscayne Blvd.
Suite 400
Miami, Florida 33131
Tel.: (786) 322-7500
Fax: (786) 322-7501
Counsel for Claimant,
Access Business Group LLC
By: */s/ Pedro J. Martinez-Fraga*
Pedro J. Martínez-Fraga