

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Access Business Group LLC
Claimant

v.

United Mexican States
Respondent

(ICSID Case No. ARB/23/15)

AWARD

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Prof. Franco Ferrari, Arbitrator
Ms. Loretta Malintoppi, Arbitrator

Secretary of the Tribunal

Mr. Francisco Abriani

Assistant to the Tribunal

Dr. David Khachvani

Date of dispatch to the Parties: 21 November 2025

Representation of the Parties

Representing the Claimant:

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Mr. C. Ryan Reetz
Mr. Kevin Cheung
Ms. Erica Kwan
Ms. June Foyo-Lorenzo
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Miami, FL, 33131
United States of America*

Representing the Respondent:

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Mr. Luis Fernando Muñoz Rodríguez
Ms. Pamela Hernández Mendoza
Mr. Oscar Manuel Rosado Pulido
Mr. Fabián Arturo Trejo Bravo
Ms. Monserrat Pérez Vázquez
Mr. Sergio Alonso Patiño Reyes
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United Mexican States*

and

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*Mr. Stephan E. Becker
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TABLE OF ABBREVIATIONS

Access	Access Business Group LLC, the Claimant in this arbitration
Annex 14-C	Annex 14-C of the USMCA
C-[#]	Claimant’s Exhibit
CL-[#]	Claimant’s Legal Authority
Claimant	Access Business Group LLC
Counter Memorial on Jurisdiction	Claimant’s Counter Memorial on Jurisdiction, dated 7 March 2025
ER	Expert Report
ER1	First Expert Report
ER2	Second Expert Report
FET	Fair and Equitable Treatment
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2022
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ILC	International Law Commission
ILC Articles	Draft Articles of the International Law Commission on the Responsibility of States for International Wrongful Acts
Memorial	Claimant’s Memorial on the Merits, dated 23 May 2024
Memorial on Jurisdiction	Respondent’s Memorial on Jurisdiction, dated 29 November 2024

NAFTA	The 1994 North American Free Trade Agreement
PO	Procedural Order
R-[#]	Respondent's Exhibit
Respondent or Mexico	The United Mexican States
RfA	Claimant's Request for Arbitration dated 13 April 2023
SEDATU	The Secretariat of Agrarian, Territorial and Urban Development
Tr. Day [#] [page:line]	Transcript of the Hearing
USD	United States Dollar
USMCA	The United States-Mexico-Canada Agreement which entered into force on 1 July 2020
USMCA Protocol	Protocol Replacing NAFTA with USMCA, dated 30 November 2018
USTR	The United States Trade Representative
VCLT	The Vienna Convention on the Law of Treaties signed on 23 May 1969 and entered into force on 27 January 1980
WS	Witness Statement
WS1	First Witness Statement
WS2	Second Witness Statement

I. INTRODUCTION

1. The present dispute was submitted to the International Centre for Settlement of Investment Disputes (**ICSID**) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the **ICSID Convention**) and under Annex 14-C (**Annex 14-C**) of the US-Mexico-Canada Agreement (**USMCA**).¹ It relates to the alleged expropriation and unlawful treatment of the Claimant's farming business in Mexico.

A. THE PARTIES

1. The Claimant

2. The claimant is Access Business Group LLC (**Access** or the **Claimant**), a limited liability company incorporated in Michigan, United States of America, on 14 November 2000.²
3. The Claimant is part of a conglomerate of companies involved, *inter alia*, in the manufacture and sale of vitamin and mineral supplements containing organically certified plant-based nutrients, sold globally by Amway IBO-Distributors. Through a Mexican subsidiary, the Claimant allegedly conducted an organic farming and food and supplement processing business in Mexico.
4. The Claimant is represented in this arbitration by:

Pedro J. Martínez-Fraga
C. Ryan Reetz
Kevin Cheung
Erica Kwan
June Foyo-Lorenzo
Bryan Cave Leighton Paisner LLP (BCLP)
200 S. Biscayne Blvd.
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2. The Respondent

5. The respondent is the United Mexican States, a sovereign State party to the ICSID

¹ CL-2, Agreement between the United States of America, the United Mexican States and Canada, 30 November 2018.

² C-1, Articles of Organization, 13 November 2000.

Convention and the USMCA (**Mexico** or the **Respondent**).

6. The Respondent is represented in this arbitration by:

Alan Bonfiglio Ríos
Luis Fernando Muñoz Rodríguez
Pamela Hernández Mendoza
Oscar Manuel Rosado Pulido
Fabián Arturo Trejo Bravo
Montserrat Pérez Vázquez
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B. THE TRIBUNAL

7. The Arbitral Tribunal is composed of:

- Prof. Gabrielle Kaufmann-Kohler, President
- Prof. Franco Ferrari, Arbitrator
- Ms. Loretta Malintoppi, Arbitrator

8. The Centre appointed Mr. Francisco Abriani as Secretary of the Tribunal.

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9. With the consent of the Parties, the Tribunal appointed Dr. David Khachvani,³ a lawyer of the President’s law firm, as Assistant to the Tribunal. His *curriculum vitae* and a declaration of impartiality and independence were circulated to the Parties.

C. SCOPE OF THIS AWARD

10. In Procedural Order No. 3, the Tribunal decided to address the following preliminary objections of the Respondent (“**Preliminary Objections**”) in a separate phase of these proceedings:
- Lack of jurisdiction *ratione temporis*, specifically lack of jurisdiction under Annex 14-C of the USMCA over alleged breaches of NAFTA arising from measures adopted after the termination of NAFTA on 1 July 2020;
 - Lack of jurisdiction on the ground that the waivers submitted by the Claimant and its Mexican subsidiary do not fulfil the requirements of NAFTA and USMCA.
11. In this Award, the Tribunal analyzes and resolves the Preliminary Objections.

II. PROCEDURAL HISTORY

12. On 13 April 2023, ICSID received a request for arbitration dated 13 April 2023, with Annexes 1 to 13, from Access against Mexico (**RfA**).
13. On 15 May 2023, the Secretary-General of ICSID registered the RfA in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.
14. In accordance with Article 1123 of the NAFTA and Article 14.D.6 of the USMCA, the tribunal would consist of three arbitrators, one to be appointed by each party and the third presiding arbitrator to be appointed by agreement of the Parties.
15. The Tribunal is composed of Gabrielle Kaufmann-Kohler, a national of Switzerland, President, appointed by agreement of the Parties; Franco Ferrari, a national of Italy, appointed by the Claimant; and Loretta Malintoppi, a national of Italy, appointed by the

³ As described in the Procedural History below, on 8 December 2023 the Tribunal initially appointed Ms. Laura Zinnerman as the Assistant to the Tribunal, replacing her with Dr. Khachvani on 4 November 2024.

Respondent.

16. On 20 October 2023, the Secretary-General, in accordance with Rule 21(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Francisco Abriani, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
17. In accordance with ICSID Arbitration Rule 29, the Tribunal held a first session with the Parties on 27 November 2023 by videoconference.
18. Following the first session, on 8 December 2023, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and appointing Ms. Laura Zinnerman as Assistant to the Tribunal. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 1 July 2022, that the procedural languages would be English and Spanish, that the place of the proceeding would be Washington, D.C., United States of America, and the procedural calendar for the jurisdictional and merits phase of the proceeding.
19. On 2 January 2024, the Tribunal circulated a draft Procedural Order No. 2 for discussion by the Parties.
20. On 12 January 2024, the Parties provided their comments to the draft Procedural Order No. 2.
21. On 19 January 2024, the Tribunal issued Procedural Order No. 2, on transparency and confidentiality.
22. On 22 February 2024, the Tribunal issued a revised procedural calendar, as requested by the Parties on 20 February 2024.
23. On 20 March 2024, the Tribunal issued a revised procedural calendar, as requested by the Parties on 20 March 2024.
24. On 2 April 2024, Prof. Franco Ferrari conveyed a disclosure to the Parties, on which they had no comments.
25. On 1 May 2024, the Tribunal issued a revised procedural calendar, as requested by the Parties on 26 April 2024.
26. On 21 May 2024, the Tribunal issued a revised procedural calendar, as requested by the

Parties on 16 May 2024.

27. On 23 May 2024, the Claimant filed its Memorial on the Merits, accompanied by Exhibits C-1 to C-55, C-60, C-62-1, C-62-2 and C-63 to C-69, C-71 to C-83, and C-88 to C-106, Exhibits Composite C-56-1 to C-56-11, Composite C-57-1 to C-57-36, Composite C-58-1 to C-58-121, Composite C-61-1 to C-61-68, Composite C-70-1 to C-70-6, Composite C-84-1 to C-84-9, Composite C-85-1 and C85-2, Composite C-86-1 and C-86-2, Composite C-87-1 and C-87-2, and Composite C-107-1 to C-107-6, Legal Authorities CL-1 to CL-140, the Witness Statement of Mr. Brian Kraus, dated 18 April 2024, and accompanying Exhibits BK-1 and BK-2; the Witness Statement of Mr. Robert Paul Hunter, dated 2 May 2024 and accompanying Exhibit RH-1, the Witness Statement of Mr. John Patrick Parker, dated 15 May 2024 and accompanying Exhibits JP-1 and JP-2, the Witness Statement of Mr. Keith Michael Eppers, dated 21 May 2024 and accompanying Exhibit Composite KE-1-1 to KE-1-33, KE-2 and KE-3, the Expert Report of Mr. Olin L. Wethington, dated 31 March 2024 and accompanying Exhibits OW-1 to OW-21, the Expert Report of Messrs. José Ramón Cossío and Raúl Mejía Garza, dated 23 April 2024, and accompanying Exhibits JCRG-1 to JCRG-18, the Expert Report of Prof. Christoph Schreuer, dated 1 May 2024, and accompanying Exhibits CS-1 to CS-46, the Expert Report of Mr. Antonio L. Argiz, dated 10 May 2024, and accompanying Exhibits AA-1 to AA-12.
28. On 7 June 2024, the Claimant filed an updated version of its Memorial on the Merits, to which the Respondent agreed on the same date.
29. On 12 July 2024, the Respondent filed its Request for Bifurcation (**Bifurcation Request**), accompanied by Exhibits R-1 to R-3 and Legal Authorities RL-1 to RL-15.
30. On 9 August 2024, the Claimant filed its Response to the Bifurcation Request (**Bifurcation Response**), accompanied by Exhibits C-108 to C-112 and Legal Authorities CL-141 to CL-172.
31. On 15 August 2024, in light of the Claimant's offer in the Bifurcation Response to withdraw its alternative claims under Annex 14-D of the USMCA without prejudice, the Tribunal requested the Claimant to confirm whether it wished to maintain its Annex 14-D claim.
32. Also on 15 August 2024, the Claimant confirmed that it "freely and voluntarily withdr[ew] its pleading in the alternative pursuant to Annex 14-D", in line with its offer contained in the Bifurcation Response (**Claim Withdrawal**).

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33. On 21 August 2024, the Respondent submitted its comments on the Claim Withdrawal, asserting that such withdrawal rendered without effect certain preliminary objections set out in the Bifurcation Request. The Respondent also requested to introduce new evidence into the record in support of its request.
 34. On 23 August 2024, as scheduled in the Procedural Timetable, the Tribunal issued its decision on bifurcation, granting the Respondent's request.
 35. On 29 August 2024, the Tribunal issued Procedural Order No. 3, supplementing its 23 August 2024 decision granting bifurcation and providing the reasons for it.
 36. On 5 September 2024, the Tribunal invited the Parties to provide their views on holding an online Hearing by 12 September 2024.
 37. On 12 September 2024, the Respondent agreed to the Tribunal's proposal of 5 September 2024, and requested to modify the procedural calendar.
 38. On 13 September 2024, the Claimant agreed to the Tribunal's proposal of 5 September 2024, and to the Respondent's request for the modification of the procedural calendar of 12 September 2024.
 39. On 26 September 2024, the Tribunal took note of the Parties' agreement to hold the hearing on jurisdiction by videoconference, confirmed that the Hearing would take place in that format on 14 April 2025 (with 15 April 2025 being held in reserve), and issued a revised procedural calendar.
 40. Further to the Parties' agreement on 31 October 2024 and 1 November 2024, Dr. David Khachvani was appointed Assistant to the Tribunal on 4 November 2024, replacing Ms. Laura Zinnerman.
 41. On 29 November 2024, the Respondent filed its Memorial on Objections to Jurisdiction, accompanied by Exhibits R-4 to R-10, Legal Authorities RL-16 to RL-94, the Expert Report of Professor Christian J. Tams, dated 8 November 2024, and Expert Report Exhibits CT-1 to CT-92.
 42. On 23 December 2024, the Claimant filed a request for the production of documents.
 43. On 24 December 2024, the Tribunal invited the Respondent to file its observations by 30 December 2024.
 44. On 30 December 2024, the Respondent filed its observations.

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45. On 31 December 2024, the Claimant filed a response to the Respondent's observations of 30 December 2024.
 46. On 7 January 2025, the Tribunal rejected the Claimant's request by majority, indicating that Professor Ferrari would have accepted the Request within the limits and for the reasons set forth in the communication to the Parties.
 47. On 14 January 2025, the Respondent filed a corrected version of its Memorial on Objections to Jurisdiction, together with an errata sheet.
 48. On 13 February 2025, the Tribunal invited the Parties to confirm their availability to hold a pre-hearing organizational meeting on 31 March 2025 at 10 a.m. Washington, D.C. time.
 49. On the same date, the Claimant confirmed its availability.
 50. On 14 February 2025, the Respondent confirmed that it was not available to conduct the pre-hearing organizational meeting on 31 March 2025.
 51. On 5 March 2025, the Tribunal proposed the Parties to make the necessary procedural and organizational arrangements for the hearing in writing.
 52. On 7 March 2025, the Claimant filed its Counter-Memorial on Jurisdiction, accompanied by Exhibits C-113 to C-122, Legal Authorities CL-173 to CL-256, the Witness Statement of Mr. Kenneth Patrick Smith Ramos, dated 7 March 2025, and accompanying Witness Exhibits KSR-1 to KSR-4, the Second Expert Report of Prof. Christoph Schreuer, dated 9 January 2025, and accompanying Expert Report Exhibits CS-47 to CS-56 and the Second Expert Report of Mr. Olin L. Wethington, dated 12 March 2025, and accompanying Expert Report Exhibits OW-22 to OW-25.
 53. On 12 March 2025, the Claimant filed a corrected version of its Counter-Memorial on Jurisdiction, together with a redline version.
 54. On 14 March 2025, the Claimant informed the Tribunal that it would like to cross-examine Professor Christian J. Tams during the Hearing.
 55. On the same date, the Respondent informed the Tribunal that it would like to cross-examine Mr. Kenneth Patrick Smith Ramos during the Hearing.
 56. On 17 March 2025, the Tribunal invited the Respondent to comment, by 21 March 2025, on the possibility of admitting into the record five documents identified by Mr. Smith Ramos in CWS-5, allegedly pertaining to the negotiating history of the USMCA.

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57. On 18 March 2025, the Tribunal circulated a draft Procedural Order No. 4 for discussion by the Parties.
 58. On 21 March 2025, the Respondent agreed to producing the five documents identified by Mr. Smith Ramos in CWS-5 pertaining to the negotiating history of the USMCA.
 59. On 24 March 2025, the Tribunal noted the Respondent's willingness to produce such documents, and invited the Respondent to do so "as soon as possible, and preferably before 31 March 2025."
 60. On the same date, pursuant to the Respondent's communication of 21 March 2025, the Claimant noted that it did not have any of the five documents identified in Mr. Smith Ramos' Witness Statement.
 61. On the same date, the Respondent filed the five documents identified by Mr. Smith Ramos in CWS-5 pertaining to the negotiating history of the USMCA.
 62. On 25 March 2025, the Parties provided their comments to the draft Procedural Order No. 4.
 63. On 28 March 2025, the Claimant provided an updated version of its comments to the draft Procedural Order No. 4, as to Annex I.
 64. On the same date, the Governments of Canada and the United States of America, respectively, filed written submissions as non-disputing State Parties pursuant to NAFTA Article 1128. Counsel for the United States of America requested an opportunity to deliver a brief oral statement at the Hearing in support of its submission.
 65. On 2 April 2025, the Tribunal circulated an updated draft of Procedural Order No. 4 for the Parties' consideration by 4 April 2025.
 66. On 3 April 2025, counsel for Canada requested an opportunity to deliver a brief oral statement at the Hearing in support of its submission.
 67. On 4 April 2025, the Respondent provided its comments to the updated draft Procedural Order No. 4 and requested to cross-examine Prof. Christoph Schreuer during the Hearing.
 68. On 6 April 2025, the Claimant provided its comments to the updated draft Procedural Order No. 4.
 69. On the same date, the Claimant opposed the Respondent's request of 4 April 2025 to cross-

examine Prof. Christoph Schreuer.

70. On 7 April 2025, the Tribunal issued Procedural Order No. 4, on the organization of the Hearing, rejecting the Respondent's request to summon Prof. Schreuer to the Hearing and allowing the Parties' Experts to attend the entirety of the hearing.
71. On 8 April 2025, the Respondent sought leave from the Tribunal to introduce an additional document to the record, for its use during the examination of Mr. Kenneth Patrick Smith Ramos during the Hearing.
72. On 9 April 2025, the Claimant filed its observations to the Respondent's 8 April 2025 request and confirmed that it did not oppose the introduction of such document.
73. A hearing on Jurisdiction was held via videoconference from 14 to 15 April 2025 (the "Hearing"). The following persons were present at the Hearing:

Tribunal:

Gabrielle Kaufmann-Kohler	President
Franco Ferrari	Arbitrator
Loretta Malintoppi	Arbitrator

ICSID Secretariat:

Francisco Abriani	Secretary of the Tribunal
Pedro Magariño	Paralegal

Tribunal Assistant:

David Khachvani

For the Claimant:

Pedro J. Martínez Fraga	Bryan Cave Leighton Paisner LLP
C. Ryan Reetz	Bryan Cave Leighton Paisner LLP
Robert Newmark	Bryan Cave Leighton Paisner LLP
Rainey Repins	Client Representative
Kevin Cheung	Bryan Cave Leighton Paisner LLP
Pushkal Mishra	Bryan Cave Leighton Paisner LLP
Erica Kwan	Bryan Cave Leighton Paisner LLP
June Foyo-Lorenzo	Bryan Cave Leighton Paisner LLP
Olin Wethington	

For the Respondent:

Alan Bonfiglio Rios	Secretaría de Economía, Mexico
Luis Fernando Muñoz Rodríguez	Secretaría de Economía, Mexico
Pamela Hernández Mendoza	Secretaría de Economía, Mexico
Oscar Manuel Rosado Pulido	Secretaría de Economía, Mexico

Fabián Arturo Trejo Bravo
Montserrat Pérez Vázquez
Sergio Alonso Patiño Reyes
Paulina Jazmín Rodríguez Cruz
Greg Tereposky
Alejandro Barragán
Daniel Hohnstein
Juan Pablo Gómez
Sacha Cannon

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On behalf of Canada

Sylvie Tabet
Jean-François Hébert
Rodney Neufeld
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Trade Law Bureau
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On behalf of the United States of America

Caroline D. Kelly
Lisa J. Grosh
John D. Daley

Department of State
Department of State
Department of State

Court Reporters:

Dante Rinaldi
Dawn Larson

D-R Esteno
Larson Reporting

Interpreters:

Jesus Getan Bornn
Amalia de Klemm
Anna Sophia Chapman

74. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Kennet Smith Ramos

Witness

On behalf of the Respondent:

Christian Tams

Expert

75. On 16 April 2025, the Tribunal issued Procedural Order No. 5, on post-hearing matters.
76. On 6 May 2025, the Parties submitted their corrections to the transcript of the Hearing.
77. On 21 May 2025, the Claimant requested the Tribunal's leave to supplement the record

with an additional Legal Authority.

78. On the same date, the Respondent requested the Tribunal's leave to supplement the record with two additional Legal Authorities.
79. On 22 May 2025, the Tribunal invited the Parties to comment on each other's application of 21 May 2025 by 23 May 2025.
80. On the same date, both Parties agreed to the opposing Party's request of 21 May 2025.
81. On 23 May 2025, the Tribunal granted leave to the Parties to introduce the new evidence into the record.
82. The Parties filed simultaneous post-hearing briefs on 27 May 2025.
83. The Parties filed their simultaneous submissions on costs on 10 June 2025.

III. FACTS RELEVANT TO THE PRELIMINARY OBJECTIONS

84. The following summary provides a chronology of the facts relevant to the Preliminary Objections. The summary is not meant to be exhaustive and is intended to put the Tribunal's analysis in context. As the Tribunal does not have the benefit of the Respondent's submissions on the merits, the facts pertaining to the merits are stated as pleaded by the Claimant, without the Tribunal considering these facts as established nor making any finding on the weight of the underlying evidence.

A. 1994 - NAFTA ENTERS INTO FORCE

85. In 1992, Canada, Mexico, and the United States concluded the North American Free Trade Agreement (NAFTA), which entered into force two years later in 1994. NAFTA included a chapter, Chapter 11, on investments. Section A of Chapter 11 provided protections for investments made by investors of one contracting party in the territory of another contracting party, and Section B contained the parties' consent to arbitrate certain investor-State disputes.

B. 2001 - THE CLAIMANT ACQUIRES THE ALLEGED INVESTMENT IN MEXICO

86. On 29 June 2001, the Claimant acquired shares in Nutrilite S. de R. L. de C.V. (**Nutrilite**), a Mexican limited liability company, through an assignment from its parent company

Alticor Inc.⁴ At that time, Nutrilite owned and operated a 280-hectare organic farming estate called El Petacal in the State of Jalisco in Mexico, comprising of:

- 160 hectares of land which Nutrilite had allegedly acquired in 1992.⁵
- 120 hectares of land which Nutrilite had allegedly acquired in 1994.⁶

87. Access alleges that Nutrilite had acquired the land and developed the farming and processing business in reliance on multiple specific assurances from the Respondent's representatives.⁷ Such assurances allegedly included a guarantee to be protected from claims that communal landowners of the township of San Isidro had advanced over El Petacal purportedly based on a Presidential Resolution of 23 August 1939 conferring rights over El Petacal to such "landowners" (**1939 Presidential Resolution**).⁸
88. Following the acquisition of Nutrilite, the Claimant continued investing in El Petacal by expanding the farming and processing business, focusing on core crops of white chia, rosemary, pomegranate, spinach, and the picao preto herb. According to Access, at its peak in 2019, Nutrilite had 667 employees.

C. 2020 - NAFTA IS REPLACED BY USMCA

89. On 15 August 2017, Canada, Mexico, and the United States commenced negotiations for the modernization of NAFTA. On 30 November 2018, the parties agreed on a protocol (**USMCA Protocol**) envisaging the substitution of NAFTA with a new US-Mexico-Canada agreement (**USMCA**). The USMCA Protocol provided that "[u]pon entry into force of this Protocol, the USMCA [...] shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."⁹
90. On 1 July 2020, USMCA entered into force, superseding NAFTA.

⁴ C-13, Assignment Agreement, Alticor Inc. and Access Business Group LLC, 29 June 2001; C-10, NPI Board of Directors' Meeting Minutes, Approval of Formation of Mexican SRL (Nutrilite), 29 April 1991.

⁵ C-18, Sale Purchase Agreement Esc. 12,802 - "Puerta El Petacal Tres" and "Puerta El Petacal Cuatro," April 1992.

⁶ C-52, Sale Purchase Agreement Esc. 34,365 "Puerta El Petacal Uno" and "Puerta El Petacal Dos," May 1994.

⁷ Memorial, Section IV.

⁸ C-19, Presidential Resolution published in the Diario Oficial, Órgano del Gobierno Constitucional de los Estados Unidos Mexicanos, Sección Primera, under "Resolución en el Expediente de Dotación de Ejidos al Poblado San Isidro, Estado de Jalisco," 23 August 1939, p. 5.

⁹ CL-3, Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, 30 November 2018.

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91. The USMCA includes Annex 14-C, which provided for a three-year extension of the consent to arbitrate investment disputes contained in Chapter 11 of NAFTA. The proper interpretation of Annex 14-C is a central issue in dispute.

D. 2022 – IMPUGNED MEASURES AFFECT THE ALLEGED INVESTMENT

92. The Claimant complains about several measures that it alleges constitute violations of the protections contained in Section A of Chapter 11 of NAFTA. In particular:
- On 1 July 2022, the Secretariat of Agrarian, Territorial and Urban Development (SEDATU) served a notice on Nutrilite (**1 July 2022 Notice**) purporting to provide for a taking of the 120 hectares of the El Petacal estate. The notice was supposedly based on the 1939 Presidential Resolution and the 1992 Law on Agrarian Reform.¹⁰
 - On 7 July 2022, SEDATU issued a second notice (**7 July 2022 Notice**) providing for a taking of the remaining parts of the El Petacal estate.¹¹
 - On 12 July 2022, the National Agrarian Registry issued an act (*Acta de Posesión y Deslinde*) which states that (i) the 120 hectares plot of El Petacal have been “physically,” “juridically,” and “materially” taken and provided to the San Isidro communal landowners, and that (ii) the remaining 160 hectares of El Petacal have been “juridically” transferred to the communal landowners of San Isidro and that the physical and material transfer of that part of the estate would take place when the harvest season would end.¹²
93. The Claimant argues that Mexico took these measures despite its earlier assurances that Nutrilite’s property rights over the estate would be guaranteed, and despite an earlier ruling by the domestic court (*Tribunal Unitario*) that El Petacal was exempt from the applications of the 1939 Presidential Resolution and was duly acquired by Nutrilite.¹³ The latter has since obtained an injunctive relief temporarily preventing the physical takeover of the 160-

¹⁰ C-81, Notice, 1 July 2022.

¹¹ C-74, Notice, 7 July 2022.

¹² C-50, “Acta de Posesión y Deslinde,” 14 July 2022.

¹³ C-24-1, Expediente: 615/97, Acción: Ampliación de Ejido por Incorporación de Tierras al Régimen Ejidal, Tribunal Unitario Agrario, Poblado: “San Isidro”, Municipio: “San Gabriel”, Estado: Jalisco, Oficio: 0266/98, 9 December 1997; C-24-2, “Cumplimiento de ejecutoria del juicio agrario 615/97,” 12 March 2014.

hectare portion of El Petacal.¹⁴

E. 2023 – REQUEST FOR ARBITRATION AND WAIVER

94. On 13 April 2023, the Claimant filed the RfA against Mexico. In the RfA, the Claimant alleges multiple violations of NAFTA and requests compensation. In addition, the Claimant waives its right to initiate other proceedings in the following terms:

Access waives its right to initiate or continue before any administrative tribunal or court under the law of any NAFTA Party, or any other dispute settlement procedures (other than arbitration under the Treaties), any proceedings with respect to the measures taken by Mexico that are here alleged to be breaches of the Treaties, except for court or administrative proceedings under Mexican law for injunctive, declaratory or other extraordinary relief, not involving the payment of monetary damages, and for the sole purpose of preserving Access's rights and interests during the pendency of the arbitration.¹⁵

IV. REQUESTS FOR RELIEF

A. CLAIMANT

95. In the Memorial, the Claimant raised the following requests for relief:

For the reasons here detailed, [the Claimant] respectfully requests that the Tribunal make the following determinations:

(a) The Tribunal has jurisdiction over this dispute.

(b) The United Mexican States have breached Arts. 1102, 1105, and 1110, of the NAFTA (1994), as well as customary international law, by failing to comply with its obligations with respect to expropriations and compensation, fair and equitable treatment, and the national treatment standard.

(c) The United Mexican States must compensate ABG for the foregoing breaches in the amount of USD 2,700,384,482 plus prejudgment interest at a normal commercial rate until the date of payment, together with such other related amounts as are just and appropriate under the circumstances.

(d) The United Mexican States shall assume the costs of these proceedings, including but not limited to the Centre's, arbitrators', attorneys', and experts' fees.¹⁶

96. With respect to the Preliminary Objections, the Claimant submitted the following request

¹⁴ C-62-1, "Expediente 292/2023, Amparo Indirecto 68/2023, Poblado: San Isidro, Municipio: San Gabriel, Estado: Jalisco", 9 September 2023; and C-62-2, "Incidente de Suspensión 1411/2022-1, Audiencia Incidenta, Amparo Indirecto 1411/2022," 15 August 2022.

¹⁵ Request for Arbitration, para. 8(b).

¹⁶ Memorial, para. 636.

for relief in its Post-Hearing Brief:

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.¹⁷

B. RESPONDENT

97. The Respondent has not yet formulated any request for relief in respect of the merits. It sought the following request for relief in respect of the Preliminary Objections:

[T]he Respondent respectfully requests that the Tribunal rule that:

- a. Annex 14-C of the USMCA does not extend the substantive obligations of Section A of Chapter 11 of NAFTA for three years after the termination of NAFTA. It only extends the procedures of Section B of Chapter 11;
- b. The Claimant failed to comply with a condition precedent set forth in NAFTA Article 1121 and, consequently, the conditions of Respondent's consent to arbitration were not met and this Tribunal lacks jurisdiction *ratione voluntatis*, and
- c. The Claimant must bear the costs incurred by the parties in connection with this arbitration.¹⁸

V. DISCUSSION

A. PRELIMINARY MATTERS

1. Scope of this Award

98. In Procedural Order No. 3, the Tribunal decided to bifurcate the proceedings between the preliminary objections and merits. In this Award, the Tribunal resolves the Respondent's preliminary objections.

2. Law applicable to jurisdiction

Article 25(1) of the ICSID Convention reads in relevant part as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent

¹⁷ CPHB, para. 117; See also, Countermemorial on Jurisdiction, para. 460.

¹⁸ RPHB, para. 123; See also, Memorial on Jurisdiction, para. 324.

unilaterally.

99. The Parties have not discussed whether the jurisdictional requirements of the ICSID Convention as they are set in Article 25 are fulfilled, except for the last one that hinges on consent. Considering the outcome of the analysis of that last requirement, which follows, the Tribunal can dispense with examining whether the other ICSID Convention conditions to jurisdiction are satisfied.
100. In addition to Article 25 of the ICSID Convention, the Claimant relies on Article 1116(1) NAFTA to establish consent to arbitrate. That provision has the following content:
- An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
- (a) Section A or Article 1503(2) (State Enterprises), or
- (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
101. As the consent to arbitration invoked by the Claimant is contained in international treaties, the validity and scope of consent are governed by international law.

3. *Jura novit curia*

102. When applying the law, the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. In accordance with the principle of *jura novit curia*, or better *jura novit arbiter*, a tribunal may form its own opinion as to the content of the law, provided it does not base its decision on a legal theory that the Parties could not anticipate.¹⁹

4. Relevance of previous decisions and awards

103. In support of their positions, both Parties have relied on previous decisions or awards, either to conclude that the same approach should be adopted in the present case or in an effort to explain why this Tribunal should depart from the solution reached by another tribunal.
104. The Tribunal is not bound by the decisions of other arbitral tribunals. At the same time,

¹⁹ *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 295; *AES Solar and others (PV Investors) v. The Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, para. 519; *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, para. 20; *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case, Award, 23 April 2012, para. 141.

however, the Tribunal considers that, unless there are compelling reasons to the contrary, it may be guided by the legal solutions reflected in a series of consistent cases, subject, of course, to the specifics of the BIT and to the circumstances of the actual case. In so doing, the Tribunal is of the view that it will contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.

B. JURISDICTION *RATIONE TEMPORIS*

105. The Parties dispute whether Annex 14-C of the USMCA vests the Tribunal with jurisdiction over claims for breaches of NAFTA that arise out of measures post-dating the termination of that treaty. More specifically, the dispute hinges on whether Annex 14-C extends only to claims for breaches of NAFTA that had occurred prior to the termination of NAFTA or also to claims for breaches committed within the three-year extension period.
106. Before setting out its analysis, the Tribunal will summarize the Parties' positions. The summary is not intended to be exhaustive, but rather aims at putting the analysis in the context. While the Tribunal has carefully considered all of the arguments and allegations raised by the Parties, it expressly addresses only those that it considers relevant and material to its analysis.

1. The Respondent's Position

107. The Respondent objects that the Tribunal lacks jurisdiction under Annex 14-C of the USMCA, given that the obligations under NAFTA's Section A of Chapter 11 on which the claims are based were no longer in force when the alleged violations occurred. The claims are based on measures taken in July 2022, more than two years after NAFTA was terminated and replaced by the USMCA on 1 July 2020. Thus, the Tribunal cannot entertain claims based on treaty provisions that were no longer in effect at the time of the alleged breaches.²⁰

(a) Principles of international law

108. In support of its position, the Respondent relies on principles of international law, including the intertemporal rule of State responsibility. This principle, codified in Article 13 of the International Law Commission's Articles on State Responsibility (**ILC Articles**), provides that a State cannot be held liable for violating an obligation unless that obligation was in

²⁰ Memorial on Jurisdiction, paras. 16 *et seq.*

force at the time of the alleged breach.²¹ Mexico contends that since NAFTA was terminated in 2020, it was no longer bound by its substantive obligations in 2022 when the impugned measures were taken. As a result, the claims must fail for lack of jurisdiction *ratione temporis*.²²

109. Mexico further invokes Article 70(1) of the Vienna Convention on the Law of Treaties (VCLT), which provides that, unless otherwise agreed, the termination of a treaty releases the parties from the obligations which that treaty created.²³ Unlike other investment treaties, the NAFTA does not contain a so-called sunset clause extending the application of its substantive provisions after termination. In reliance on the expert opinion of Professor Tams, the Respondent argues that, since there is no express provision in the USMCA extending NAFTA's substantive protections beyond its termination, Mexico is no longer bound by the obligations that the Claimant seeks to enforce and the Tribunal cannot assert jurisdiction over claims based on a terminated treaty.²⁴
110. Moreover, the Respondent cites investment decisions holding that a State cannot be held responsible for breaches of obligations that were not in force at the time of the violations.²⁵ It asserts that this well-established principle of international law applies equally in the present case.²⁶
111. In addition, says the Respondent, the Claimant confuses the concepts of "measure" and "investment". The fact that Annex 14-C applies to pre-existing "legacy investments" does not mean that it covers "measures" taken after NAFTA's termination.²⁷

(b) Annex 14-C does not contain a choice of law extending NAFTA's application

112. Mexico opposes the Claimant's argument that Annex 14-C includes a choice of law agreement that provides for the application of Section A of Chapter 11 of NAFTA as

²¹ Memorial on Jurisdiction, para. 33; RL-6, ILC Articles, 2001, Article 13.

²² Memorial on Jurisdiction, paras. 32-36.

²³ Memorial on Jurisdiction, para. 33; RL-8, VCLT, Article 70.

²⁴ Tams ER, paras. 65-67.

²⁵ CT-22, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000; CT-27, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002; and CT-26, *The Renco Group Inc. v. Republic of Peru*, UNCITRAL, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, cited in Tams ER, paras. 50-51.

²⁶ Memorial on Jurisdiction, para. 58.

²⁷ Memorial on Jurisdiction, para. 109.

governing law and thus extends its application after the treaty's termination.²⁸ For the Respondent, the framing of the issue as one of "choice of law" is flawed. The reference in Annex 14-C of the USMCA to NAFTA Chapter 11 as the law applicable to the claims cannot be equated to a temporal extension of NAFTA's substantive obligations over acts occurring after its termination. The Tribunal must first establish whether it has jurisdiction over the claims before considering the applicable law. If the Tribunal lacks jurisdiction because NAFTA's obligations had expired at the time of the alleged breach, then the issue of the applicable substantive law does not arise.²⁹

113. In this respect, Mexico points to *TC Energy v. US*, where the claimant also advanced that Annex 14-C contained a choice of law clause.³⁰ In that case, the claimant also relied on an expert opinion by Professor Schreuer like in the present arbitration. In *TC Energy*, the United States argued that paragraph 1 of Annex 14-C was never intended to serve as an applicable law clause. That tribunal found that Articles 1116(1) and 1117(1) of NAFTA contained language similar to paragraph 1 of Annex 14-C but have never been interpreted as applicable law clauses.
114. The Respondent agrees with the United States' position on this point, asserting that there is no basis for the view that paragraph 1 of Annex 14-C encompasses a choice of law, much less that it somehow maintains the substantive obligations of Section A in force. If such an intention existed, it would require clear and explicit language, which is notably absent from Annex 14-C. The Respondent's expert, Professor Tams, observes that the language of Annex 14-C does not support the existence of an applicable law clause, especially when compared to explicit governing law clauses in NAFTA and other treaties.

(c) Ordinary meaning of Annex 14-C

115. The Respondent argues that the ordinary meaning of the text of Annex 14-C shows that it extends the States' consent to arbitration under NAFTA's dispute resolution mechanism to claims that exist under Section A of Chapter 11 of NAFTA. This means that a claim must be based on a violation of a NAFTA obligation that occurred before 1 July 2020. The Claimant's argument that Annex 14-C of the USMCA extends NAFTA's substantive obligations for three years following its termination is not supported by the text of Annex

²⁸ Memorial on Jurisdiction, para. 68.

²⁹ Memorial on Jurisdiction, para. 60.

³⁰ RL-40, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, paras. 199-207.

14-C.³¹

116. Mexico also notes that Annex 14-C consists of six paragraphs and two footnotes, both of which pertain to the first paragraph. The first paragraph is crucial as it establishes the parties' consent to arbitrate claims concerning "Legacy Investments" based on alleged violations of certain NAFTA obligations. Such claims are to be resolved under the investor-State dispute resolution mechanism set out in Section B of Chapter 11 of NAFTA.³²
117. In the Respondent's submission, the consent to arbitration is explicitly tied to breaches of obligations under Section A of Chapter 11 of NAFTA. The ordinary meaning of the phrase "breach of an obligation" used in paragraph 1 of Annex 14 indicates that the obligation must have been legally binding at the time of the alleged breach. Thus, for a claim to fall under Annex 14-C, the challenged measures must be capable of constituting a breach of obligations that were in effect under NAFTA. In this respect, the Respondent invokes the principles of customary international law codified in Articles 12 and 13 of the ILC Articles, which provide that a State can only violate an obligation if that obligation was binding at the time of the alleged breach.³³
118. According to Mexico, the language of Annex 14-C only contemplates an extension of the consent to arbitrate to claims arising from measures that took place while NAFTA was still in force. There is no wording in Annex 14-C that modifies the temporal scope of the substantive provisions of NAFTA. The Respondent cites international treaty practice to argue that when States wish to preserve treaty obligations after termination, they include express survival or sunset clauses. NAFTA did not contain such a clause, indicating that the obligations under it were intended to end when the treaty would be terminated.³⁴
119. Further, the Respondent draws attention to paragraph 3 of Annex 14-C, stressing that its primary purpose is to limit the temporal scope of the consent to arbitration.³⁵ The provision is clearly limited to the extension of the consent to arbitrate and does not address the substantive obligations of Section A, nor does it extend their application beyond NAFTA's termination. The tribunal in *TC Energy* recognized that nothing in paragraph 3 suggested that substantive NAFTA obligations should continue beyond the treaty's termination,

³¹ Memorial on Jurisdiction, paras. 51-74.

³² Memorial on Jurisdiction, para. 53.

³³ Memorial on Jurisdiction, para. 57.

³⁴ Memorial on Jurisdiction, paras. 55-68.

³⁵ Paragraph 3 reads as follows: "A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994."

which further supports the Respondent's position.³⁶

120. Finally, the Respondent turns to footnote 20 of Annex 14-C, which in Access's view provides for continued applicability of NAFTA's substantive protections.³⁷ For the Respondent, that footnote confirms its position and does not introduce any new obligations. The *TC Energy* tribunal similarly found that the phrase "for greater certainty" in footnote 20 was used to confirm the state of the law, not to establish new rights or obligations.³⁸

(d) Context

121. According to the Respondent, the placement of Annex 14-C outside the body of Chapter 14 of the USMCA, which contains the substantive obligations of the new treaty, confirms that the annex was never intended to create an alternative set of substantive obligations. Instead, Annex 14-C refers solely to the parties' consent to arbitrate disputes arising out of "legacy investments", in accordance with Section B of Chapter 11 of NAFTA.³⁹ Read in context, the relevant provisions of Annex 14-C demonstrate that the purpose of the Annex was to provide a transitory dispute resolution mechanism for claims related to pre-existing investments, not to extend NAFTA's substantive protections beyond its termination.
122. The structure of the USMCA reinforces this conclusion, says Mexico. Chapter 14 introduces new substantive protection standards, which differ from those provided in NAFTA. It would be illogical to interpret Annex 14-C as creating parallel and overlapping regimes of substantive treaty protection.
123. The Respondent finds further support for its position in the absence of any reference to NAFTA's substantive obligations in Chapter 14. In addition, Article 14.2 of the USMCA clarifies that Chapter 14 does not bind a party in relation to an act or fact that took place before the USMCA entered into force, except as provided for in Annex 14-C. This provision corroborates that Annex 14-C only applies to acts that occurred before NAFTA's termination.

³⁶ Memorial on Jurisdiction, paras. 76-77.

³⁷ Footnote 20 reads as follows: "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 1-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Service and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim."

³⁸ RL-40, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, para. 162.

³⁹ Memorial on Jurisdiction, paras. 75-137.

(e) Object and Purpose

124. The Respondent argues that the object and purpose of the USMCA strengthens its interpretation of Annex 14-C.⁴⁰ The USMCA's preamble expressly records the States' intention to "REPLACE the 1994 NAFTA with a 21st-century, high-standard new agreement." This statement evinces the parties' intent to put an end to NAFTA and regulate their relations under the new treaty. The Respondent asserts that it would be contradictory for the agreement that expressly replaces NAFTA to simultaneously maintain NAFTA's substantive investment guarantees.⁴¹
125. Chapter 14 of the USMCA introduces a more restrictive investor-State dispute settlement regime than NAFTA. The Respondent emphasizes that the USMCA parties intentionally moved away from NAFTA in this respect. Under NAFTA, investors had a wider range of substantive procedural protections. In contrast, the USMCA establishes a narrower framework, both in terms of substantive obligations and procedural remedies, evidencing the parties' intentions to replace NAFTA rather than to extend it.⁴²
126. According to the Respondent, maintaining NAFTA's substantive protections would be incompatible with the object and purpose of the USMCA, which was to introduce a new investment protection system. In the Claimant's interpretation, the two protection regimes would coexist, which would be contrary to the treaty's objectives.⁴³
127. Mexico criticizes the Claimant's expert, Mr. Wethington, for selectively ignoring the structural changes introduced by the USMCA. It argues that Mr. Wethington's interpretation lacks coherence, as it fails to acknowledge the shift from NAFTA to the USMCA's modernized framework.
128. If the Claimant's interpretation were correct, it would lead to legal uncertainty, where two separate investment protection systems would coexist for three years, despite the USMCA explicitly replacing NAFTA. This state of affairs would undermine the clarity, finality, and predictability that the treaty parties sought to achieve.⁴⁴
129. The Respondent relies on the expert opinion of Professor Tams, who rejects the Claimant's

⁴⁰ Memorial on Jurisdiction, paras. 138-153.

⁴¹ Memorial on Jurisdiction, para. 139.

⁴² Memorial on Jurisdiction, para. 140.

⁴³ Memorial on Jurisdiction, para. 143.

⁴⁴ Memorial on Jurisdiction, para. 143.

argument that extending NAFTA's protections would promote stability and predictability. Instead, Professor Tams argues that such an extension would undermine legal certainty, as the USMCA does not regulate how NAFTA's investment protections would apply alongside its own investment provisions.⁴⁵

130. Moreover, the Claimant's reliance on selective portions of the USMCA's preamble, such as references to "transparency, good governance, and rule of law", is misplaced, in Mexico's view, as these general statements do not override the clear intent to replace NAFTA.

(f) Supplementary means of interpretation

131. The Respondent submits that supplementary means of interpretation under Article 32 of the VCLT may be used to confirm or clarify the interpretation reached under Article 31 of the VCLT,⁴⁶ and cannot contradict the meaning established under Article 31 VCLT. Instead, they serve a complementary role and must not be used as a substitute for the primary rules of treaty interpretation. In this respect, the Respondent cites the *TC Energy* tribunal, which reaffirmed that supplementary means of interpretation cannot override conclusions reached through Article 31 VCLT. The tribunal concluded that Annex 14-C only applies to measures that predate NAFTA's termination and that supplementary means do not alter this understanding.
132. In any event, the Respondent opposes the sources on which the Claimant relies as supplementary means of interpretation, in particular the statements made by government officials and former negotiators of the USMCA parties, particularly Mr. Lauren Mandell, a former U.S. negotiator. Citing Professor Tams, Mexico argues that these statements lack probative value for purposes of treaty interpretation because they were made unilaterally by individuals representing a single treaty party and do not establish an understanding common to the USMCA parties, which is required under international law. In addition, the statements were made after the completion of the USMCA negotiations and therefore do not reflect the intent of the parties at the time of the treaty's adoption.
133. Professor Tams further opines that none of these statements were uttered while their authors were still in the employment of a USMCA party. Many were delivered in settings such as panel discussions or legal commentaries, which do not qualify as supplementary means of interpretation under Article 32 VCLT. The expert also testified at the hearing that

⁴⁵ Memorial on Jurisdiction, para. 151, citing Tams ER, para. 103.

⁴⁶ Memorial on Jurisdiction, paras. 174 *et seq.*

internal documents have limited evidentiary value because they emanate from one side, and do not evince a common understanding of the treaty parties.⁴⁷

134. By contrast, adds Mexico, official positions expressed by each of the three contracting States in the context of disputes, including as non-disputing parties, confirm the Respondent's interpretation of Annex 14-C.⁴⁸
135. The Respondent further disputes the Claimant's attempt to support its interpretation of Annex 14-C by referencing past international treaties, including the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA), the Modernized Global Agreement between Mexico and the EU, and the Canada-Peru Free Trade Agreement. In Mexico's submission, these treaties contain express provisions extending the applicability of prior agreements, which the USMCA does not.
136. Indeed, the CETA and Mexico-EU Modernized Agreement explicitly address and limit the survival of past treaty obligations, aligning with the Respondent's position that NAFTA's obligations did not survive its termination. For Professor Tams, these examples confirm that treaty parties which intend to extend past obligations, do so explicitly, which they did not do here.
137. Finally, the Respondent rejects Access's argument based on Article 28 of the VCLT that treaties should be presumed to apply prospectively unless stated otherwise. Article 28 VCLT establishes the principle of non-retroactivity, meaning that a treaty does not apply to past events unless it explicitly states otherwise. The Claimant misinterprets this principle, incorrectly suggesting that unless otherwise stated, treaties automatically apply prospectively, even after their termination. The general rule in international law is that a treaty binds a party only in relation to acts occurring while the treaty is in force, except if the treaty provides otherwise.
138. The Respondent concludes that Annex 14-C was designed to provide a transitional procedural mechanism, not to extend NAFTA's substantive obligations. Thus, claims must be based on alleged violations that occurred while NAFTA was still in force. The Claimant's interpretation improperly expands the scope of Annex 14-C beyond its intended

⁴⁷ Transcript, Day 2, 519: 7-10.

⁴⁸ Memorial on Jurisdiction, paras. 159 *et seq.*, citing the positions of Mexico, US and Canada in *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63; *Coeur Mining Inc. v. United Mexican States*, ICSID Case No. UNCT/22/1; *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5; and *Westmoreland Coal Company v. Canada (III)*, ICSID Case No. UNCT/23/2.

purpose and should therefore be rejected.

2. The Claimant's Position

(a) In general

139. Access responds that Annex 14-C of the USMCA extended the application of Sections A and B of NAFTA to legacy investments for three years following the termination of NAFTA. The Respondent's argument that such extension only applies to measures taken prior to the termination of NAFTA finds no support in the text of Annex 14-C. Annex 14-C does not draw any temporal distinctions between or among State measures or actions.
140. According to the Claimant, Annex 14-C provides the contracting States' consent to arbitrate all legacy investment claims provided the claim:
- pertains to a legacy investment;
 - alleges that a State measure breached the treaty;
 - is brought under the procedures of Section B of NAFTA Chapter 11;
 - is raised within three years of NAFTA's termination, i.e., by 1 July 2023.⁴⁹
141. For Access, Annex 14-C only contains two temporal limits:
- The first one arises from the definition of "legacy investment", which "means an investment of an investor of another Party in the territory of the Party established or acquired between 1 January 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement". This requirement is met as the Claimant made its investment when NAFTA was in force.
 - The second temporal requirement is that the claim be brought within the three-year transition period. This time limit is also satisfied as the Request for Arbitration was filed on 13 April 2023, within three years from the termination of NAFTA on 1 July 2020.
142. According to the Claimant, there is no support for a third temporal requirement that Mexico

⁴⁹ Countermemorial on Jurisdiction, para. 6.

attempts to read into the text of Annex 14-C:⁵⁰

- First, the text of Annex 14-C provides no temporal limitation related to the occurrence of the impugned measures. Indeed, the text, including the chapeau and footnotes, refer to “legacy investments,” and not (a) “legacy measures,” (b) “legacy claims,” (c) “legacy disputes,” or (d) “legacy State measures.”⁵¹
- Second, it is undisputed that Section B of Chapter 11 of NAFTA, dealing with dispute resolution, applies after the treaty’s termination. That section contains Article 1131(1), which provides for the substantive governing law.⁵² This choice of law “mandates the application of NAFTA’s substantive standards as spelled out in Section A”, which is reinforced by the fact that Article 1(a) of Annex 14-C references “Section A of Chapter 11 (Investment) of NAFTA 1994.”⁵³
- Third, it is logically and grammatically impossible to “maintain that (i) Section B of NAFTA’s Chapter 11 applies after NAFTA’s termination, (ii) while also asserting that Section A NAFTA Chapter 11 does not survive NAFTA’s termination for the relevant period, (iii) without wresting from Section B [of] NAFTA Chapter 11, Art. 1131(1).”⁵⁴
- Fourth, Mexico seeks to use the choice of law provision to limit the Tribunal’s jurisdiction under Annex 14-C. By arguing that the NAFTA’s substantive standards no longer form part of the applicable law after the USMCA’s entry into force, the “Respondent attempts to determine this Tribunal’s jurisdictional scope by significantly reducing it.”⁵⁵
- Fifth, Footnote 20 to Annex 14-C provides that Section A of NAFTA’s Chapter 11 applies to claims over which Annex 14-C confers jurisdiction. By providing for arbitration under Section B of NAFTA’s Chapter 11, however, Annex 14-C

⁵⁰ Countermemorial on Jurisdiction, paras. 10-24.

⁵¹ Countermemorial on Jurisdiction, paras. 58-59.

⁵² The provision reads as follows: “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

⁵³ Countermemorial on Jurisdiction, para. 80, citing Second Opinion, para. 19, CER-005.

⁵⁴ Countermemorial on Jurisdiction, para. 136.

⁵⁵ Countermemorial on Jurisdiction, para. 18.

contains an express choice of law, as Section B includes Art. 1131(1).⁵⁶

- Sixth, Article 70 VCLT provides that a treaty may have effect after its termination if the Parties so agree. Annex 14-C is precisely such an agreement under which Chapter 11, i.e. both Sections A and B, shall apply to legacy investments during the transition period. Supplementary means of interpretation under Article 32 VCLT corroborate this view. In particular, Mexico's former Chief Lead Negotiator of the USMCA, Mr. Kenneth P. Smith Ramos, as well as the Deputy USTR-Investment and US Lead Negotiator-Investment forcefully state that Annex 14-C was intended to apply to measures concerning legacy investments without qualification.⁵⁷
- Seventh, the sources on which Mexico relies, such as self-interested submissions of the USMCA contracting parties in contentious proceedings do not constitute proper means of treaty interpretation, and in any event depart from the contracting parties' initial understanding of USMCA Annex 14-C.

143. Like the Respondent, Access seeks to interpret Annex 14-C pursuant to Articles 31 and 32 of the VCLT.

(b) Ordinary meaning

144. The Claimant submits that the ordinary meaning of Annex 14-C of the USMCA provides for a binding choice of law provision that mandates the continued application of Section A of NAFTA Chapter 11 without any temporal limitation. Annex 14-C contains no language restricting its applicability to measures occurring before NAFTA's termination, confirming that substantive NAFTA protections extend throughout the transition period.⁵⁸

145. According to Access, the Respondent and its expert Professor Tams incorrectly assert that the reference to Section A in Annex 14-C constitutes a jurisdictional limitation rather than a choice of law provision. Indeed, Annex 14-C expressly incorporates Section A of NAFTA Chapter 11 as the applicable law, and the Respondent's position contradicts the plain language of the agreement.

146. In support, the Claimant invokes the structure of Annex 14-C. It highlights that Annex 14-C establishes four conditions for the Tribunal's jurisdiction over legacy investment claims,

⁵⁶ Counter Memorial on Jurisdiction, paras. 19-20.

⁵⁷ Counter Memorial on Jurisdiction, paras. 142-146.

⁵⁸ Counter Memorial on Jurisdiction, paras. 76-91.

none of which imposes any restriction on the timing of the alleged breach, namely: (i) the claim must concern a legacy investment, (ii) it must allege a breach of Section A of NAFTA's Chapter 11, (iii) it must be submitted under Section B of NAFTA's Chapter 11, and (iv) it must be filed within three years of NAFTA's termination.⁵⁹

147. The only temporal restrictions in Annex 14-C relate to the definition of a "legacy investment" and the three-year transition period. Mexico's attempt to introduce an implied third limitation lacks textual support and should be rejected.⁶⁰
148. The Claimant further points to Footnote 20, which explicitly states that the relevant provisions of Chapter 11, including Section A, apply to legacy investment claims. It argues that this reference confirms the Tribunal's obligation to apply the substantive protections of NAFTA throughout the transition period, reinforcing that Annex 14-C has both jurisdictional and substantive effects.

(c) Context

149. Access submits that the context of Annex 14-C of the USMCA confirms that the treaty parties intended for Section A of Chapter 11 to apply as the governing law for legacy investment claims.⁶¹ Annex 14-C includes explicit references to Section A of NAFTA Chapter 11, which would be unnecessary if the contracting parties had meant to limit its application.
150. Furthermore, Footnote 21 carves out claims that may be pursued under Annex 14-E.⁶² That annex applies prospectively to breaches that arise after the entry into force of the USMCA. Had the contracting parties understood Annex 14-C to apply only to State conduct while NAFTA was in force, there would be no need to agree in Footnote 21 to carve out claims that can be submitted under both Annex 14-C and Annex 14-E, as such claims would be inexistent.⁶³
151. The Claimant further asserts that Article 34.1 of the USMCA, which contains the parties' recognition of "the importance of a smooth transition from NAFTA 1994 to this

⁵⁹ Countermemorial on Jurisdiction, paras. 112-119.

⁶⁰ Countermemorial on Jurisdiction, para. 102.

⁶¹ Countermemorial on Jurisdiction, paras. 92-126.

⁶² It provides: "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)."

⁶³ Countermemorial on Jurisdiction, para. 104.

Agreement” supports its position. Given Canada’s refusal to consent to arbitration under Annexes 14-D and 14-E, the treaty States could not have intended to abruptly eliminate NAFTA protections without explicitly stating so.

152. Moreover, Article 34.1.4 of the USMCA, which provides that “Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement” demonstrates the treaty parties’ practice of specifying temporal restrictions where they intend to impose them.⁶⁴
153. For the Claimant, the USMCA Protocol further confirms its interpretation. The Protocol states that NAFTA’s termination is “without prejudice to those provisions set forth in the USMCA that refer to provisions of NAFTA.” Since Annex 14-C explicitly refers to Section A of NAFTA Chapter 11, the Claimant argues that the Treaty Parties’ agreement in the USMCA Protocol reinforces that these substantive protections remain in effect for legacy investments.
154. The Claimant seeks support in the negotiation history of the USMCA. In reliance on Mr. Wethington’s expert opinion which sets out the political dynamics surrounding the negotiation of investor-State dispute settlement provisions, it observes that the parties deliberately structured Annex 14-C to ensure continuity of protection for legacy investments during the transition period, which is also evidenced by the absence of any express exclusion of measures occurring after NAFTA’s termination.⁶⁵
155. Access also disputes the Respondent’s invocation of Article 14.2(3) of the USMCA, which provides that the treaty does not apply retroactively. Annex 14-C does not involve retroactive application but rather a transitory arrangement explicitly agreed upon by the States. The latter created a limited exception allowing for the continued application of Section A of Chapter 11 to legacy investments.⁶⁶
156. According to the Claimant, Mexico’s interpretation produces an illogical result where Section B of NAFTA Chapter 11 remains in force for three years, but Section A does not. Such a construction does not conform with effective treaty interpretation, argues Access, as it renders the reference to Section A in Annex 14-C meaningless. Access insists that the contracting parties could not have meant to preserve the procedural rights under Section B

⁶⁴ Counter Memorial on Jurisdiction, paras. 104-105.

⁶⁵ Counter Memorial on Jurisdiction, para. 107.

⁶⁶ Counter Memorial on Jurisdiction, paras. 120-122.

while removing the substantive protections under Section A.

(d) Object and purpose

157. It is the Claimant's submission that the object and purpose of the USMCA, as reflected in its preamble, buttress its position that Annex 14-C was designed to establish a transitional investor-State dispute settlement mechanism. The preamble makes clear that the States sought to protect and expand trade and investment within a clear, transparent, and predictable framework. The implied restrictions pleaded by the Respondent, particularly the exclusion of measures taken during the transition period, are inconsistent with the express objectives of the USMCA.⁶⁷
158. The preamble of the USMCA further highlights the parties' commitment to fostering economic integration and legal certainty. The exclusion of substantive protections for legacy investments during the transition period would undermine these goals, creating an unstable investment environment. The Claimant maintains that nothing in the text of the preamble of the USMCA supports the interpretation that it only applies to breaches occurring before NAFTA's termination.⁶⁸
159. According to the Claimant, a good faith interpretation of the USMCA under Article 31 of the VCLT requires giving full effect to its object and purpose. The Tribunal must interpret Annex 14-C in a manner that protects the guarantees given to investors under NAFTA Chapter 11 during the transition period. A restrictive reading would deprive Annex 14-C of this intended function.

(e) Supplementary means of interpretation

160. The Claimant argues that evidence that qualifies as supplementary means of treaty interpretation under Article 32 of the VCLT corroborates the view that Annex 14-C applies Section A of Chapter 11 to legacy investment claims where the measures complained of are taken during the three-year transition period. In particular, the Claimant points to the following documents:⁶⁹

- Letter of 18 May 2017 from USTR Representative Ambassador Lighthizer to

⁶⁷ Counter Memorial on Jurisdiction, paras. 127-132.

⁶⁸ Counter Memorial on Jurisdiction, para. 128.

⁶⁹ Counter Memorial on Jurisdiction, paras. 168 to 251.

Congress;⁷⁰

- USTR publication of 17 July 2017 entitled “NAFTA Negotiating Objectives”;⁷¹
- Draft and cover email of 12 September 2017 of NAFTA 2.0 investment chapter;⁷²
- USTR Memorandum Seeking Interagency Trade Policy Staff Committee Approval: TPSC 2017-XXX: NAFTA Negotiation – Investment Chapter Proposed Text;⁷³
- Internal USTR document concerning Chapter 11, Investment draft text for Round Three: Attachment to 12 September 2017 Email Communication from Lauren A. Mandell, to Jamieson L. Greer, Subject: NAFTA 2.0 Investment Chapter Text;⁷⁴
- Internal USTR email of 16 September 2017 and attachment;⁷⁵
- Email of 28 September 2018 from USTR Representative Ambassador Lighthizer to Mr. Butts, Principal Secretary to Prime Minister Trudeau;⁷⁶
- Email of 29 September 2018 from Mr. Verheul, Canada’s Chief Negotiator of the

⁷⁰ C-114, USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement, United States Trade Representative Executive Office of the President, Press Release, 18 May 2017. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces>.

⁷¹ KSR-2, Summary of objectives for the NAFTA renegotiation, 17 July 2017.

⁷² C-113-3, Email correspondence from Lauren A. Mandell to Jamieson Greer, *et al.*, 12 September 2017 (John M. Melle was the Chief Negotiator to whom Lauren A. Mandell, Chief Negotiator – Investment, reported. Mr. Melle reported directly to the USTR, Amb. Lighthizer), Subject: NAFTA 2.0 Investment Chapter text.

⁷³ C-113-3, Email correspondence from Lauren A. Mandell to Jamieson Greer, *et al.*, 12 September 2017, Subject: NAFTA 2.0 Investment Chapter text, Attachments: NAFTA 2.0 Investment Chapter text - (redline revised 091117).docx; C-113-4A, Internal USTR Document Concerning Chapter 11, Investment Draft Text for Round Three: Attachment to Internal USTR Email Communication from Lauren Mandell, to Jamieson Greer, Re: NAFTA 2.0 Investment Chapter Text, 12 September 2017; C-113-4B, Internal USTR Document Concerning Chapter 11, Investment Draft Text for Round Three, 12 September 2017; C-113-4C, TPSC memo, 12 September 2017.

⁷⁴ C-113-4A, Internal USTR Document Concerning Chapter 11, Investment Draft Text for Round Three: Attachment to Internal USTR Email Communication from Lauren Mandell to Jamieson Greer, Re: NAFTA 2.0 Investment Chapter Text, 12 September 2017.

⁷⁵ C-113-5, Email correspondence thread from Lauren A. Mandell to Stuart B. Young, *et al.*, 16 September 2017, Subject: Investment Chapter text, Attachments: NAFTA 2.0 investment text.pdf NAFTA 2.0 investment text - Hill cover sheet.pdf.

⁷⁶ C-113-6, Email Communication from the United States Trade Representative Amb. Robert E. Lighthizer to Mr. Gerald Butts, Principal Secretary to Prime Minister Justin Trudeau at the Time the Email is Written (Friday 28 September 2018 at 4:55 p.m.), Subject: Can Term Sheet.docx, Attachment: Can Term Sheet.docx; C-113-1, US-Canada Closing Term Sheet, 28 September 2018.

USMCA to Mr. Melle, (USTR) Chief Negotiator;⁷⁷

- Email of 9 October 2018 and attachments from Mr. Mandell to Mr. Mahoney, on “Investment Text Revision, Attachments: USMCA – Potential Revisions to Investment Text”;⁷⁸
- Internal USTR email of 18 October 2018 from Mr. Mandell to Mr. Tracton OECD on “Week Item, String Email, and Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings”.⁷⁹
- Email of 19 October 2018 from Ms. Foley to Messrs. Behar and Mandell, on “USMCA Investor-State Dispute Settlement Provisions: Background and Talking Points”.⁸⁰
- Final Email in a Thread Commencing on 28 November 2018 from Mr. Melle to Ms. Pagan on “Talking Points on Scrub Items in USMCA_112818 (002) JM, and Talking Points on Scrub Items in USMCA”.⁸¹
- Correspondence from Ms. Benson to Ambassador Lighthizer dated 27 September 2018.⁸²

161. In the Claimant’s view, these documents demonstrate the contracting parties’ intention that Annex 14-C provide investor-State dispute settlement rights over measures affecting legacy investments during the transition period. This is supposedly shown by the term “grandfathering”, which was used throughout the negotiations to describe the continued applicability of NAFTA Chapter 11’s substantive protections for three years following

⁷⁷ C-113-7, Email Communication from Steve Verheul, Canada’s Chief Negotiator USMCA to US counterpart John M. Melle (USTR), 29 September 2018, Subject: Non-Agricultural Issues, with attachment.

⁷⁸ C-113-8, Email correspondence from Lauren A. Mandell to C. J. J. Mahoney, 9 October 2018, Subject: Paper re: investment Text revision, Attachments: USMCA – Potential Revisions to Investment Text.

⁷⁹ OW-14, Internal USTR Document, Email exchanges between Lauren A. Mandell and Michael K. Tracton, 12 to 20 October 2018, Subject: Re: OECD Week Item, String Email, and Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings.

⁸⁰ C-113-9, Email correspondence from Molly L. Foley to Daniel Behar and Lauren A. Mandell, 19 October 2018, Subject: Materials for ARL next week, Attachments: ARL TPS on USMCA Investment.docx, FIRRMA CFIUS Update.docx.

⁸¹ C-113-10, Email thread from John M. Melle (USTR) to María L. Pagan (USTR), Lauren A. Mandell (USTR) *et al.*, ending with email from Daniel C. O’Brien (USTR) to Sharon E. Bomer Lauritsen (USTR), Lauren A. Mandell (USTR), *et al.* Subject: Talking Points on Scrub Items in USMCA_112818 (002) JM.

⁸² C-113-11, Correspondence from Elizabeth Benson to Ambassador Robert Lighthizer attaching the ITAC10 Report, 27 September 2018.

NAFTA's termination.⁸³

162. The Claimant further relies on a statement made by Mr. Mandell, former Deputy Assistant USTR for Investment and negotiator of the investments chapter of the USMCA in an email exchange with Mr. Gharbieh, then Deputy USTR, Investment.⁸⁴ In that exchange, says Access, Mr. Mandel confirmed that Annex 14-C was intended to apply to measures taken within the three-year grandfathering period:

[EXTERNAL] RE: Your ICSID Review article

From: "Mandell, Lauren A." <lauren.mandell@wilmerhale.com>
To: "Gharbieh, Khalil N. EOP/USTR" <khalil.n.gharbieh@ustr.eop.gov>
Date: Tue, 02 Mar 2021 12:31:39 -0500

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

Are friends across the border aren't questioning this, are they?

163. Furthermore, the Claimant invokes the testimony of Mr. Smith Ramos, Mexico's former chief negotiator of the USMCA, who explained that Mexico understood Annex 14-C to apply to measures arising before and for three years after the entry into force of the USMCA.⁸⁵
164. Access further submits that it attempted to obtain documents pertaining to the negotiating history of the USMCA through requests filed under Mexico's freedom of information legislation, which Mexico rejected. According to the Claimant, such refusal "creates a

⁸³ Counter Memorial on Jurisdiction, paras. 168, 171.

⁸⁴ C-121, Email communication from Khalil N. Gharbieh to Lauren A. Mandell, 2 March 2021, 7:25 a.m. Subject: Your ICSID Review article.

⁸⁵ Smith Ramos WS, paras. 8, 25.

factual inference from which to infer reasonably that Respondent does not have access to even a single sheet of paper embodying the most modest ambiguity from which inferences in support of its interpretative position may be drawn” classified.⁸⁶

165. The Claimant also challenges the Respondent’s reliance on the State parties’ positions in investor-State arbitration proceedings. In its view, such positions do not constitute “subsequent practice” within the meaning of Article 31(3)(b) of the VCLT. In the context of litigation, these submissions are self-serving, as they depart from the original understanding of USMCA Annex 14-C.
166. According to the Claimant, subsequent practice under Article 31(3)(b) VCLT requires a “concordant, common, and consistent” pattern of State conduct.⁸⁷ The positions adopted by the contracting States in arbitration are neither systematic nor consistent, but constitute *ad hoc* defenses tailored to their role as respondents in disputes. They thus lack the evidentiary value necessary to establish an agreement regarding the treaty’s interpretation.
167. In any event, Access underlines that subsequent practice is not binding on arbitral tribunals. It cites several decisions, including *Aguas del Tunari v. Bolivia*, which held that a tribunal is not bound by the views of State parties on the meaning of a treaty.⁸⁸
168. The Claimant further submits that third-party rights constrain the ability of NAFTA parties to redefine treaty obligations through subsequent practice. It states that NAFTA and USMCA Annex 14-C confer rights on investors, and that any unilateral reinterpretation by the States to limit investor protections would violate those rights.

(f) The *TC Energy* decision should be disregarded

169. The Claimant refutes the relevance of the majority’s decision in *TC Energy v. US*.⁸⁹ It submits that the majority was wrong in holding that Annex 14-C did not include a choice of law agreement.
170. Furthermore, the majority misapprehended the authorities on which it relied and drew

⁸⁶ Counter Memorial on Jurisdiction, para. 326.

⁸⁷ Counter Memorial on Jurisdiction, para. 349 referring to CT-58, *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, para. 189.

⁸⁸ CS-55, *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections on Jurisdiction, 21 October 2005.

⁸⁹ Counter Memorial on Jurisdiction, paras. 404-422, referring to RL-40, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, paras. 199-207.

conclusions that were inconsistent with the reasons given in those cases. Specifically, the Claimant asserts that *Ambatielos* supports the principle that treaty provisions can apply to pre-existing obligations unless explicitly excluded, contrary to the restrictive interpretation adopted by the *TC Energy* majority. Additionally, it criticizes the tribunal for misreading *Churchill Mining* and *CSOB*, which in its view, do not support the tribunal's finding on the applicability of prior treaty provisions.

171. The Claimant also emphasizes that the *TC Energy* majority improperly disregarded documentary evidence that was critical to understanding the parties' intent. The tribunal took an excessively strict approach to evidence, excluding documents that confirmed the parties' original understanding of the scope and applicability of Annex 14-C. In particular, Access disputes the propriety of the tribunal's dismissal of internal documents and negotiating history, despite their relevance under Article 32 of the VCLT.
172. Finally, the Claimant stresses that the dissenting opinion in *TC Energy* merits consideration, as it highlights significant methodological and interpretive defects in the majority's reasoning,⁹⁰ pointing to key documents reflecting the treaty parties' common understanding, which the majority ignored. It also argues that the dissent correctly recognized that Canada's negotiation history and the US-Canada Closing Term Sheet supported the view that Annex 14-C extended NAFTA's substantive protections during the transition period. By contrast, the tribunal majority engaged in speculation when it suggested that Canada may have revised its legal analysis of Annex 14-C's meaning in the final weeks before signing the USMCA, without citing any supporting evidence.

3. Analysis

(a) Introductory comments and legal framework

173. The present dispute concerns the alleged violations of substantive obligations contained in Section A of Chapter 11 of NAFTA.⁹¹ The measures that the Claimant impugns were taken in 2022,⁹² at a time when NAFTA had been terminated and replaced by the USMCA.⁹³ Accordingly, the question for the Tribunal is whether Mexico was bound by Section A of

⁹⁰ RL-40, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024.

⁹¹ See, the Claimant's request for relief in the Memorial, para. 636.

⁹² See, paras. 92 *et seq.*

⁹³ On 1 July 2020, USMCA entered into force, thereby terminating and substituting NAFTA; CL-3, Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, 30 November 2018.

Chapter 11 or, in other words, whether the Contracting States have agreed to extend the application of Section A of Chapter 11 of NAFTA to the period when the acts complained of were committed.

174. The question must be resolved in the light of Article 70(1)(a) of the VCLT and Article 13 of the ILC Articles. Under the former rule, unless otherwise agreed, “the termination of the treaty [...] releases the parties from any obligation further to perform the treaty”. Pursuant to the provision of the ILC Articles, “[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”
175. Therefore, unless the substantive obligations under Section A of Chapter 11 of NAFTA apply beyond that treaty’s termination, the present dispute will fall beyond the scope of the investor-State dispute resolution clause of NAFTA, which is limited to claims for breaches of the substantive provisions of Section A of NAFTA.⁹⁴
176. The Claimant submits that Annex 14-C of the USMCA extends the application of the substantive provisions of Section A of Chapter 11 by three years following the termination of NAFTA, with the result that the impugned measures are encompassed within the ambit of Section A.
177. For purposes of this analysis, it is useful to quote Annex 14-C in full:
 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

⁹⁴ Article 1116 (1) NAFTA: “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.”

Section A of Chapter 11 (Investment) of NAFTA 1994.^{95 96}

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.
 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).
178. It is common ground that Annex 14-C prolongs the consent to arbitration contained in Section B of Chapter 11 of NAFTA by three years following NAFTA’s termination. The

⁹⁵ [Footnote 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 1-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Service and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.

⁹⁶ [Footnote 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).

Parties disagree, however, on whether Annex 14-C also extends the temporal scope of the substantive protections contained in Section A of Chapter 11 of NAFTA. According to the Claimant, Annex 14-C contains a choice of law agreement, extending the scope of application of Section A of Chapter 11 of NAFTA beyond the latter's termination.

179. Article 31 of the VCLT provides that treaties must be interpreted “in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*.”⁹⁷ In turn, Article 32 of the VCLT provides for supplementary means of interpretation to either confirm the meaning reached under Article 31 or to determine the meaning, when the application of Article 31 leads to an ambiguous or absurd result.
180. The Tribunal will first analyze the relevant provisions of Annex 14-C under Article 31 of the VCLT, addressing the elements of ordinary meaning (b), context (c), and object and purpose (d). Thereafter, the Tribunal will review the Parties' positions and the evidence concerning the supplementary means of interpretation under Article 32 of the VCLT (e). Finally, given its prominence in the Claimant's case, the Tribunal will devote one section to separately address the issue of a choice of law in Article 1131(1) of Section B of NAFTA (f).

(b) Ordinary Meaning

181. Paragraph 1 of Annex 14-C provides that “[e]ach Party consents [...] to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex”. Paragraph 3 then specifies that the “consent under paragraph 1 shall expire three years after the termination of NAFTA”. The ordinary meaning of these terms clearly indicates that they extend the duration of the *consent* to submit claims to arbitration.
182. There is no comparable language in Annex 14-C that would prolong the application of the substantive protections contained in Section A of Chapter 11 of NAFTA. This said, Annex 14-C refers to Section A on three occasions:
- **Paragraph 1(a)** refers to Section A to qualify the type of claims for which the consent to arbitration is extended, i.e. claims “alleging breach of an obligation under [...] Section A of Chapter 11”. This delimits the subject-matter of the claims for which the consent to arbitrate is extended. The language does not suggest that

⁹⁷ Emphasis added.

the application of Section A itself is extended;

- **Paragraph 1(c)** similarly mentions Section A to describe the subject-matter of the claims for which the consent to arbitration is extended, i.e. claims “alleging breach of an obligation under [...] 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”. Again, there is no indication that the scope of application of Section A is extended;
- **Footnote 20** clarifies that, “[f]or greater certainty”, Section A applies with respect to claims for which the consent to arbitration is extended pursuant to paragraph 1 of Annex 14-C. This language confirms that Section A applies to *claims*, which fall within the scope of the consent extended by Annex 14-C. The wording does not provide that Section A continues to apply to *measures* taken after the termination of NAFTA. The use of the wording “for greater certainty” indicates that footnote 20 merely confirms the uncontroversial proposition that Section A is applicable to claims arising out of the measures that predate the termination of NAFTA.

183. Giving the words used their ordinary meaning, the Tribunal finds that nothing in the terms of Annex 14-C indicates that the Contracting States extended the application of the substantive provisions of Section A of Chapter 11 beyond the termination of NAFTA.
184. The Claimant argues that “no temporal constraints on measures are contained in the text” of Annex 14-C and that, therefore, the text “should be applied generally to alleged breaches pertaining to legacy investments”.⁹⁸ The Tribunal is not persuaded by this argument. The temporal limitation of the application of NAFTA derives from the uncontroversial rules of international law, pursuant to which measures postdating the termination of a treaty cannot engage a breach of that treaty, unless otherwise agreed by the contracting parties.⁹⁹ Thus, contrary to what the Claimant suggests, the correct test is not whether Annex 14-C provides any “temporal *constraints* on measures”, but rather whether Annex 14-C includes a temporal *extension* of the substantive obligations of NAFTA to measures occurring after termination. As mentioned, the outcome of the text is negative.

(c) Context

185. The context of the relevant provisions of Annex 14-C confirms that Annex 14-C extends

⁹⁸ Countermemorial on Jurisdiction, para. 76.

⁹⁹ RL-8, VCLT, Article 70(1)(a); and RL-6, ILC Articles, Article 13.

the temporal scope of the consent to arbitrate, rather than the substantive protections of Section A of Chapter 11 of NAFTA.

186. The five main paragraphs of Annex 14-C all refer to the scope and modalities of the extension of the *consent* to arbitration under Section B of Chapter 11 of NAFTA, reinforcing the idea that the entire annex is procedural in character, and does not aim to extend the temporal scope of application of the substantive protection standards of NAFTA.¹⁰⁰
187. Other provisions of the USMCA indicate that when the Contracting States intended to extend the scope of application of certain provisions of NAFTA beyond that treaty's termination, they did so expressly. For instance, Article 34(1)(4) of the USMCA, which is entitled "Transitional Provision from NAFTA 1994" and thus deals expressly with the transition from the NAFTA to the USMCA, provides that "Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews". No similar wording is found in Annex 14-C or elsewhere in the USMCA in respect to Section A of Chapter 11 of NAFTA.
188. The Claimant relies on Footnote 21 of Annex 14-C, pursuant to which, the United States and Mexico agreed the following carve out from the application of Annex 14-C:
- 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).
189. According to the Claimant, that carve out would serve no practical purpose if Annex 14-C were to be limited to extending the consent to arbitration.¹⁰¹ In the Tribunal's reading, the text of Footnote 21 is clear: it excludes the extension of the consent to arbitration under paragraph 1 of Annex 14-C for certain categories of investors who are eligible to submit claims under Annex 14-E. This exclusion does not necessarily imply that the temporal scopes of application of the substantive protections of NAFTA and the USMCA do coincide. Thus, Footnote 21 retains its utility even if Annex 14-C only extends the consent to arbitrate, and not the substantive protections of NAFTA.
190. The Claimant further points to the definition of "legacy investment" in paragraph 6 of Annex 14-C, which requires that such investment be "in existence on the date of entry into force of [the USMCA]". For the Claimant, this shows that the Contracting States "intended

¹⁰⁰ Paragraph 6 in turn deals with definitions.

¹⁰¹ Countermemorial on Jurisdiction, para. 98.

for their consent in Annex 14-C to protect investments with respect to State conduct that were taken in breach of Section A of NAFTA Chapter 11 during the transition period”.¹⁰² The Tribunal finds this argument difficult to follow. The fact that the Parties limited the extension of the consent to arbitrate to investments that were in existence when the USMCA entered into force does not entail the extension of the substantive obligations contained in NAFTA to conduct postdating the treaty’s termination.

191. Together with the context found in the treaty, Article 31(3) of the VCLT provides that an interpreter must take into account:
- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
192. These elements support the conclusion that Annex 14-C does not extend the temporal scope of the substantive investment protections of NAFTA. The Contracting States of the USMCA and NAFTA have all expressed their position in this arbitration, stating that Annex 14-C does not purport to extend the application of Section A of Chapter 11 of NAFTA to any measures post-dating the termination of NAFTA.¹⁰³ They have adopted that position throughout other arbitral proceedings, both in their capacity as disputing and as non-disputing parties.¹⁰⁴ Whether these manifestations qualify as a “subsequent agreement” or a “subsequent practice” is immaterial, as in both cases Article 31(3) of the VCLT requires the Tribunal to take the position of the Contracting States into account together with the context of the treaty terms.
193. The Claimant argues that the positions taken by the Contracting States in contentious proceedings should not be attributed significant value, since the Contracting States have likely made those statements with the aim of shielding themselves from potential liability.¹⁰⁵ However, Article 1128 of NAFTA provides that non-disputing parties “may

¹⁰² Countermemorial on Jurisdiction, para. 102.

¹⁰³ Canada and the United States of America have submitted non-disputing party submissions in support of Mexico’s position in this arbitration.

¹⁰⁴ See, the non-disputing party submissions in *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63; *Coeur Mining, Inc. v. United Mexican States*, ICSID Case No. UNCT/22/1; *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1; *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5.

¹⁰⁵ Countermemorial on Jurisdiction, para. 338.

make submissions to a Tribunal on a question of interpretation of this Agreement”. This provision shows that the Contracting States intended that the interpretation of the agreement be informed by non-disputing party submissions in contentious proceedings.

194. In addition, pursuant to the commentaries included in the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, “statements in the course of a legal dispute”, including as a disputing party, are to be taken into account as subsequent practice under VCLT Article 31(3)(b).¹⁰⁶ Investment treaty tribunals have consistently endorsed this approach.¹⁰⁷
195. Accordingly, the Tribunal must take into account the position of the Contracting States pursuant to which Annex 14-C does not extend the temporal scope of application of Section A of Chapter 11 of NAFTA. At the same time, the Tribunal considers that the positions of the Contracting States are not dispositive means of treaty interpretation, as they are merely one, albeit a primary one. That being so, the Tribunal cannot disregard the convergent positions of the Contracting States simply because they are expressed in a litigious context. It is due to the nature of Annex 14-C that questions of interpretation primarily arise within arbitral proceedings. The fact that the three Contracting States have chosen to intervene in a number of contentious proceedings to express their concordant position, and have consistently maintained the same position as disputing and non-disputing parties, cannot simply be ignored.
196. In addition, pursuant to Article 31(3)(c) of the VCLT, the Tribunal must also take into account other rules of international law applicable between the Contracting States. As the Tribunal mentioned above, in conformity with Article 70(1)(a) of the VCLT, “the termination of the treaty [...] releases the parties from any obligation further to perform the treaty” and, under Article 13 of the ILC Articles, a State cannot be held liable for a

¹⁰⁶ CS-47, ILC’s Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, UN Doc. A/73/10, Chapter IV, 2018, para. 18 (“Subsequent practice under article 31, paragraph 3 (b), must be conduct ‘in the application of the treaty’. This includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.”).

¹⁰⁷ RL-53, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 21; CT-57, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s Preliminary Objections, 13 March 2020, para. 156; CL-228, *Nissan Motor Co. Ltd. (Japan) v. The Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, paras. 216, 217.

violation of an obligation which was not in force at the time of the allegedly wrongful act. As the Tribunal observed, nothing in the text of Annex 14-C indicates that the Contracting States intended to depart from this regime.

(d) Object and Purpose

197. The object and purpose of the USMCA is not particularly instructive for purposes of determining whether Annex 14-C extends the substantive investment protections beyond the termination of NAFTA. The objectives expressed in the Preamble of the USMCA, such as the Contracting States' desire to "strengthen anew the longstanding friendship between them and their peoples, and the strong economic cooperation that has developed through trade and investment", and to "further strengthen their close economic relationship" do not militate in favor or against the extension of the temporal scope of Section A.
198. It is nevertheless worth noting that the Preamble contains a reference to the Contracting States' desire to "REPLACE the 1994 NAFTA with a 21st-century, high-standard new agreement". The USMCA thus includes Chapter 14 which introduces more restrictive investment protections than the NAFTA guarantees. This language suggests that the States viewed the NAFTA regime as outdated and in need of replacement, which points against the extension of the NAFTA provisions, unless express language in the USMCA provides otherwise. As discussed in the preceding sections, that is not the case.
199. Furthermore, under the Claimant's interpretation of Annex 14-C, the substantive investment protections of NAFTA, which the Contracting States regarded as outdated, would continue to apply concurrently with the modernized substantive provisions of the USMCA. This coexistence would not promote the establishment of a "clear, transparent, and predictable legal and commercial framework", which is another purpose listed in the Preamble of the USMCA.
200. Therefore, while the object and purpose of the USMCA does not provide a conclusive argument in favor or against the alleged extension of Section A of Chapter 11 of NAFTA, they provide a further indication that the Contracting States did not extend the substantive investment protections beyond the termination of NAFTA, in line with the text and context of the annex.
201. In summary, the application of the primary means of treaty interpretation leads to the conclusion that Annex 14-C did not extend the temporal scope of Section A of Chapter 11 of NAFTA. As explained above, the consent to arbitrate under Article 1116(1) NAFTA is limited to claims for violation of the substantive provisions contained in Section A of

Chapter 11 of NAFTA. The measures that the Claimant impugns in this arbitration postdate the expiration of NAFTA and are not thus capable of engaging a violation of NAFTA. The claims are therefore outside the jurisdiction of the Tribunal.

202. The Tribunal could end its analysis here. Indeed, pursuant to Article 32 of the VCLT, it is not required to resort to supplementary means of treaty interpretation unless the primary means leave the meaning of the treaty terms ambiguous or lead to absurd results.¹⁰⁸ It can, however, use supplementary means to confirm the interpretation under Article 31 of the VCLT. As the Parties have devoted considerable efforts to discussing the supplementary means of interpretation, the Tribunal will discuss them in the following section.

(e) Supplementary Means of Interpretation

203. Article 32 of the VCLT provides for the supplementary means of treaty interpretation as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.
204. The provision does not list the categories of sources that can be used as supplementary means of treaty interpretation in an exhaustive manner. It merely mentions that such means include “the preparatory work of the treaty and the circumstances of its conclusion”. That said, for a source to be given interpretative weight as “preparatory work” of a treaty, it should be capable of shedding light on the common intent of the Contracting States at the time of conclusion of the treaty.¹⁰⁹ International tribunals and scholars thus caution against attributing weight to documents that reflect the position of one Contracting State only.¹¹⁰

¹⁰⁸ Article 32 of the VCLT; see also: ICJ, *Admission of a State to the United Nations (Charter, Art. 4)*, *Advisory Opinion: I.C.J. Reports 1948*, p. 63 (“The Court considers that the text is sufficiently clear; consequently it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.”).

¹⁰⁹ CT-61, Oliver Dörr, ‘Article 32’ in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn., Springer, 2019), para. 15.

¹¹⁰ CT-63, *Iron Rhine (‘Ijzeren Rhin’) Railway Arbitration (Kingdom of Belgium v. Kingdom of the Netherlands)* Award, 24 May 2005, XXVII UNRIAA 35, para. 48; CT-61, Oliver Dörr, ‘Article 32’ in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn., Springer, 2019), para. 15; CT-64, *US-Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, para. 130.

More specifically, NAFTA tribunals have refused to attach any material importance to “internal documents not shared with the other NAFTA Parties”.¹¹¹

205. The Claimant invokes a number of documents allegedly showing the intention of the Contracting States to extend the temporal scope of application of Section A of Chapter 11 beyond the termination of NAFTA.¹¹² Most of these are internal documents that have not been contemporaneously exchanged between the Contracting States. Therefore, they do not reflect the States’ common understanding about the application of Section A Chapter 11 after the termination of NAFTA. In any event, the content of the documents is inconclusive with respect to the possible extension of Section A of Chapter 11 beyond the lifetime of NAFTA. This is in particular clear from the following documents:

- Several documents refer to the concept of **grandfathering**.¹¹³ More precisely, those documents that have been contemporaneously exchanged between the Contracting States refer to a possible “3-year grandfathering of ISDS”.¹¹⁴ Grandfathering is a general concept that entails the continued application of certain rules following the termination of a legal regime. A reference to grandfathering does not necessarily indicate that the Contracting States intended to grandfather NAFTA’s substantive

¹¹¹ CT-65, *Canfor Corporation v. United States of America*, UNCITRAL, Procedural Order No. 5, 28 May 2004, para. 19; RL-40, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, para. 183.

¹¹² See, e.g. C-114, USTR “Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement”, Press Release, 18 May 2017; KSR-2, Summary of objectives for the NAFTA renegotiation, 17 July 2017; C-113-4A, Internal USTR Document Concerning Chapter 11, Investment Draft Text for Round Three: Attachment to Internal USTR Email Communication from Lauren Mandell, to Jamieson Greer, Re: NAFTA 2.0 Investment Chapter Text, 12 September 2017.

¹¹³ KSR-3-6, Talking points on USMCA prepared by USTR for Congress, 28 November 2018; C-113-3, Email exchanged between two USTR officials (Lauren Mandell to Jamieson Greer), Subject: NAFTA 2.0 Investment Chapter Draft, 12 September 2017; C-113-4C, USTR Memorandum Seeking Interagency Trade Policy Staff Committee Approval: Investment Chapter Proposed Text, (undated); C-113-1, Email Communication from the United States Trade Representative Ambassador Robert Lighthizer to Gerald Butts, Principal Secretary to Prime Minister Justin Trudeau, 28 September 2018; C-113-7, Email Communication from Steve Verheul, Canada’s Chief Negotiator USMCA to John Melle USTR Chief Negotiator, 29 September 2018; C-113-8, Internal USTR Email and Attachments from Lauren Mandell to C. Mahoney, Subject: “paper re Investment Text revisions”, Attachments USMCA – Potential revisions to Investment Text (10-9-18), 9 October 2018; R-15, Internal Report of the Investment Group of the Secretariat of Economy of Mexico, attached to an email from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 4 May 2018; C-94, Website of World Trade Online, “Quoted: Senior Administration Officials on the USMCA”, 1 October 2018; C-95, U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, Inv. No. TPA 105-003, USITC Pub. No. 4889, April 2019; C-92, John F. Walsh, David J. Ross, Danielle Morris, and Lauren Mandell, “Three Tips for Investors in Mexico’s Energy Sector Regarding Potential USMCA Claims”, 18 March 2021.

¹¹⁴ C-113-1, Email Communication from the United States Trade Representative Ambassador Robert Lighthizer to Gerald Butts, Principal Secretary to Prime Minister Justin Trudeau, 28 September 2018; C-113-7, Email Communication from Steve Verheul, Canada’s Chief Negotiator USMCA to John Melle USTR Chief Negotiator, 29 September 2018.

investment protections as opposed to the procedural right to initiate arbitration. The express reference to “grandfathering of ISDS”¹¹⁵ rather points to a narrower understanding that excludes the substantive provisions of NAFTA. Hence, in the Tribunal’s view, the documents that mention grandfathering do not support the Claimant’s interpretation of Annex 14-C.

- Another set of documents are internal documents of the US, on the one hand, and of Mexico, on the other, which compare Annex 14-C to a **sunset provision**.¹¹⁶ The fact that the US and Mexico have referred to Annex 14-C as a sunset clause in their respective internal communications does not evince that the annex was intended to apply to the substantive provisions. Like the term “grandfathering”, the notion of a “sunset provision” merely suggests that the temporal scope of application of a rule is extended. It says nothing about the content of the rule at stake, and could apply to a procedural or to a substantive rule or to both. Moreover, the wording of the provisions in Annex 14-C differs from that of typical sunset clauses. Looking at the three Contracting States’ Model BITs, one notes that their standard sunset clauses clearly specify which rules of the relevant treaty are extended: they provide that “[t]his agreement shall continue to be effective for a period of ten years [...]”¹¹⁷; or “[f]or ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination”¹¹⁸; or further “Articles 1 through 56, as well as paragraphs 1 and 2 of this Article, shall remain in force for 15 years”.¹¹⁹
- Another set of internal US documents discusses the legacy investors’ ability to

¹¹⁵ C-113-1, Email Communication from the United States Trade Representative Ambassador Robert Lighthizer to Gerald Butts, Principal Secretary to Prime Minister Justin Trudeau, 28 September 2018; C-113-7, Email Communication from Steve Verheul, Canada’s Chief Negotiator USMCA to John Melle USTR Chief Negotiator, 29 September 2018.

¹¹⁶ C-113-11, Internal US report of the Industry Trade Advisory Committee on Services on a Trade Agreement with Mexico and Potentially Canada, Reflecting Consensus Advisory Opinion on the Proposed Agreement, 27 September 2018; R-12, Internal Report of the Investment Group of the Secretariat of Economy of Mexico from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 16 October 2017; R-13, Internal Report of the Investment Group of the Secretariat of Economy of Mexico from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 27 February 2018; R-14, Internal Report of the Investment Group of the Secretariat of Economy of Mexico from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 20 April 2018.

¹¹⁷ RL-34, Mexico Model BIT, 2008, Article 30, and the treaties concluded accordingly.

¹¹⁸ RL-36, US Model BIT, 2012, Article 22, and the treaties concluded accordingly.

¹¹⁹ RL-38, Canada Model BIT, 2021, Article 57, and the treaties concluded accordingly.

“continue to bring ISDS claims under the NAFTA rules and procedures”.¹²⁰ The Claimant argues that the reference to “rules and procedures” entails that the Contracting States intended to extend not only procedural but also substantive provisions of NAFTA Chapter 11. In the Tribunal’s view, these documents cannot be taken as evidence of the common intention to apply the transitory arrangement to the substantive provisions of Section A of Chapter 11. Even if there existed a strict distinction between “rules” and “procedures”, whereby the term “rules” could only refer to substantive rules (*quod non*), there is no indication that the US adhered to such distinction in its internal communications, much less that this understanding was shared among the three Contracting States.

- Some internal Mexican documents show that, at one point in the negotiations, Mexico’s representatives may have understood that the US was proposing to “*extender la vigencia del capítulo de inversión 3 años después de que termine la vigencia del TLCAN*”.¹²¹ While the document indeed refers to a proposed temporal extension of the entire investment chapter of NAFTA, this merely shows how the Mexican officials understood the US proposal at a specific time of the negotiations. In any event, the document adds that Canada and Mexico have not accepted this proposal, as their representatives had no mandate to this effect.¹²² These documents are thus equally inconclusive.
- The Claimant further relies on the witness statement of Mr. Kenneth Smith Ramos, Mexico’s former chief negotiator of the USMCA, now in private practice, who testified that Mexico understood Annex 14-C to apply to measures occurring in the transitional period. This testimony is not, however, a contemporaneous position expressed in an official capacity. At most, it shows Mr. Smith Ramos’s personal recollection of his position at the time of the negotiations of the USMCA. From his evidence, it was clear that it was the recollection of someone who, in his capacity as chief negotiator of a major treaty, supervised a significant number of different work streams each involving numerous sometimes complex issues, and who, by the

¹²⁰ OW-14, Internal USTR Email from Lauren Mandell to Michael Tracton, 12 to 20 October 2018, Subject: “OECD Week Item, String Email, and Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings 18 October 2018”; C-113-9, Internal USTR Email from Molly Foley to Daniel Behar and Lauren Mandell, Subject: “USMCA Investor-State Dispute Settlement Provisions: Background and Talking Points”, 19 October 2018.

¹²¹ R-12, Internal Report of the Investment Group of the Ministry of Economy of Mexico from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 16 October 2017; R-15, Internal Report of the Investment Group of the Ministry of Economy of Mexico, attached to an email from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 4 May 2018.

¹²² R-15, Internal Report of the Investment Group of the Secretariat of Economy of Mexico, attached to an email from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 4 May 2018.

nature of his position, did not have detailed direct knowledge of all the discussions occurring among negotiating delegations.¹²³ He was actually unable to point to any contemporaneous document where he would have expressed such clear position in his official capacity, let alone communicated it to the other Contracting States. Thus, the probative value of Mr. Smith Ramos's testimony is limited and cannot possibly override the result that the Tribunal reached through the primary means of interpretation.

206. The only documents on record that appear to clearly refer to the extension of the temporal scope of the substantive protections pertain to the informal exchange between Lauren Mandell, former Deputy Assistant USTR, and Khalil Gharbieh, his successor, in connection with an article that Mr. Mandell would author for the ICSID Review. In his email, which Mr. Mandell writes in his private capacity and no longer as the representative of the US Government, he conveys his understanding as follows: "We intended the annex to cover measures in existence before AND after USMCA entry into force." Mr. Mandell's views were formulated in response to the following question from Mr. Gharbieh:

One question on USMCA, which I have begun thinking about but haven't looked at in detail - the Annex 14-C text on legacy claims isn't clear on whether the grandfather applies to measures introduced/implemented in the three years after USMCA's entry into force, as opposed to just providing three years to pursue claims on measures in existence as of the date of entry into force. Assuming you intended the former, what would you point to in the text? Does footnote 21 help make the case?

207. Mr. Mandell replied by making an argument supporting the assumption proposed by Mr. Gharbieh and added: "I'd have to think about the best textual argument, but the one that immediately comes to mind rests on paragraph 3." It is thus obvious that, instead of recalling the common understanding of the Contracting States at the time of the negotiation of the treaty, Mr. Mandell is essentially trying to come up with arguments. In the next sentence, Mr. Mandell observes that the intent to cover the measures postdating the termination of NAFTA "could probably be clearer" and asks whether the "friends across the border aren't questioning this".¹²⁴ Thus, leaving aside the issue of the evidentiary weight of this internal, informal and non-contemporaneous exchange, the content at best demonstrates Mr. Mandell's recollection of the US position, without evidence that such position was communicated to the other States in clear terms at the time when they negotiated the USMCA. As such, this email is of no assistance to establish the common

¹²³ See, Tr., Day 1, pp. 218-224.

¹²⁴ C-121, Email from Lauren Mandell (former Deputy Assistant USTR to Khalil Gharbieh (then Deputy USTR), Subject: ICSID Review Article, 2 March 2021.

intention of the Contracting States.

208. In conclusion, the alleged supplementary means of treaty interpretation are inconclusive when it comes to elucidating the common intentions of the States with respect to the contentious issues of interpretation of Annex 14-C. Therefore, they cannot change the meaning arrived at through the primary means of treaty interpretation, according to which Annex 14-C does not extend the temporal scope of the substantive obligations contained in Section A of Chapter 11 of NAFTA.

(f) Choice of Law

209. Although not strictly necessary in light of the conclusions reached above, the Tribunal will address the Claimant's submission about a choice of law for the sake of completeness.
210. The Claimant argues that the temporal scope of application of Section A of Chapter 11 is extended by virtue of an alleged choice of law contained in Annex 14-C. In support, the Claimant points to the references to Section A in Annex 14-C and in Article 1131(1) of Section B of NAFTA.¹²⁵ The Claimant's legal expert, Prof. Schreuer explains this view as follows:

[T]here is a clear reference in Annex 14-C to the clause on governing law in Article 1131(1) of NAFTA. Article 1131 is part of Section B of Chapter 11 of NAFTA. In turn, Annex 14-C provides for jurisdiction 'in accordance with Section B of Chapter 11'. Therefore, the NAFTA's clause on governing law is incorporated into Annex 14-C. It is beyond doubt that Annex 14-C mandates the application of NAFTA's substantive standards as spelled out in Section A ('this Agreement') to alleged violations with respect to legacy investments. By virtue of the reference in Annex 14-C to Section B of NAFTA's Chapter 11, and its Article 1131, the substantive protections of NAFTA and applicable rules of international law are the governing law in legacy investment arbitrations independently of NAFTA's termination.¹²⁶

211. The Tribunal has difficulty following this opinion. Even if it was correct that Annex 14-C provides for the application of Section A as governing law to legacy investment *claims*, this does not mean that Section A covers *measures* postdating the termination of NAFTA. For a claim to come under the jurisdiction of the Tribunal, it must first be capable of constituting a violation of Section A.¹²⁷ Only where this jurisdictional requirement is satisfied, can the Tribunal entertain the claim and, when doing so, apply the governing law

¹²⁵ Countermemorial on Jurisdiction, para. 81.

¹²⁶ CER-5, Schreuer Second ER, 9 January 2025, para. 19.

¹²⁷ Article 1116 (1) of NAFTA.

chosen by the Parties.

212. A choice of substantive law must be distinguished from the scope of application of the substantive provisions of a treaty. What rules govern the merits of the claim is a different question from whether the measures underlying that claim are susceptible of constituting a treaty breach. Indeed, if a choice of NAFTA Section A as applicable law in Article 1131 entailed the extension of that section to any measure for which a claim is raised before a NAFTA tribunal, Section A could apply not only to conduct that postdates NAFTA, but also conduct that pre-dates it.
213. *Feldman v. Mexico* is instructive in this regard.¹²⁸ There, the tribunal held that irrespective of the choice of law, Section A of Chapter 11 of NAFTA only applied to measures postdating the entry into force of NAFTA. The tribunal did not extend the scope of application of Section A to pre-NAFTA measures by virtue of Article 1131 of NAFTA. It did not do so precisely because a choice of law does not alter the temporal scope of application of the chosen rules. Similarly, the tribunal in *TC Energy* drew a clear distinction between the choice of law and the temporal scope of application of Section A and held that Section A did not apply to measures post-dating the termination of NAFTA.¹²⁹
214. As a result, the Claimant's choice of law argument does not change the Tribunal's conclusion, according to which Annex 14-C does not extend the scope of application of Section A of Chapter 11 beyond the date of termination of NAFTA. It follows from this finding that the measures of which the Claimant complains are not capable of constituting a breach of NAFTA as they postdate its termination, with the consequence that the related claims fall outside the scope of the Tribunal's jurisdiction.
215. In light of this conclusion, the Tribunal will dispense with examining the Respondent's "secondary objection", concerning the validity of the waivers submitted by the Claimant and its Mexican subsidiary for reasons of procedural economy.

C. COSTS

216. The Claimant claims costs in the amount of **USD 3,458,619.08**, broken down as follows:

¹²⁸ CL-117, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 57.

¹²⁹ RL-40, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, para. 203.

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- Legal fees: USD 3,083,334.60
 - Expert fees: USD 374,618.24
 - Miscellaneous disbursements: USD 666.24
217. The Respondent claims a total of **USD 1,050,096.79** on account of costs, broken down as follows:
- Legal representation by the Secretariat of Economy: USD 319,665.79
 - Fees of external counsel: USD 679,431.00
 - Expert fees: USD 51,000
218. The Parties further claim the amounts corresponding to the advance payments requested by the Centre to defray the costs of the proceeding, which are set out in detail below.
219. Article 61(2) of the ICSID Convention provides the Tribunal with wide discretion to allocate the costs of the arbitration, including legal fees and other costs, Tribunal fees and ICSID charges, as it deems appropriate:
- In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.
220. The outcome of the dispute, i.e., the acceptance of the Respondent's jurisdictional objection, warrants an award of costs in favor of the Respondent. The Tribunal further notes that the conduct of the Parties and their representatives was efficient and collegial. Accordingly, the procedural conduct does not warrant altering the allocation of costs dictated by the outcome of the dispute. Furthermore, the Respondent's costs are reasonable, taking into consideration that, despite being the moving party with respect to the jurisdictional objections, the Respondent's costs are significantly lower than those of the Claimant.
221. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Gabrielle Kaufmann-Kohler	155,125.00
Franco Ferrari	173,400.00
Loretta Malintoppi	95,730.19
Assistant's fees and expenses	74,550.00
ICSID's administrative fees	146,000.00
Direct expenses	46,660.83
Total	<u>691,466.02</u>

222. The above costs have been paid out of the advances made by the Parties. The Claimant has covered USD 441,466.02 and the Respondent has covered USD 250,000.¹³⁰
223. Accordingly, the Tribunal considers that the Claimant shall bear its own costs and pay the Respondent the amount of (i) USD 250,000 which represents the amount that the Respondent has advanced towards the costs of the arbitration, as well as (ii) USD 1,050,096.79 representing the costs of legal representation and expert fees.

¹³⁰ The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

VI. OPERATIVE PART

224. For the reasons set forth above, the Tribunal by majority decides as follows:

- (1) The Tribunal lacks jurisdiction over the dispute before it;
- (2) The Claimant shall pay to the Respondent USD 250,000 for the latter's share of the fees and expenses of the Tribunal and the ICSID administrative costs;
- (3) The Claimant shall pay to the Respondent USD 1,050,096.79 for the Respondent's costs of legal representation and expert fees.

[Signature]

Prof. Franco Ferrari
Arbitrator

Subject to the attached Dissenting Opinion

Ms. Loretta Malintoppi
Arbitrator

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

[Signature]

Prof. Franco Ferrari
Arbitrator

Subject to the attached Dissenting Opinion

Ms. Loretta Malintoppi
Arbitrator

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Prof. Franco Ferrari
Arbitrator

Subject to the attached Dissenting Opinion

Ms. Loretta Malintoppi
Arbitrator

[Signature]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Access Business Group LLC

Claimant

v.

United Mexican States

Respondent

(ICSID Case No. ARB/23/15)

Dissenting Opinion of Arbitrator Franco Ferrari

I. THE MAJORITY’S OPINION: SUMMARY AND GENERAL COMMENTS

1. The majority of the Tribunal concludes that it lacks jurisdiction over the claims submitted by Access Business Group LLC (“Claimant”) against the United Mexican States (“Mexico”), based on the fact that the contested measures occurred after the termination of NAFTA on July 1, 2020, notwithstanding their occurrence within the three-year transitional period contemplated in Annex 14-C of the USMCA (“Annex 14-C”), and the fact that the substantive NAFTA obligations were not in force at the time the alleged measures occurred.
2. According to the majority of the Tribunal, “[g]iving the words used their ordinary meaning, the Tribunal finds that nothing in the terms of Annex 14-C indicates that the Contracting States extended the application of the substantive provisions of Section A of Chapter 11 beyond the termination of NAFTA.”¹
3. The majority of the Tribunal bases its decision *inter alia* on the claim that “[t]he five main paragraphs of Annex 14-C all refer to the scope and modalities of the extension of the *consent* to arbitration under Section B of Chapter 11 of NAFTA, reinforcing the idea that the entire Annex is procedural in character, and does not aim to extend the temporal scope of application of the substantive protection standards of NAFTA.”² The majority also holds that “[t]he object and purpose of the USMCA is not particularly instructive for purposes of determining whether Annex 14-C extends the substantive investment protections beyond the termination of NAFTA.”³
4. In light of the above – and further – arguments, the majority concludes that “the application of the primary means of treaty interpretation leads to the conclusion that Annex 14-C did not extend the temporal scope of Section A of Chapter 11 of NAFTA. As explained above, the consent to arbitrate under Article 1116(1) NAFTA is limited to claims for violation of the substantive provisions contained in Section A of Chapter 11 of NAFTA. The measures that Claimant impugns in this arbitration postdate the expiration of NAFTA and are not

¹ Majority Opinion, para. 183.

² Majority Opinion, para. 186 (emphasis in original).

³ Majority Opinion, para. 197.

thus capable of engaging a violation of NAFTA. The claims are therefore outside the jurisdiction of the Tribunal.”⁴

5. With due respect to my learned colleagues, I am unable to concur with them for various reasons, which I will address in detail below. In my opinion, when properly applied to Annex 14-C and the USMCA’s textual architecture and overarching objectives and purpose, including as a matter of course the object and purpose of the transitional mechanism negotiated by the NAFTA Parties themselves, which, however, the majority considers “not particularly instructive” in the present case, Article 31 VCLT’s interpretive methodology compels recognition that Annex 14-C encompasses post-termination government measures affecting legacy investments and that the application of the substantive NAFTA obligations has been extended to the same extent as the consent to arbitrate for three years after NAFTA’s termination.
6. For the reasons that will be set out below, I consider the interpretation of Annex 14-C advanced by Claimant to be correct and faithful to Annex 14-C’s letter and spirit and in line with the object and purpose of the USMCA and its transitional mechanism. In particular, I agree that the continued application of Section B of NAFTA Chapter 11 during the three-year transition period, which is common ground and uncontested by Respondent,⁵ necessarily entails also the continued applicability of Section A’s substantive obligations to conduct by a State that affects “legacy investments”, even where the challenged measures post-date NAFTA’s termination.
7. Unlike the majority of the Tribunal,⁶ I find that this interpretation is the only one in line with the integrity of the bargain struck by the NAFTA and USMCA Parties, the predictability of USMCA’s transitional regime, and the very availability of legal remedies for investors who in good faith relied on substantive NAFTA protections during the three-year post-NAFTA termination period.

⁴ Majority Opinion, para. 201.

⁵ See, e.g., Majority Opinion, para. 121, referring in footnote 89 to Respondent’s Memorial on Jurisdiction-ENG, pp. 27- 47 (paras. 75-137).

⁶ See Majority Opinion, para. 199, stating that “under the Claimant’s interpretation of Annex 14-C, the substantive investment protections of NAFTA, which the Contracting States regarded as outdated, would continue to apply concurrently with the modernized substantive provisions of the USMCA. This coexistence would not promote the establishment of “clear, transparent, and predictable legal and commercial framework”, which is another purpose listed in the Preamble of the USMCA.”

8. In my opinion, Mexico's restrictive reading of Annex 14-C, espoused by the majority of the Tribunal, turns the transition regime into a legal mirage, a promise of continued consent that evaporates the moment an investor relies on it because a State engaged in the very conduct that may trigger recourse to arbitration. This result is neither dictated by the text nor its context, nor is it supported by the preparatory work or subsequent practice, as Mexico claims. Most concerning of all, however, it is inconsistent with the object and purpose of the treaty framework, including the transitional regime, established by the United States, Mexico, and Canada.

II. THE ORDINARY MEANING OF ANNEX 14-C DOES NOT SUPPORT THE MAJORITY'S INTERPRETATION

9. The principal reason for my dissent lies in my esteemed colleagues' interpretation of paragraph 1 of Annex 14-C. While I agree with the majority of the Tribunal that Annex 14-C must be interpreted in light of its text and "in accordance with the ordinary meaning",⁷ i.e., in light of what is "regular, normal or customary",⁸ I disagree as to what that ordinary meaning is.
10. The majority of the Tribunal⁹ accepts Mexico's position "that Annex 14-C [merely] extended access to ISDS mechanism under Section B of NAFTA Chapter 11 for certain investors and investments for three years after its termination on 1 July 2020 but did not extend Chapter 11 as a whole or Section A of Chapter 11 independently."¹⁰ Rather, "this language limits eligible claims to those arising from measures that predate the termination of NAFTA".¹¹ In other words, "Annex 14-C does not extend the force of what is said under the NAFTA Agreement. What it does is it extends Annex 14-C to allow that those Claims based upon a measure that has been introduced prior to the termination of the NAFTA Agreement could be submitted to arbitration under the Rules and procedures that existed

⁷ Majority Opinion, para. 179.

⁸ O. Dörr, *Article 31*, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer, 2019), p. 542 (para. 41).

⁹ See Majority Opinion, para. 182 (stating that "[t]here is no comparable language in Annex 14-C that would prolong the application of the substantive protections contained in Section A of Chapter 11 of NAFTA").

¹⁰ Respondent's Post-Hearing Brief-ENG, p. 1 (para. 2).

¹¹ Respondent's Memorial on Jurisdiction-ENG, p. 80 (para. 243).

at the time of the alleged breach.”¹² Annex 14-C “does not extend the substantive obligations in Section A for the 3-year [post-NAFTA termination] period.”¹³ “No provision in the USMCA extends the substantive protections in Chapter 11 beyond the NAFTA’s termination.”¹⁴ The text of Annex 14-C clearly disproves these assertions.

11. The majority’s view is also in line with the holding of the majority in the *TC Energy* case.¹⁵

While that holding is not binding on this Tribunal, it cannot be disregarded altogether, because that tribunal also had to interpret Annex 14-C, as this Tribunal does,¹⁶ and because Mexico heavily relied on the majority opinion in the *TC Energy* case to corroborate its arguments,¹⁷ as did the majority of this Tribunal, although to a much lesser extent.¹⁸ As is known, in that case as well, the “core”¹⁹ question was whether Annex 14-C permitted the investor to claim breaches that occurred after NAFTA ended but within the three-year transition period or only those tied to events that occurred while NAFTA was still in effect. Specifically, TC Energy argued that President Biden’s 2021 revocation of the Keystone XL Pipeline permit violated NAFTA obligations and could be challenged under USMCA’s Annex 14-C, which preserves a window for claims relating to “legacy investments”. The United States countered that NAFTA’s obligations ceased when the treaty ended, and that Annex 14-C did not authorize claims based on post-termination measures. The majority of the *TC Energy* tribunal held that “the ordinary meaning of Annex 14-C is that consent to arbitrate was established until 30 June 2023 for facts capable of constituting a breach of NAFTA while NAFTA was in force.”²⁰ In other words, the majority of the *TC Energy*

¹² Transcript Hearing Day 1, p. 16, lines 10-16.

¹³ Respondent’s Post-Hearing Brief-ENG, p. 6 (para. 16).

¹⁴ Respondent’s Post-Hearing Brief-ENG, p. 8 (para. 20).

¹⁵ RL-0040-ENG.

¹⁶ See, e.g., Respondent’s Post-Hearing Brief-ENG, p. 2 (para. 5), expressly stating that the *TC Energy* case “involved an identical jurisdictional objection brought by the United States.”

¹⁷ See, e.g., Respondent’s Memorial on Jurisdiction-ENG, p. 24 (para. 69) (“the findings of the tribunal in the TC Energy arbitration are directly relevant”); Respondent’s Post-Hearing Brief-ENG, p. 2 (para. 5) (“Mexico’s interpretation of Annex 14-C is also supported by the recent award in the *TC Energy* case”) (italics in original); Transcript Hearing Day 1, p. 18, lines 5-8 (“Even if there were any further doubts about the correct interpretation of said Annex, it is worth recalling that this has been supported by the TC Energy against the U.S.”).

¹⁸ See Majority Opinion, paras. 204 (footnote 111) and 213.

¹⁹ For this qualification, see Respondent’s Memorial on Jurisdiction-ENG, p. 7 (para. 21); Legal Opinion by Christoph Schreuer, p. 14 (para. 53).

²⁰ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, p. 44 (para. 177), RL-0040-ENG.

tribunal held that the “ordinary meaning” of the words, the context, and the object and purpose of Annex 14-C itself and the USMCA had to be read as not extending NAFTA’s substantive obligations into the USMCA era and that only pre-termination breaches could be arbitrated under the Annex.

12. At this point it is worth determining the relevance of the *TC Energy* award, which the majority of this Tribunal refers to in order to reinforce its understanding of Annex 14-C,²¹ seemingly treating the case as persuasive authority for the proposition that NAFTA’s substantive protections could not apply to measures taken after NAFTA’s termination.
13. I certainly do not want to diminish the usefulness of the contribution, referred to in the award, to “the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law”,²² by way of reliance on “the legal solutions reflected in a series of consistent cases, subject, of course, to the specifics of the BIT and to the circumstances of the actual case.”²³ This, however, requires not only “a series of consistent cases”, but, in my opinion even more importantly, that such reliance be accompanied by a careful assessment of whether the reasoning of the authority invoked is apposite and convincing.
14. In the present case, this means that one should not rely on the *TC Energy* tribunal’s solution because, on the one hand, the *TC Energy* case is not part of such “a series of consistent cases”, and, on the other hand, because the *TC Energy* award does not carry persuasive force, *inter alia*, although not exclusively, because the *TC Energy* case was not decided unanimously. The Dissenting Opinion authored by Henri C. Alvarez, KC, which Mexico rarely acknowledges in its pleadings and which the majority does not refer to in its analysis,²⁴ exposed significant methodological flaws in the majority’s reasoning. In my opinion, the existence of so pointed a dissent deprives the majority opinion of the weight Mexico seeks to place on it. The dissent criticized, in particular, the refusal by the majority to consider relevant negotiating history and internal documents, despite the express

²¹ See Majority Opinion, para. 213.

²² Majority Opinion, para. 104.

²³ Ibid.

²⁴ The award only refers to the Dissenting Opinion of Dr. Alvarez in the summary of Claimant’s arguments on why the *TC Energy* award should be disregarded; see Majority Opinion, para. 172.

allowance in Article 32 VCLT for recourse to such materials to confirm the ordinary meaning or resolve ambiguity. By circumscribing its interpretative tools, the *TC Energy* tribunal risked distorting rather than clarifying the meaning of Annex 14-C, thus diminishing the persuasiveness of that majority’s entire opinion.

15. This being noted, as mentioned earlier,²⁵ I agree with the majority of this Tribunal and that of the *TC Energy* case regarding the approach to be taken in interpreting Annex 14-C: one should apply foremost, although certainly not exclusively, the “ordinary meaning” rule,²⁶ which the parties to the current proceedings also identified as the starting point of their submissions,²⁷ although with different nuances, as did their experts.²⁸ However, I cannot subscribe to the result Mexico and its expert – or the majority of the Tribunal, for that matter – reach. In fact, in my view, the ordinary meaning of the text of Annex 14-C as well as its context and purpose lead to the opposite result.
16. The ordinary meaning of Annex 14-C cannot be one that adds a condition to those expressly provided in the text where there is no textual support whatsoever for adding such condition. This is because, as stated by Oliver Dörr, a commentator relied on by Mexico’s expert, Christian J. Tams,²⁹ “[t]he general rule of treaty interpretation contained in Art 31 para 1 is based on the textual approach, ie on the view that the text must be presumed to be the authentic expression of the intentions of the parties. Consequently, the starting point of every interpretation is the elucidation of the meaning of the text, rather than of any external will of the parties.”³⁰

²⁵ See *supra* para. 9.

²⁶ See O. Dörr, *Article 31*, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer, 2019), p. 541 (para. 40), stating that “[t]he first element of the general rule of interpretation [under Article 31 VCLT] requires giving an ordinary meaning to the “terms of the treaty”. (footnote omitted)

²⁷ See, e.g., Respondent’s Memorial on Jurisdiction-ENG, pp. 14-15 (para. 42); Respondent’s Post-Hearing Brief-ENG, p. 1 (para. 2); Transcript Hearing Day 1, p. 34, lines 19-20; Claimant’s Memorial on the Merits-ENG, p. 196 (para. 388); Claimant’s Counter-Memorial on Jurisdiction, p. 21 (para. 53); Transcript Hearing Day 1, p. 117, lines 15-18.

²⁸ See Legal Opinion by Christoph Schreuer, pp. 8 et seq. (paras. 25 et seq.), *sub* “D. The Ordinary Meaning of Annex 14-C of USMCA”; Expert Report by Christian J. Tams, p. 6 (para. 15).

²⁹ See, e.g., Expert Report by Christian J. Tams, p. 37 (para. 114), citing to O. Dörr, *Article 32*, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer, 2019) p. 618, para. 3, CT-0061-ENG.

³⁰ O. Dörr, *Article 31*, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer, 2019), p. 541 (para. 38).

17. In my opinion, however, the reading of Annex 14-C by the majority of this Tribunal and that of the *TC Energy* tribunal leads to the addition of a condition for jurisdiction that has no basis in the text and, thus, is not in line with the general rule just referred to. The majority of the *TC Energy* tribunal sought to defend itself against the charge of adding words by claiming that its “interpretation does not amount to adding language to Annex 14-C; it is rather the result of an interpretive exercise of the Annex”.³¹ And Mexico did the same when stating that its “interpretation does not impose a non-textual temporal requirement”.³²
18. But this is unpersuasive, as that interpretation does add a temporal requirement. Adding a requirement that has no basis in the text of the Annex 14-C cannot be considered an interpretation based on the text of Annex 14-C or that text’s ordinary meaning. In my opinion, an interpretation that creates a hitherto unknown requirement with no basis in the text does not conform with the relevant principles of treaty interpretation. Rather, in my opinion, it amounts to a departure from the text under the guise of interpretation, which I cannot subscribe to, as this would mean to legislate rather than to interpret. In my opinion, it is not the task of a tribunal, including this Tribunal, to revise the text, improve upon it, or read into it conditions not found there. To use the words of one commentator, the applicable “principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”³³
19. Case law clearly—and rather unsurprisingly—supports this view. In *Saluka v Czech Republic*, the tribunal held that “it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.”³⁴ The *Yukos v Russian Federation* tribunal similarly held that “[t]he principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements—which the drafters did not include—into a

³¹ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, p. 44 (para. 177), RL-0040-ENG.

³² Respondent’s Post-Hearing Brief-ENG, p. 10 (para. 25).

³³ Chang-fa Lo, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties A New Round of Codification* (Springer, 2017), p. 158, quoting Appellate Body Report, India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, para. 45, WTO Doc. WT/DS50/AB/R (adopted 16 Jan 1998).

³⁴ *Saluka Investments BV (Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para 241, CL-0073-ENG.

treaty, no matter how auspicious or appropriate they may appear.”³⁵ As stated by Professor Schreuer, who in his Legal Opinion also cites to the two decisions just referred to, “[p]erhaps the clearest statement came from the Tribunal in *Gran Colombia Gold v Colombia*. After stating that it was relevant to consider not only what treaty provisions say, but equally what they do not say, the Tribunal continued: ‘In these circumstances, the Tribunal would have great difficulty concluding that the FTA implicitly contains an additional (temporal) limitation on the Contracting Parties’ exercise of the right they expressly agreed to retain in Article 814, but without stating any such limitation. States are free to grant reciprocal protections to investors through the mechanism of investment treaties, but they are also free to condition such grants on particular qualifying principles. ... In general, it is not for arbitral tribunals, in interpreting the text of investment treaties, to read into such texts additional requirements (either on States or on investors) that the State Parties have not chosen to impose’.”³⁶

20. I therefore cannot but share the view expressed by Professor Schreuer in his Legal Opinion that “[t]he attempt to insert additional requirements for jurisdiction, not contained in treaties providing for consent to arbitration [. . .] is contrary to the accepted canon of treaty interpretation.”³⁷ As stated by one commentator, this is because “the goal of interpretation is not the reconstruction of the subjective intentions of the parties if these intentions are not reflected in the text. The goal is rather the determination of the ‘objective’ meaning of the text.”³⁸ “Based on such an understanding, the wording of the treaty is at the same time the starting point and the outer boundary of interpretation.”³⁹

21. I do of course recognize that, as stated by Richard Gardiner, whose commentary Respondent’s expert, Professor Tams, also relied on,⁴⁰ “while it is the text of the treaty that

³⁵ *Yukos Universal Limited (Isla de Man) v The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 415, CS-0013-ENG.

³⁶ Legal Opinion by Christoph Schreuer, p. 10 (para. 37), citing *Gran Colombia Gold Corp. v Republic of Colombia*, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 127, CS-0015-ENG. (footnotes omitted)

³⁷ Legal Opinion by Christoph Schreuer, p. 8 (para. 32).

³⁸ A. Metzger, *Interpretation of IP Treaties in Accordance with Articles 31–33 VCLT. A Case Study on the Practice of the European Patent Office*, in H. Grosse Ruse-Khan and A. Metzger (eds.), *Intellectual Property Ordering beyond Borders*, Cambridge University Press, 2022, 157 (160).

³⁹ *Ibid.*

⁴⁰ See Expert Report by Christian J. Tams, p. 6 (para. 15).

must be taken as the authentic expression of the agreement of the parties, the treaty is to be read as a whole and respect paid to its object and purpose, rather than simply taking words that are the subject of controversy and digging out their meaning solely from dictionary, grammar, and syntax.”⁴¹ Still, as stated by Dörr, “[t]he consideration of object and purpose finds its limits in the ordinary meaning of the text of the treaty. It may only be used to bring one of the possible ordinary meanings of the terms to prevail and cannot establish a reading that clearly cannot be expressed with the words used in the text.”⁴² As stated by the Iran-US Claims Tribunal, a “treaty’s object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.”⁴³ This means, that “[t]he object and purpose, therefore, cannot be used by the interpreter to disregard the ordinary meaning in order to confer a special meaning on a term of the treaty. It is not a gateway to teleological constructions that go beyond the text of the treaty.”⁴⁴ Ultimately, the “object and purpose” should be understood as elements which help to confirm or clarify the meaning rather than to override the ordinary meaning, which, in my opinion, is what Mexico wants this Tribunal to do. One has to be mindful of Ian Sinclair’s warning of the “risk that the placing of undue emphasis on the ‘object and purpose’ of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties.”⁴⁵

22. In the present arbitration, however, there is no need to address whether a reading of Annex 14-C in light of the object and purpose may override the ordinary meaning of Annex 14-C, because the results of the textual interpretation I am favoring are in line with the object and purpose of the USMCA and its transitional regime, as well as the context in which Annex 14-C is embedded.

⁴¹ R. Gardiner, *Treaty Interpretation* (2nd edn., Oxford University Press, 2015), p. 165.

⁴² O. Dörr, *Article 31*, in O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer, 2019), p. 547 (para. 58).

⁴³ Iran-United States Claims Tribunal United States, *Federal Reserve Bank of New York v Iran, Bank Markazi Case A 28* (2000) 36 *Iran-US Claims Tribunal Reports* 5, para 58.

⁴⁴ R. Castro de Figueiredo, *The ICSID Convention and the VCLT: Interpreting the Term “Investment”*, in E. Shirlow and K. Nasir Gore (eds.), *The Vienna Convention on the Law of Treaties in Investor-State Disputes. History, Evolution and Future* (Kluwer, 2022), p. 86-87.

⁴⁵ I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press, 1984), p. 130.

23. As mentioned *supra*, I am aware that the position I am taking in this Dissenting Opinion directly challenges the restrictive interpretation favored by the majority of this Tribunal and that of the *TC Energy* tribunal, arguing instead that comprehensive temporal post-NAFTA termination protection serves the USMCA’s fundamental purpose of ensuring regulatory predictability during treaty succession. Still, in light of a systematic examination of the treaty text, contextual integration, and object and purpose analysis, I have to hold that the expanded temporal interpretation I am favoring is more in line with the object and purpose of the USMCA, also because it better fulfills the negotiating parties’ expressed commitment to “smooth transition”⁴⁶ between the NAFTA and the USMCA regimes.⁴⁷
24. Mexico’s claim that the context of Annex 14-C and the object and purpose of the USMCA—as well as subsequent practice—confirm its reading that Annex 14-C did not amount to a preservation of NAFTA’s substantive obligations, because Annex 14-C serves solely a procedural function, allowing investors with “legacy investments” to submit arbitration claims under NAFTA’s Chapter 11 dispute resolution mechanism, but only with respect to breaches that had occurred prior to NAFTA’s termination, is not convincing for various reasons.
25. According to Claimant, the text of Annex 14-C requires the following four conditions to be met for a tribunal to have jurisdiction under Annex 14-C. “(i) First, the claim must be one that pertains to a legacy investment. (ii) Second, the claim must allege a State measure giving rise to a Treaty violation. (iii) Third, the claim must be made under the rules and procedures articulated in Section B NAFTA Chapter 11. (iv) Fourth and finally, the claim must be brought within three years of NAFTA’s termination, i.e., by July 1, 2023.”⁴⁸
26. These prerequisites for the Tribunal to be able to assert jurisdiction over the claim are not – and, in light of the text of Annex 14-C, cannot be – in dispute.⁴⁹ But these are the only

⁴⁶ See Article 34(1)(1) USMCA: “The Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement”.

⁴⁷ See also *infra*, para. 38.

⁴⁸ Claimant’s Counter-Memorial on Jurisdiction, p. 7 (para. 6).

⁴⁹ See also Legal Opinion by Christoph Schreuer, p. 8 (para. 30): “Based on all the information available to me, the claim in the present case meets all these requirements. The Claimant’s investment was made during the period between NAFTA’s entry into force and its termination. The Claimant alleges a violation of Section A of Chapter 11 of NAFTA. The claim was brought under Section B of NAFTA’s Chapter 11. Claimant filed its Request for Arbitration with ICSID on November 22, 2021, i.e., within three years of NAFTA’s termination.”

conditions, as also stated by Dr. Alvarez in his Dissenting Opinion in the *TC Energy* case, which I find more consistent and convincing than the majority’s opinion in that case, which I do not find persuasive for the reasons identified above⁵⁰ and one to be referred to later.⁵¹ According to Dr. Alvarez, “the plain or ordinary language of Annex 14-C to the USMCA offers consent by the State Parties to arbitrate all legacy investment claims, subject *only* to four conditions. These are that: a) the claim must be with respect to a legacy investment; b) the claim alleges the breach of an obligation under NAFTA Chapter 11, section A; c) the claim must be made under the procedure set out in NAFTA, Chapter 11 section B; d) the claim must be brought within three years of NAFTA’s termination.”⁵²

27. In the arbitration at hand, it is not in dispute that the aforementioned four conditions, the *only* conditions expressly identified in Annex 14-C,⁵³ are met. Mexico did not contest this. As regards condition (i), Mexico did not dispute that the claim brought by Claimant related to a “legacy investment”. In other words, Mexico did not assert, as it could not, that the investment at issue in these proceedings was not a “legacy investment” as expressly defined in Annex 14-C, paragraph 6(a). According to this provision, “‘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.” But Mexico tried to downplay the fact that paragraph 6(a)’s express definition of “legacy investment” focuses exclusively on investment establishment and existence dates and that the asset-based temporal qualification contained in paragraph 6(a) creates protection linked to investment characteristics rather than the timing of State action, thus protecting qualifying assets against all government measures during the transition period, regardless of when such measures are adopted. In other words, the temporal qualifier in the definition of a “legacy investment” contained in Annex 14-C, paragraph 6(a) is carefully limited to the date of acquisition and existence of the investment—not the timing of the State’s conduct affecting

⁵⁰ See *supra* para. 14.

⁵¹ See *infra* para. 91.

⁵² *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez, K.C., 12 July 2024, p. 2 (para. 3), RL-0040-ENG. (emphasis added)

⁵³ See also Legal Opinion by Christoph Schreuer, p. 8 (para. 30).

it. As stated by Dr. Alvarez in his Dissenting Opinion mentioned above, which I cannot but endorse, “Annex 14-C 1 provides consent with respect to legacy investments without any temporal limitation or requirement that the alleged breach of an obligation of Chapter 11, Section A must occur before the termination of NAFTA. Rather, in its plain meaning 14-C 1 relates to all legacy investments and all claims alleging a breach of an obligation under NAFTA, Chapter 11, section A. Annex 14-C refers to legacy investments, not legacy claims, measures or disputes.”⁵⁴

28. As to condition (iii), Mexico did not dispute that Claimant brought its claim under Section B procedures and that it was allowed to do so. This is evident from Mexico’s own acknowledgement that “[i]t is clear from the plain language used in Annex 14-C that what was extended beyond the termination of the NAFTA was the *consent* of the USMCA Parties to arbitrate, under the dispute settlement mechanism established in Section B.”⁵⁵ This shows that Mexico did not take issue with the procedural route taken by Claimant, as it could not, because, as the majority of this Tribunal states, “[i]t is common ground that Annex 14-C prolongs the consent to arbitration contained in Section B of Chapter 11 of NAFTA by three years following NAFTA’s termination.”⁵⁶
29. Regarding condition (iv), Mexico did not allege that the claim had been filed outside the 3-year time limit. Rather, Mexico’s jurisdictional challenge centered on the timing of the alleged breach (i.e. in 2022) rather than the filing date.
30. Concerning condition (ii), the measures that Claimant alleged to have given rise to a violation of obligations under NAFTA did actually occur. Mexico did not dispute that Claimant based its claims on certain measures (taken by SEDATU) that occurred within “three years after the termination of NAFTA 1994”. Indeed, Mexico acknowledged that “there seems to be no disagreement between the parties that the measures at issue in this arbitration were adopted approximately *two years* after the termination of the NAFTA.”⁵⁷

⁵⁴ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez, K.C., 12 July 2024, p. 2 (para. 3), RL-0040-ENG.

⁵⁵ Respondent’s Memorial on Jurisdiction-ENG, p. 3 (para. 8). (emphasis in original)

⁵⁶ Majority Opinion, para. 178.

⁵⁷ Respondent’s Memorial on Jurisdiction-ENG, p. 10 (para. 27) (emphasis in original).

31. Mexico's objection centered on the fact that "[t]he measures that the Claimant identifies as breaches of the Respondent's NAFTA obligations all occurred after the Date of Termination".⁵⁸ Mexico argued that this precluded the Tribunal's *ratione temporis* jurisdiction,⁵⁹ because Annex 14-C did not grant jurisdiction over claims concerning post-NAFTA measures affecting legacy investments. In Mexico's words, "[t]he Respondent has not consented to arbitrate disputes under Annex 14-C that are based on alleged violations of substantive Section A obligations arising from measures that were adopted after the termination of the NAFTA."⁶⁰ According to Mexico, "the breaches [. . .] of the NAFTA occurred as a result of certain actions taken by the Respondent approximately 2 years *after* the NAFTA was terminated, at a time when those provisions were no longer in force and therefore were no longer binding on the NAFTA Parties."⁶¹ Accordingly, "the Claimant cannot allege a 'breach of an obligation' under Section A in relation to acts or facts that took place after the termination of the NAFTA",⁶² because "Annex 14-C [. . .] cannot be interpreted to extend or resurrect NAFTA's substantive protections in relation to post-termination measures."⁶³ In fact, according to Mexico, an ordinary meaning interpretation "limits interpretation of Annex 14-C to those Claims arising from violations that took place when NAFTA was in force, that is to prior to its termination 1st of July 2020. Annex 14-C does not make it possible to have claims based on any measure that took place after the end of NAFTA."⁶⁴ "In other words, it confirms that the claims are only allowed where the breaches have occurred prior to the termination of the NAFTA."⁶⁵
32. I must disagree with Mexico's position, which the majority of the Tribunal accepts:⁶⁶ as previously explained, the text of Annex 14-C, which must constitute the basis for any interpretation under Article 31 VCLT,⁶⁷ does not allow for this additional condition to be

⁵⁸ Respondent's Memorial on Jurisdiction-ENG, p. 9 (para. 26).

⁵⁹ Respondent's Memorial on Jurisdiction-ENG, p. 4 (para. 10).

⁶⁰ Respondent's Memorial on Jurisdiction-ENG, p. 4 (para. 10).

⁶¹ Respondent's Memorial on Jurisdiction-ENG, p. 3 (para. 7). (emphasis in original)

⁶² Respondent's Memorial on Jurisdiction-ENG, p. 3 (para. 9).

⁶³ Respondent's Memorial on Jurisdiction-ENG, p. 45 (para. 131).

⁶⁴ Hearing Transcript, Day 1, p. 52, lines 9-15.

⁶⁵ Hearing Transcript, Day 1, p. 68, lines 19-21.

⁶⁶ See, e.g., Majority Opinion, paras. 192, 200, and 201.

⁶⁷ See O. Dörr, *Article 31*, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer, 2019), p. 522 (para. 3).

read into Annex 14-C. This is because, as stated for example by Dörr, “interpretation is always directed at bringing to bear the intention of the parties, [which] it can only do [. . .] to the extent that that intention has found adequate expression in the text of the treaty.”⁶⁸ No such “adequate expression in the text” of the additional condition asserted by Mexico can be found in Annex 14-C, nor has Mexico demonstrated how its restrictive interpretation aligns with Annex 14-C’s context and the object and purpose of the USMCA and its transitional mechanism, or that it is confirmed by subsequent practice.

33. Annex 14-C, paragraph 1 establishes that “[e]ach 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”. This provision contains no temporal limitation regarding when the alleged breaches must have occurred, creating what may be characterized as “temporal neutrality”. This textual construction contrasts sharply with the precise temporal restrictions on claim submission deadlines expressly provided in paragraph 3, demonstrating the drafters’ capacity for explicit temporal limitations when they intended one to apply. The absence of a temporal restriction on covered State measures suggests intentional design rather than drafting oversight.
34. This reading of Annex 14-C is consistent with the definition of “legacy investment” which, as noted above,⁶⁹ focuses exclusively on investment establishment and existence dates. Annex 14-C, paragraph 6(a) defines “legacy investment” as “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.” By structuring the temporal qualification in this manner, protection depends, as stated above already, on the characteristics of the investment itself rather than on the timing of State intervention.
35. Accepting Mexico’s restrictive reading leads to unreasonable consequences: it creates an incentive for States to avoid liability by deferring harmful measures until after NAFTA’s termination, precisely when investors would need the promised transitional protection most. This concern is particularly acute because transition periods typically involve

⁶⁸ Ibid.

⁶⁹ See *supra* para. 27.

regulatory uncertainty spikes during which governments may implement previously restrained policy changes to the detriment of rights holders, including those holding legacy investments as defined in Annex 14-C, paragraph 6(a). Such result is not consistent with a good faith interpretation of Annex 14-C and conflicts both with the object and purpose of the USMCA and its transitional regime.

III. CONTEXT, OBJECT AND PURPOSE

36. Having addressed the ordinary meaning of Annex 14-C in the preceding section, I now turn to examine its context and the object and purpose of the USMCA and its transitional regime, as mandated by Article 31(1) VCLT.
37. Article 31(2) of the VCLT specifies that “the context for the purpose of the interpretation of a treaty shall comprise [. . .] the text, including its preamble and annexes.” Annexes, and even footnotes within annexes, are thus integral to interpretation, which is relevant for the purposes of this arbitration. For the interpretation of the USMCA, this contextual framework necessarily also encompasses the Agreement’s sophisticated transition architecture, including Article 34.1 and the commitments to predictability contained in the Preamble, which also help to identify the object and purpose of the USMCA. It also includes the structural relationship between the investment annexes.
38. Article 34.1(1) states that “the parties recognize the importance of a smooth transition from NAFTA 1994 to this agreement.” This provision establishes the USMCA’s commitment to transition management which necessarily includes the post-termination period when regulatory uncertainty is at its peak. Interpreting Annex 14-C in light of this context requires reading it to extend NAFTA substantive protections to post-termination measures implemented by States. Any narrower reading would create artificial discontinuities that undermine the objectives of the transition management regime and incentivize States to avoid accountability by postponing harmful measures until after NAFTA’s termination, precisely when investors most require the transitional regime’s protections, thereby fostering unpredictability.
39. This latter point is important because the USMCA itself, in its Preamble, commits the Contracting Parties to establishing a “predictable legal and commercial framework for business planning that supports further expansion of trade and investment”. In my opinion,

this predictability commitment requires protection mechanisms that extend to the transition period during which legacy investments as unambiguously defined in Annex 14-C, paragraph 6(a), are subject to increased regulatory uncertainty. The USMCA's predictability commitment would lose coherence if legacy investments were to become vulnerable to State measures during the sensitive post-termination period, when adverse State actions could occur without any recourse for the investor, given the sensible differences between NAFTA and USMCA substantive protections expressly referred to by Mexico⁷⁰ as well as the majority of the Tribunal.⁷¹ In light of this, and unlike the majority of the Tribunal, I cannot but fully endorse the view taken by Claimant that "[a]n implied temporal restriction that was not previously publicized would not [. . .] establish or promote a clear, transparent, and predictable legal and commercial frameworks for the further expansion of investment, and the rule of law."⁷²

40. These goals cannot be served by Mexico's restrictive interpretation of Annex 14-C, as it allows States to avoid liability for measures taken in relation to legacy investments after the termination of NAFTA against which the USMCA offers no protection equivalent to those available under NAFTA. I fail to see how this restrictive reading is conducive to "strengthen[ing] anew the longstanding friendship between [the Contracting Parties] and their peoples, and the strong economic cooperation that has developed through trade and investment; [or] further strengthen[ing] their close economic relationship",⁷³ goals which the USMCA's Preamble expressly refers to.
41. This, too, shows why the interpretation that legacy investments are protected also from State measures taken after NAFTA's termination is to be preferred, provided, of course, that the *only* two temporal requirements established in Annex 14-C are met: "[i]n addition to the existence of the investment at the date of the entry into force of the USMCA, the only other temporal limitation is that consent to the submission of a claim to arbitration

⁷⁰ See, e.g., Respondent's Memorial on Jurisdiction-ENG, p. 48 (para. 140) ("While NAFTA offered a broader range of protections to investors and their investments, the new USMCA regime is narrower, both substantively and procedurally").

⁷¹ See Majority Opinion, para. 198.

⁷² Claimant's Counter-Memorial on Jurisdiction, p. 49 (para. 131).

⁷³ Preamble of the USMCA.

with respect to a legacy investment expires on 1 July 2023.”⁷⁴ No further temporal requirement needs to be met for the Tribunal to be able to assert jurisdiction.

42. It is worth noting that this interpretation is not in contrast with what Professor Tams, Mexico’s expert, considers to be “the true object and purpose of the USMCA, which precisely was not to expand *investor rights* beyond those granted under NAFTA.”⁷⁵ This is because the interpretation favored here applies, as clearly required by the text of Annex 14-C, only to investments “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 [the USMCA]”, and claims “alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994”. Therefore, there is no “expansion” of *investor rights* under the interpretation of Annex 14-C which I am advancing here.

IV. MEXICO’S MISPLACED RELIANCE ON VCLT ARTICLE 70

43. To counter Claimant’s argument that Annex 14-C also applies to State measures adopted after NAFTA’s termination, Mexico argued, *inter alia*, that “[t]he Claimant alleges that breaches of Articles 1110, 1102, and 1105 of the NAFTA occurred as a result of certain actions taken by the Respondent approximately 2 years after the NAFTA was terminated, at a time when those provisions were no longer in force and therefore were no longer binding on the NAFTA Parties.”⁷⁶ According to Mexico (and its expert),⁷⁷ for a measure to amount to a breach of NAFTA obligations at all the impugned measure must be “capable of constituting such a breach”⁷⁸ and, therefore, must have taken “place while NAFTA was still in force”.⁷⁹ Relying on Article 70(1)(a) VCLT, which in its relevant part establishes that the termination of a treaty “releases the parties from any obligation further to perform

⁷⁴ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez, K.C., 12 July 2024, p. 2 (para. 5), RL-0040-ENG.

⁷⁵ Expert Report by Christian J. Tams, p. 6 (para. 15) (emphasis added).

⁷⁶ Respondent’s Memorial on Jurisdiction-ENG, p. 3 (para. 7) (emphasis omitted).

⁷⁷ See, by way of example, Expert Report by Christian J. Tams, p. 8 (para. 40).

⁷⁸ Respondent’s Memorial on Jurisdiction-ENG, p. 19 (para. 55); Expert Report by Christian J. Tams, p. 8 (para. 40).

⁷⁹ Respondent’s Memorial on Jurisdiction-ENG, p. 19 (para. 55).

the treaty”, Mexico asserted “that a claim [such as the ones brought by Claimant] cannot rest on obligations that [. . .] are no longer in force.”⁸⁰

44. Mexico’s position, which the majority of the Tribunal follows,⁸¹ rests on a syllogism that is correct in the abstract but inapposite here. While it is certainly correct that, as a general rule, termination of a treaty releases the Contracting Parties from further performance of treaty obligations as per Article 70(1)(a) VCLT,⁸² this rule is just that, a general rule, not an absolute one; it is a “default rule”⁸³, to use the very words of Professor Tams, Mexico’s expert. It is a default rule which, as per the chapeau of Article 70(1) VCLT, is subject to the treaty itself or the Contracting Parties providing otherwise. “Therefore, it is by no means axiomatic that Section A of Chapter 11 of NAFTA cannot be applied after NAFTA’s termination on July 1, 2020.”⁸⁴
45. Annex 14-C is a clause reflecting that the Contracting Parties provided otherwise. Far from contradicting Article 70(1)(a) VCLT, which is basically Mexico’s argument, the Annex is an implementation of it, spelling out the Parties’ decision to preserve a subset of NAFTA obligations for a limited time. It shows an agreement by the NAFTA and USMCA Contracting Parties to preserve not only NAFTA’s procedural mechanism, which, as noted above,⁸⁵ is uncontested between the Parties,⁸⁶ but also NAFTA’s substantive obligations for a specific class of investments for three years post-termination. And this is unsurprising. In fact, as pointed out by Professor Schreuer, “[i]t is not uncommon for treaties to include provisions stipulating that predecessor treaties shall continue to apply to certain situations. In particular, BITs that replace earlier BITs between the same parties often provide that although the later BIT terminates and replaces the earlier one, certain provisions of the old BIT shall continue to apply to certain claims. The rationale for such provisions is to create continuity of protection for investors”,⁸⁷ which is also the rationale of the USMCA’s transitional regime.

⁸⁰ Respondent’s Memorial on Jurisdiction-ENG, p. 12 (para. 34); see also Respondent’s Post-Hearing Brief-ENG, p. 9 (para. 23).

⁸¹ See Majority Opinion, para. 196.

⁸² Ibid.

⁸³ Expert Report by Christian J. Tams, p. 15 (para. 64).

⁸⁴ Legal Opinion by Christoph Schreuer, p. 15 (para. 59).

⁸⁵ See *supra* para. 6.

⁸⁶ See Majority Opinion, para. 178.

⁸⁷ Legal Opinion by Christoph Schreuer, p. 16 (para. 61). (footnotes omitted)

46. Still, Mexico contended, and the majority of the Tribunal accepts,⁸⁸ as did that of the *TC Energy* tribunal,⁸⁹ that Annex 14-C is purely procedural⁹⁰ and does not preserve substantive obligations,⁹¹ with the consequence that pursuant to Article 13 of the ILC Articles on State Responsibility “State responsibility [is precluded] unless a claimant party can identify a breach of an obligation that was binding on the respondent at the time of the alleged violation. This principle, firmly rooted in customary international law, underscores that a claim cannot rest on obligations that have yet to enter into force or that are no longer in force.”⁹² This is correct as a general principle but is non-responsive to the point at issue. Capacity to constitute a NAFTA breach depends on what law governs the alleged wrong; Annex 14-C answers that for legacy claims filed during the three-year transition period: Section A governs. It is, in my opinion, circular to say that Section A cannot govern because Section A does not govern.
47. I cannot agree with Mexico’s argument, endorsed by the majority of this Tribunal, which assumes that Section B’s application is extended but that of Section A is not. This approach lacks textual support and logical coherence. Furthermore, it deprives key provisions of their effect and is incompatible with “the principle of effectiveness (effet utile) [which] is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that ‘every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or inutile).’”⁹³
48. This is important, because Section B, the temporal extension of which through Annex 14-C is a given and uncontested by the Parties,⁹⁴ does not stand alone as a procedural shell, as Mexico seems to suggest. It has effects on the governing law, because it contains a

⁸⁸ See, e.g., Majority Opinion, para. 186.

⁸⁹ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, p. 36 (para. 151), RL-0040-ENG.

⁹⁰ See, among many, Respondent’s Memorial on Jurisdiction-ENG, p. 23 (para. 67) (referring to “the limited role of Annex 14-C as a procedural mechanism”).

⁹¹ See, among many, Respondent’s Memorial on Jurisdiction-ENG, p. 9 (para. 25).

⁹² Respondent’s Memorial on Jurisdiction-ENG, p. 12 (para. 34).

⁹³ *Renco Group Inc. v. Republic of Peru* (UNCITRAL), Decision as to the Scope of the Respondent Preliminary Objections Under Article 10.20.4, 18 December 2014, at ¶ 177, CS-0056-ENG; see also *Eureko B.V. v. Republic of Poland*, ad hoc, Partial Award of 19 August 2005, at ¶ 248 (“It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. [T]reaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective”).

⁹⁴ See Majority Opinion, para. 178.

governing law clause, Article 1131(1), which mandates that tribunals “decide the issues in dispute in accordance with this Agreement and applicable rules of international law.” “This Agreement” refers to NAFTA and its substantive obligations contained in Section A, as stated by several tribunals.⁹⁵ As a consequence, to use the words of the *Metalclad v. Mexico* award, which Mexico cites in relation to a different issue⁹⁶ and not the one at hand, despite its relevance and despite the fact that the paragraph cited by Mexico is the same one containing the statement relevant for the present purpose: “[a] Tribunal established pursuant to NAFTA Chapter Eleven, Section B must decide the issues in dispute in accordance with NAFTA and applicable rules of international law. (NAFTA Article 1131(1)).”⁹⁷

49. This, however, means that the procedural survival of Section B necessarily entails the application of the substantive standards in Section A. Severing Section A from Section B would not only contradict the Parties’ deliberate reference to Section B in Annex 14-C, but would also deprive Article 1131(1) of meaning and run counter to the principle of effectiveness.
50. This is also the view taken by Professor Schreuer, which I share: “NAFTA’s clause on governing law is incorporated into Annex 14-C. It is beyond doubt that Annex 14-C mandates the application of NAFTA’s substantive standards as spelled out in Section A (‘this Agreement’) to alleged violations with respect to legacy investments. By virtue of the reference in Annex 14-C to Section B of NAFTA’s Chapter 11, and its Article 1131, the substantive protections of NAFTA and applicable rules of international law are the governing law in legacy investment arbitrations independently of NAFTA’s termination.”⁹⁸
51. The argument advanced by Professor Tams that “Annex 14-C generally, and paragraph 1 more specifically, does not contain the language most commonly found in applicable law

⁹⁵ See, e.g., *Pope & Talbot Inc. v. Government of Canada*, Award in Respect of Damages, 31 May 2002, at ¶ 13 (“the Tribunal is required by Article 1131 to decide the issue in dispute in accordance with the NAFTA Agreement and applicable rules of international law”); *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Merits), 13 November 2000, at ¶ 304 (“Article 1131 provides that Chapter 11 tribunals shall decide . . . in accordance with [the NAFTA] and applicable international law”).

⁹⁶ See Respondent’s Memorial on Jurisdiction-ENG, p. 15 (para. 43).

⁹⁷ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at ¶ 70, RL-0030-SPA.

⁹⁸ Second Legal Opinion by Christoph Schreuer, p. 6 (para. 19).

clauses in investment treaties”,⁹⁹ and therefore “does not support Claimant’s contention that an applicable law clause can be found therein”,¹⁰⁰ is very unpersuasive. Simply because Annex 14-C, paragraph 1 is not framed using “the language most commonly found” in investment treaties does not mean that it is not a clause that has effects on the governing law. Professor Tams wants to let (a very specific) form prevail over substance. This view cannot dissuade me that Annex 14-C extends NAFTA substantive obligations for three years after NAFTA’s termination.

V. FOOTNOTES 20 AND 21 AND THEIR RELEVANCE

52. Footnote 20 confirms, rather than contradicts, as Mexico,¹⁰¹ the majority of this Tribunal¹⁰² and that of the *TC Energy* case find,¹⁰³ the above conclusion. Its express text states that, “[f]or greater certainty, the relevant provisions in [. . .] Chapter 11 (Section A) [. . .] of NAFTA 1994 apply with respect to such a claim.” This cannot be dismissed as an indication that Footnote 20 “merely confirms the uncontroversial proposition that Section A is applicable to claims arising out of the measures that predate the termination of NAFTA.”¹⁰⁴ If, as Mexico insists, the text of Annex 14-C already foreclosed any post-termination application of Section A, there would be no need to underscore Section A’s applicability in a footnote. Footnote 20 deliberately confirms the result reached through the Contracting Parties’ agreement as recorded in Annex 14-C that extends the substantive obligations of Section A of NAFTA Chapter 11 for three years. To hold otherwise renders Footnote 20 superfluous, which violates the principle of effectiveness. The interpretation I favor preserves the coherence of Annex 14-C: Section B provides the arbitral mechanism, Article 1131(1) identifies the substantive governing law, and Footnote 20 dispels any doubt by expressly confirming the applicability of Section A. Together, these provisions create

⁹⁹ Expert Report by Christian J. Tams, p. 52 (para. 154).

¹⁰⁰ Ibid.

¹⁰¹ See Respondent’s Memorial on Jurisdiction-ENG, p. 15 (para. 43).

¹⁰² See Majority Opinion, para. 182.

¹⁰³ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, pp. 39-40 (paras. 161-165), RL-0040-ENG.

¹⁰⁴ Majority Opinion, para. 182.

an integrated regime for claims relating to legacy investments with the only two temporal limitations mentioned above.¹⁰⁵

53. Even if, *arguendo*, one were to agree with Mexico's contention, the view of the majority of this Tribunal and that of the *TC Energy* tribunal that Annex 14-C is merely procedural in character and that NAFTA's substantive obligations are not extended despite the existence of Article 1131(1), NAFTA's substantive obligations would still have to be considered applicable during the three-year transition period due to Footnote 20. The text of Footnote 20 contains various features that support the extension of NAFTA's substantive obligations, independently of Article 1131(1).
54. The text of Footnote 20 states: "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."
55. The text's relevant features include the imperative "apply", the target "such a claim", and the breadth of cross-referenced NAFTA chapters, which only make sense if they continue to govern claims relating to legacy investments. The word "apply" is normative, not descriptive; it directs tribunals how to decide Annex 14-C disputes. The term "such a claim" links Footnote 20's command to the claims defined in paragraph 1 of Annex 14-C, i.e., legacy investment claims alleging breach of Section A, submitted under Section B. The temporal contour of such claims is laid down in paragraph 3, which fixes a three-year filing window after termination. Read together, paragraph 1 (defining covered claims) and paragraph 3 (establishing the filing deadline) identify the universe of "such . . . claim[s]" to which Footnote 20 says the listed NAFTA provisions "apply".
56. Mexico and the majority of this Tribunal reduce Footnote 20 to a restatement about pre-termination measures. The majority puts it this way: "Footnote 20 [. . .] merely confirms the uncontroversial proposition that Section A is applicable to claims arising out of the

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See *supra* para. 41.

measures that predate the termination of NAFTA.”¹⁰⁶ In my opinion, this reading cannot be reconciled with Footnote’s 20 own scope and structure.

57. Footnote 20 is not limited to Section A; it enumerates definitions, financial services, competition policy, monopolies and state enterprises, intellectual property, exceptions, and Annexes I-VII—a comprehensive framework that is relevant for post-termination measures. If legacy investment claims were limited to those relating to pre-termination measures, Footnote 20 would be superfluous. The principle of effectiveness disfavors an interpretation that strips an adopted clause of effect. Thus, even assuming, *arguendo*, that Article 1131(1) does not play the role attributed to it earlier, Footnote 20 itself supplies the missing bridge by stating that the chapters listed above “apply with respect to such a claim”.
58. Furthermore, the term “such a claim” is a term of reference to Annex 14-C, paragraph 1-claims “alleging breach of an obligation under [. . .] Section A of Chapter 11 (Investment) of NAFTA 1994”, submitted “in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994”, claims that can be filed during the three-year period after NAFTA’s termination fixed by paragraph 3. There is no textual qualifier in Footnote 20 limiting the measures giving rise to such claims to measures predating NAFTA’s termination. The drafters knew how to write temporal limitations and place them expressly where intended.
59. The context confirms this reading. Footnote 21 carves out claims eligible under Annex 14-E: “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).” This carve-out presupposes a potential overlap between Annex 14-C legacy investment claims and post-USMCA-entry-into-force Annex 14-E claims. This overlap can only exist if Annex 14-C and, therefore, Footnote 20 reach post-NAFTA-termination measures. This is because USMCA Chapter 14 obligations, to which Annex 14-E relates, only apply to measures taken after the entry into force of the USMCA. This is because Chapter 14 applies prospectively only, absent Annex 14-C carve-outs. Article 14(2)(3) states that “this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this

¹⁰⁶ Majority Opinion, para. 182.

Agreement.” Because Annex 14-E claims are brought under “this Chapter”,¹⁰⁷ the impugned State measures must arise after the USMCA’s entry into force. Therefore, Footnote 21 necessarily presumes that Annex 14-C covers also post-NAFTA-termination measures, meaning post-USMCA-entry-into-force measures (for the purpose of Annex 14-E claims), else there would be no need for a carve-out.

60. For the above reasons, even accepting, *quid non*, Mexico’s contention (and the view taken by the majority of this Tribunal and that of the *TC Energy* case) regarding Article 1131(1), Footnote 20 independently carries Section A forward for legacy investment claims within the Annex 14-C, paragraph 3-window. Any reading that denies Footnote 20 such effect would treat a negotiated text as decorative rather than normative, which runs counter the principle of effectiveness.
61. I therefore conclude that, by operation of Annex 14-C and Footnotes 20 and 21, the substantive protections of NAFTA Chapter 11, Section A, apply to legacy investment claims, including those arising from measures adopted after NAFTA’s termination but within the three-year transition period.

VI. DOCUMENTARY EVIDENCE AND SUBSEQUENT CONDUCT

62. The record supports the interpretation reached.
63. Mexico argued that “Claimant ha[d] the burden of establishing the Tribunal’s jurisdiction”¹⁰⁸ and that “the Claimant ha[d] failed to meet its burden.”¹⁰⁹ To corroborate its argument, Respondent refers to case law¹¹⁰ stating, *inter alia*,¹¹¹ that “[i]t is an accepted principle of international law that the claimant in an arbitration bears the legal burden of

¹⁰⁷ See Annex 14-E, paragraph 2(a)(i): “the claimant, on its own behalf, may submit to arbitration under Annex 14-D (Mexico-United States Investment Disputes) a claim: (i) that the respondent has breached any obligation *under this Chapter*”. (emphasis added)

¹⁰⁸ Respondent’s Memorial on Jurisdiction-ENG, p. 5 (para. 15).

¹⁰⁹ Ibid.

¹¹⁰ Respondent’s Memorial on Jurisdiction-ENG, p. 5 (para. 15)

¹¹¹ See *inter alia* *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC. v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award, 22 December 2017, at ¶ 148, RL-0021-ENG; *Sergei Viktorovich Pugachev v. Russia*, UNCITRAL Award on Jurisdiction, 18 June 2020, at ¶ 248, RL-0022-ENG; *ICS Inspection and Control Services Ltd. v. Argentina*, Case PCA No. 2010-09, Award on Jurisdiction, 10 February 2012, at ¶ 280, RL-0023-SPA.

showing that the tribunal has jurisdiction to consider its claim.”¹¹² Claimant, on the other hand, argued that “[w]ith respect to a jurisdictional dispute there is no legal principle allocating the burden of proof to any party. No single party is aprioristically saddled with the burden of proof for establishing the existence of consent. Instead, the ICJ and investment tribunals have declined an aprioristic approach in favor of analyzing the preponderance of authority that would determine whether to exercise jurisdiction.”¹¹³

64. In my opinion, there is no need to definitively resolve the aforementioned controversy, as either approach leads to the interpretation I favor here—that Annex 14-C also extends NAFTA’s substantive protections to post-termination measures taken by the Contracting States.
65. This holds true for the approach according to which “the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it ..., this has no relevance for the establishment of the Court’s jurisdiction, which is a ‘question of law to be resolved in the light of the relevant facts’ [...]. That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, ‘whether the force of the arguments militating in favour of jurisdiction is preponderant, and to ‘ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it’ [...]”¹¹⁴ In light of the entire record, which includes the documents invoked by Claimant that allegedly demonstrate the intention of the Contracting States to extend the temporal scope of application of Section A of Chapter 11 beyond the termination of NAFTA which are listed

¹¹² Respondent’s Memorial on Jurisdiction-ENG, p. 5 (para. 15 fn. 11) (quoting *Hydro S.r.l. et al. v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, at ¶ 248, RL-0020-ENG).

¹¹³ Claimant’s Counter-Memorial on Jurisdiction, p. 17 (para. 43) (relying, *inter alia*, on the Legal Opinion by Christoph Schreuer, p. 7 (paras. 22-24); *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, ICJ Judgment, 4 December 1998, 1998 ICJ Reports, at ¶¶ 37-38, CS-0003-ENG; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, at ¶ 37, CS-0006-ENG; *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, at ¶ 293, CS-0009-ENG; *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia’s Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020, at ¶ 200, CL-0021-ENG).

¹¹⁴ *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, ICJ Judgment, 4 December 1998, 1998 ICJ Reports, at 432, CS-0003-ENG

in paragraph 205 of the Majority Opinion, as well as the arguments submitted by the Parties, I conclude that the expansive interpretation is the only one that commends itself to the interpreter.

66. Nevertheless, even if *arguendo* one were to adopt Mexico's approach, which is merely an application of the principle *onus probandi incumbit actori*, one would reach the same conclusion, because one would have to disagree with Mexico's assertion that Claimant was unable to meet this burden. In my opinion, the principle *onus probandi incumbit actori* only requires Claimant to prove the existence of the four conditions derived directly from the text of Annex 14-C—the *only* conditions anchored in the text of Annex 14-C.¹¹⁵ Mexico would have to prove the additional condition it asserted without any textual basis. This is in line with the principle *onus probandi incumbit actori* that Mexico itself relies on: a party asserting that a treaty has a certain meaning must substantiate that interpretation, particularly when the meaning or condition is not obvious from the plain text, as in the present arbitration. Therefore, even if one were to agree with Mexico that the Tribunal should rely on the principle *onus probandi incumbit actori* when deciding on jurisdiction, Mexico would still have the burden of proving that the additional condition it asserted is one required by Annex 14-C despite the absence of any textual basis. And Mexico did not meet this burden, whereas, in my opinion, Claimant did. This is not too surprising, as a party, such as Claimant in this arbitration, proposing an interpretation consistent with the ordinary meaning of the text must show that the textual basis supports that meaning. This is generally not considered a high burden, as the ordinary meaning is presumed to be accessible—it certainly is in this case, in my opinion. A party, like Mexico, arguing for an implied or additional condition—especially one that does not appear in the text—must demonstrate a legal basis for reading that condition into the treaty. This is a much heavier burden, which Mexico has failed to meet.
67. It is worth noting that placing the burden on Claimant to prove the additional jurisdictional prerequisite beyond the text would mean to require Claimant to prove the non-existence of an unstated condition, compelling Claimant to prove a negative. In my opinion, this is not

¹¹⁵ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez, K.C., 12 July 2024, p. 2 (para. 3) RL-0040-ENG.

in line with the principle that Mexico itself put forth, and it also violates the requirement in Article 31 VCLT that any interpretation be carried out in good faith.

68. As to the subsequent practice of the Contracting Parties, which Mexico relies heavily on to try to demonstrate that there is a common understanding among the Contracting Parties that “Annex 14-C does not somehow imply the survival or continuation of the substantive obligations under Section A”,¹¹⁶ it is true that as a matter of principle under Article 31(3)(b) VCLT subsequent practice in the application of a treaty can, in theory, inform that treaty’s interpretation, including when such practice emerged during disputes.
69. This is also the position taken by the majority of this Tribunal, which considers the interpretative positions of the Contracting States emerging from subsequent practice, including the submissions of non-disputing State Parties, on two grounds: NAFTA Article 1128, which allows non-disputing parties to make interpretative submissions, demonstrating the drafters’ intent,¹¹⁷ and established international law principles, which allow statements made by treaty parties even during disputes to constitute subsequent practice to be considered when interpreting treaties.¹¹⁸
70. While I do not disagree with the majority of the Tribunal on the principle, I must note that there are tribunals that have addressed the question of whether submissions made by States when defending investment arbitration claims constitute subsequent practice, with the result of rejecting such submissions as evidence of interpretative agreement.¹¹⁹ Considering, as stated above,¹²⁰ that reliance on “the legal solutions reflected in a series of consistent cases”¹²¹ should be had to promote “the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors

¹¹⁶ Respondent’s Memorial on Jurisdiction-ENG, p. 17 (para. 47).

¹¹⁷ See Majority Opinion, para. 193.

¹¹⁸ See Majority Opinion, para. 194.

¹¹⁹ See, e.g., *Urbaser S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, at ¶ 51, CS-0053-ENG; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, at ¶ 272, CT-0076-ENG; *Telefónica, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, at ¶¶ 112, 114, CS-0050-ENG; *Gas Natural SDG, SA v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, at ¶ 47 n. 12, CS-0049-ENG.

¹²⁰ See *supra* para. 13.

¹²¹ Majority Opinion, p. 104.

towards legal certainty and the rule of law”,¹²² I wonder whether the solution adopted by these tribunals should really be disregarded entirely.

71. Importantly, however, even if one fully agrees with the principle, one must realize that the principle cannot stand alone as if it were justification enough to support Mexico’s contention. The principle cannot operate in isolation from the specific factual circumstances that define the alleged subsequent practice. Mexico’s reliance on various arbitration submissions as evidence of subsequent practice establishing agreement among the NAFTA/USMCA Contracting States regarding the interpretation of Annex 14-C fails when subjected to a rigorous analysis of the circumstances revolving around the alleged subsequent practice. The chronology, context, and motivation behind the submissions reveal them to be defensive positions that are too reactive and too self-interested to be able to amount in the present case to genuine interpretative practice as required by Article 31(3)(b) VCLT.
72. The most telling example is Mexico’s 10 April 2024 Article 1128 submission in *Westmoreland Coal v. Canada (III)*,¹²³ where Mexico *inter alia* argued that Annex 14-C only allowed claims for NAFTA violations that had arisen from measures taken before NAFTA’s termination in July 2020, and that once NAFTA ended, the States were no longer bound by NAFTA Chapter 11 obligations.¹²⁴ And it did so even though these questions and Annex 14-C were not at all at issue, given that the impugned measures pre-dated 1 July 2020, as confirmed by the tribunal when stating that “[t]he Claimant alleges breaches of NAFTA by Canada with respect to measures adopted latest by 24 November 2016, while NAFTA was in force.”¹²⁵ In light of this, I have to agree with Claimant’s assessment that the “Article 1128 submission can only be seen as an effort to bolster its own arbitration defenses rather than to assist th[at] tribunal (on a topic not even before the tribunal).”¹²⁶
73. Canada’s conduct is the clearest evidence of reactive litigation posture rather than the type of subsequent practice Article 31(3)(b) VCLT refers to. Canada’s first articulation of the

¹²² Ibid.

¹²³ *Westmoreland Coal Company v. Government of Canada III*, ICSID Case No. UNCT/23/2, NAFTA Article 1128 Submission of the United Mexican States, 10 April 2024, RL-0057-ENG.

¹²⁴ Respondent’s Memorial on Jurisdiction-ENG, p. 55 (para. 167).

¹²⁵ *Westmoreland Coal Co. v. Government of Canada (III)*, ICSID Case NO. UNCT/23/2, Award, 17 December 2024, at ¶ 85, CL-0235-ENG.

¹²⁶ Claimant’s Counter-Memorial on Jurisdiction, p. 152 (para. 362).

restrictive interpretation came on July 15, 2024, in its Reply Brief on the Merits and Brief on Canada's Jurisdiction in *Ruby River Capital LLC v. Canada*.¹²⁷ The timing relative to the *TC Energy* award shows the self-serving and purely defensive nature of that submission. The *TC Energy* tribunal issued its award on July 12, 2024, rejecting the \$15 billion claim on the ground that Annex 14-C did not extend NAFTA's substantive protection to transition-period measures. Canada did not file an Article 1128 submission in either the *TC Energy* or the *Coeur Mining* cases. However, three days after the *TC Energy* award had been issued, Canada filed its Reply Brief in *Ruby River*, adopting the identical position.

74. The irony of Canada's position cannot be overstated. TC Energy Corporation, the claimant asserting the \$15 billion claim against the United States, is itself a major Canadian energy infrastructure company. Canada thus found itself in the position that one of its own corporations was advancing an Annex 14-C claim based on transition-period measures against the United States, while Canada simultaneously defended against Ruby River, where adopting the restrictive interpretation would serve its own interests as respondent. This tension explains Canada's prolonged and conspicuous silence on the issue.
75. The sequence demonstrates that Canada avoided taking a position on this issue for as long as possible, attempting even to suspend the *Ruby River* proceedings pending the *TC Energy* decision, declining to seek bifurcation on Annex 14-C grounds when finally forced to file a bifurcation request, and making no Article 1128 submissions in the *TC Energy* or the *Coeur Mining* cases when Mexico and the United States were actively filing such submissions. Canada's reticence can only be explained by the tension between its interests as a respondent in *Ruby River* and the position being advanced by TC Energy (a major Canadian company) against the United States. Supporting the broad interpretation of Annex 14-C would have advanced the interests of TC Energy but undermine Canada's defense in *Ruby River*. Adopting the restrictive interpretation while TC Energy's claim remained viable would have placed Canada in the untenable position of arguing against the interests of a very significant corporate citizen in a case seeking over \$15 billion in damages.

¹²⁷ See *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5, Reply Brief on the Merits and Brief on Canada's Jurisdiction, 15 July 2024, RL-0048.

76. Once the *TC Energy* tribunal ruled favorably on the restrictive interpretation on July 12, 2024, this tension evaporated. The ruling eliminated TC Energy’s prospects of success on its claims as well as the political cost Canada would have faced by embracing the restrictive interpretation for its own defensive benefit. Three days later Canada filed its *Ruby River* Reply Brief. In my opinion, this sequence shows that Canada’s position was not based on genuine interpretive understanding but rather self-serving adoption of a ruling favorable to its defensive interests once that ruling had eliminated the aforementioned conflict. While this way of proceeding is certainly legitimate, this sequence—silence when a major Canadian company (TC Energy) and also, this is worth mentioning, a Canadian state-owned enterprise, namely Alberta Petroleum Marketing Commission (APMC) were advancing claims,¹²⁸ followed by an about-face three days after an adverse award—cannot be reconciled with “subsequent practice in the application of the treaty” establishing agreement among the Parties regarding the interpretation of Annex 14-C. It is, instead, quintessential, outcome-driven defensive litigation positioning.
77. Regarding the United States, its Article 1128 submission in the *Coeur Mining*¹²⁹ case reveals the extraordinary lengths to which the United States went to support a position that served its defensive interests. Its submission included four “expert reports” that the United States had previously submitted to the *TC Energy* tribunal in its own defense. These reports were not prepared for *Coeur Mining*; they were clearly litigation work product from the United States’ defense of the \$15 billion claim against it by the Canadian company TC Energy, which the tribunal in *Coeur Mining* excluded and removed from the record on the grounds that “the inclusion of the NDP Reports, drafted as they were for use in a different, parallel case, as part of the United States NDP Submission in this case, were they allowed to remain in the record of this arbitration, would disrupt these proceedings and impair the

¹²⁸ See *Alberta Petroleum Marketing Commission v. United States of America*, ICSID Case No. UNCT/23/4, Notice of Intent to Submit a Claim to Arbitration, 9 February 2022, CL-0236-ENG; *Alberta Petroleum Marketing Commission v. United States of America*, ICSID Case No. UNCT/23/4, Claimant’s Memorial, 16 April 2024, CL-0237-ENG.

¹²⁹ *Coeur Mining, Inc. v. United Mexican States*, ICSID Case No. UNCT/22/1, Submission of the United States of America, CT-0091.

Disputing Parties’ due process rights”¹³⁰ “as well as their legitimate interest in an efficient procedure, and would undermine the integrity of these proceedings.”¹³¹

78. The United States’ attempt to introduce expert reports from its own litigation defense into an Article 1128 submission purporting to assist a tribunal as a Non-Disputing Party clearly demonstrates that the United States’ submission was motivated by defensive rather than interpretive interests. A genuine effort to assist the tribunal through neutral interpretation of treaty provisions would not involve importing expert testimony solely prepared for the submitting State’s own defense.
79. In light of the above, I conclude that the submissions invoked by Mexico as “subsequent practice” are episodic and adversarial submissions that do not reflect “practice in the application of the treaty,” and that they do not establish any agreement among the three NAFTA Parties. In particular, Mexico’s NDP submissions track its defensive posture and even intruded into a case where Annex 14-C was irrelevant (*Westmoreland*); Canada’s belated stance—first expressed three days after the TC Energy decision—confirms a reactive, outcome-driven posture, not a stable interpretive practice; and the United States’ NDP submissions were filed only after it faced major exposure and even attempted to import *TC Energy* expert reports drafted for defensive purposes into *Coeur Mining*, which the tribunal excluded. Accordingly, I cannot accord any weight to these submissions as “subsequent practice” under Article 31(3)(b) VCLT.
80. Furthermore, nothing in the record submitted by Mexico demonstrates that the Contracting States held the view asserted by Mexico regarding the temporal restriction on timing of the State measures prior to submitting litigation pleadings and/or NAFTA Article 1128 submissions. In fact, Mexico’s evidentiary stance has been one of non-responsiveness: it has declined to produce negotiating records or internal documents, even when such materials were specifically requested pursuant to Mexico’s own transparency statute.¹³² This silence underscores that there is no evidentiary basis for Mexico’s claim that “a straightforward reading of Annex 14-C—consistent with Article 31 of the VCLT—does

¹³⁰ *Coeur Mining, Inc. v. United Mexican States*, ICSID Case No. UNCT/22/1, Procedural Order No. 4, 28 May 2024, at ¶ 60, CL-0238-ENG

¹³¹ *Coeur Mining, Inc. v. United Mexican States*, ICSID Case No. UNCT/22/1, Procedural Order No. 4, 28 May 2024, at ¶ 62, CL-0238-ENG.

¹³² Claimant’s Counter-Memorial on Jurisdiction, pp. 130-133 (paras. 318-326).

not establish consent to arbitrate claims arising from post-termination measures under Annex 14-C” beyond Mexico’s own litigation pleadings and the submissions by Canada and the United States, which, as shown, do not amount to subsequent practice under Article 31(3)(b) VCLT.

VII. THE DOCUMENTARY RECORD AND MR. MANDELL’S MARCH 2, 2021, EMAIL

81. Unlike Mexico, Claimant adduced abundant contemporaneous negotiating documents,¹³³ including documents that the majority of this Tribunal readily dismisses on the grounds that they “are internal documents that have not been contemporaneously exchanged between the Contracting States”,¹³⁴ and the contents of which are anyway “inconclusive with respect to the possible extension of Section A of Chapter 11 beyond the lifetime of NAFTA.”¹³⁵
82. I have to disagree with the majority on multiple grounds. Article 32 VCLT does not exclude *a priori* that unilateral statements may inform the interpretation of a treaty text. This is because, as stated *inter alia* by the *Churchill Mining* tribunal, “Article 32 VCLT allows recourse to the preparatory work of the treaty and the circumstances surrounding the treaty’s conclusion. It does not give an exhaustive list of admissible materials and the Tribunal thus has latitude to include any element capable of shedding light on the interpretation of [a treaty]”.¹³⁶ In fact, “[t]he range of supplementary means of interpretation that a tribunal may use to elucidate the meaning of ambiguous treaty language is broad”,¹³⁷ and includes, in my opinion, also unilateral statements. I am not suggesting that these documents are part of the *travaux préparatoires*, which may well require certain characteristics to be met to qualify as such,¹³⁸ but they can still be relied on

¹³³ See the list of documents referred to in Majority Opinion, paras. 205 and 206.

¹³⁴ Majority Opinion, para. 205.

¹³⁵ Ibid.

¹³⁶ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, at ¶ 181, CT-0067-ENG.

¹³⁷ *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Jurisdiction, 13 February 2015, at ¶ 251, CL-0180-ENG.

¹³⁸ See, e.g., O. Dörr, *Article 32*, in O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer, 2019), p. 621 (paras. 12-14), CT-0061-ENG.

as other “supplementary means” to confirm an interpretation under Article 31. There is authority for this proposition, including the very authority cited by the majority of the Tribunal.¹³⁹ In fact, Dörr not only states that “[d]ocuments or facts may be considered that are sufficiently closely connected to the preparation of the treaty and have, therefore, in the eyes of the interpreter, a direct bearing on the interpretation”,¹⁴⁰ but also that “[i]n the end, it seems that it basically depends on the assessment of the interpreter whether the material in question can reasonably be thought to assist in establishing the meaning of the treaty under consideration, and if it does, there are scarcely any clear limits to taking it into account under Art 32. The provision leaves the interpreter a wide discretion in this respect.”¹⁴¹ The ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties confirms this when stating that “Article 32 includes a non-exhaustive list of supplementary means of interpretation”¹⁴² and referring to “the discretionary nature of the use of the supplementary means of interpretation under article 32.”¹⁴³

83. In light of this, I find that the documents submitted by Claimant expressly listed in the Majority Opinion do have probative value.¹⁴⁴ I also find that they are not inconclusive, as suggested by the majority. It is undeniable that they show, *ad minimum*, that the protection of legacy investments from State measures had never been limited to pre-NAFTA-termination measures. And Mexico did not submit any documents or witness statements to show otherwise.

84. I also disagree with my colleagues regarding their assessment of the email, dated March 2, 2021, drafted by Lauren A. Mandell, the Deputy Assistant United States Trade Representative for Investment and Chief Negotiator for Investment of the USMCA (serving from 2013-2019), who also served as Chief Counsel for Negotiation, Legislation, and Administrative Law for USTR during that period. In that email, Mr. Mandell expressly

¹³⁹ See Majority Opinion, para. 204 footnotes 109 and 110.

¹⁴⁰ O. Dörr, *Article 32*, in O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer, 2019), p. 627 (para. 26), CT-0061-ENG.

¹⁴¹ *Id.* at p. 627 (para. 27).

¹⁴² ILC’s Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, UN Doc. A/73/10, Chapter IV, 2018, Commentary to Conclusion 2, p. 20 (para. 8), CS-0047.

¹⁴³ *Ibid.*

¹⁴⁴ See the list of documents referred to in Majority Opinion, paras. 205 et seq.

states that the United States intended Annex 14-C “to cover measures in existence before AND after USMCA entry into force.”¹⁴⁵ The majority dismisses the relevance of said email holding that, “leaving aside the issue of the evidentiary weight of this internal, informal and non-contemporaneous exchange, the content at best demonstrates Mr. Mandell’s recollection of the US position, without evidence that such position was communicated to the other States in clear terms at the time when they negotiated the USMCA. As such, this email is of no assistance to establish the common intention of the Contracting States.”¹⁴⁶

85. I must challenge this line of reasoning from a methodological perspective, given the aforementioned “wide discretion” that interpreters enjoy in deciding what documents to rely on as other supplementary means to confirm an interpretation under Article 31 VCLT.¹⁴⁷ This discretion allows one to attribute probative value to the email at issue, as I do, because, to use the words of the *Sempre Energy v. Argentina* tribunal, “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 the original intention.”¹⁴⁸

86. I also disagree with my colleagues’ assessment of the email’s contents, and this not only because, as the record shows, the United States’ position referred to in the Mandell email was communicated and did not remain “internal”.¹⁴⁹ This email constitutes the single most probative piece of evidence concerning, if nothing else, the United States’ understanding of Annex 14-C’s scope and application at the time of its drafting, namely that Annex 14-C was intended to extend the temporal scope of NAFTA’s substantive protections during the three-year transition period and to also cover measures taken by Contracting States after NAFTA’s termination. The email possesses qualities that render it not merely relevant or compelling, but properly characterized as dispositive evidence of the United States’ original understanding of Annex 14-C.

¹⁴⁵ C-0121-ENG.

¹⁴⁶ Majority Opinion, para. 207.

¹⁴⁷ See *supra* para. 82.

¹⁴⁸ *Sempre Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, at ¶ 145, CL-0184-ENG.

¹⁴⁹ See Internal Report of the Investment Group of the Secretariat of Economy of Mexico, attached to an email from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 4 May 2018, R-0015: “Propuesta de EE.UU. para extender la vigencia del capítulo de inversión 3 años después de que termine la vigencia del TLCAN.”

87. The email's evidentiary value derives from five independent and mutually reinforcing factors: the professional standing of Mr. Mandell and Mr. Gharbieh, who initiated the March 2, 2021 inquiry, and who served as USTR Director for Investment at the time of the exchange (a position within USTR that placed him in direct succession to Mr. Mandell's former role); the email's temporal proximity to the USMCA's entry into force; the spontaneous and unguarded nature of the inquiry by Mr. Gharbieh and the response by Mr. Mandell; the absence of any litigation-related motivation for Mr. Mandell's email; and substantive clarity of the explanation provided. In light of these factors, there is no reason to question the email's relevance for confirming the interpretation of Annex 14-C advanced by Claimant, which I cannot but endorse.
88. Regarding the professional standing of Mr. Mandell and Mr. Gharbieh, their positions provide sufficient evidence of their authority. It is worth noting that Mr. Gharbieh's inquiry to Mr. Mandell concerning Annex 14-C's interpretation demonstrates that within USTR itself Mr. Mandell was recognized as the authoritative source concerning Annex 14-C's intended operation. The fact that the sitting USTR Director for Investment sought clarification from the former Deputy Assistant USTR for Investment, rather than relying on internal institutional knowledge or consulting with other then current officials, establishes Mr. Mandell's unique authority regarding this issue.
89. The March 2, 2021, date of the Mandell email bears critical significance because it was authored merely eight months after the USMCA's entry into force. This temporal proximity places it within a period of time when the understanding of the USMCA and Annex 14-C was fresh, undiluted, and, very importantly, undistorted by subsequent litigation pressures, thus distinguishing it clearly from the NAFTA Article 1128 submissions and defensive pleadings on which Mexico relied.
90. The circumstances surrounding the March 2, 2021, email exchange establish its spontaneous and unguarded character. Mr. Gharbieh's inquiry stated: "One question on USMCA, which I have begun thinking about but haven't looked at in detail:- the Annex 14-C text on legacy claims isn't clear on whether the grandfather applies to measures introduced/implemented in the three years after the USMCA's entry into force as opposed to just providing three years to pursue claims on measures in existence as of the date of entry into force. Assuming you intended the former, what would you point to in the text?"

Does footnote 21 help make the case?”¹⁵⁰ Mr. Mandell’s response came the same day, and it is useful to reproduce it here:¹⁵¹

[EXTERNAL] RE: Your ICSID Review article

From: "Mandell, Lauren A." <lauren.mandell@wilmerhale.com>
To: "Gharbieh, Khalil N. EOP/USTR" <khalil.n.gharbieh@ustr.eop.gov>
Date: Tue, 02 Mar 2021 12:31:39 -0500

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

Are friends across the border aren't questioning this, are they?

91. The email demonstrates a spontaneous rather than deliberate drafting (“I’d have to think about the argument but the one that immediately comes to mind. . .”) and the fact that it provides multiple independent textual bases for the interpretation demonstrates confidence in the answer, evidencing direct knowledge that remained fresh in Mr. Mandell’s mind and not, as the majority of the Tribunal finds, a way of “trying to come up with arguments”.¹⁵² It is also significant that the exchange occurred privately between two USTR officials (one current, one former) for clarification purposes; neither participant in the email exchange could have anticipated that their exchange would become part of an arbitral record or subject to scrutiny by tribunals and parties. The exchange served no public relations purpose, no litigation strategy, no defensive interest. It constituted simply what it purported

¹⁵⁰ C-0121-ENG.

¹⁵¹ Ibid.

¹⁵² Majority Opinion, para. 207.

to be: a current USTR official seeking clarification from his predecessor concerning a provision the predecessor had negotiated, and that predecessor providing a clear answer based on direct knowledge. In my opinion, this undermines the *TC Energy* tribunal's rationale for according no evidentiary value to the Mandell email, specifically its reasoning that "[a]t the time [of authoring the email], Mr. Mandell was in private practice and no longer in the government".¹⁵³ This reasoning is unconvincing.

92. The March 2, 2021, date establishes conclusively that Mr. Mandell's explanation was untainted by any litigation-related motivations; it emerged in a litigation-free context. Given the private nature of the email exchange, it cannot be considered to have been made to attract clients, as the majority of the *TC Energy* tribunal seems to suggest when giving the aforementioned reason for excluding that the email could have evidentiary value.
93. As regards the substantive clarity of the explanation by Mr. Mandell, it is worth noting that his response is a reasoned explanation grounded in the specific textual features of Annex 14-C. He did not merely assert that Annex 14-C also applied to post-NAFTA-termination measures, but explained why the text of Annex 14-C requires that interpretation through multiple independent analytical paths, while also addressing the significance of Footnote 21 as a confirmation of the result reached through the textual path.
94. Mr. Mandell's email concluded with a question: "[Our] friends across the border aren't questioning this, are they?"¹⁵⁴ This question demonstrates that Mr. Mandell considered the interpretation so clear and uncontroversial that he expressed surprise at the possibility that this interpretation might not be shared by Mexico and Canada.
95. Mr. Gharbieh's response to Mr. Mandell's explanation provides independent corroboration of its correctness, as the text of his reply clearly shows: "Thanks for your thoughts on this – agree that the opening framing of claims 'with respect to a legacy investment' helps, as do the other points."¹⁵⁵ Mr. Gharbieh's response establishes two significant facts. First, Mr. Gharbieh, the then-current USTR Director for Investment agreed with Mr. Mandell's explanation. He did not express uncertainty, suggest alternative interpretations, or indicate that internal USTR analysis had reached different conclusions. Rather, he affirmatively

¹⁵³ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, p. 48 (para. 196), RL-0040-ENG.

¹⁵⁴ C-0121-ENG.

¹⁵⁵ Ibid.

agreed with Mr. Mandell’s reasoning, finding Mr. Mandell’s textual analysis persuasive. Second, Mr. Gharbieh’s agreement demonstrates continuity of understanding between the negotiating administration and the post-entry-into-force administration. Although the USMCA was negotiated under the Trump administration and entered into force during the Trump administration, by March 2, 2021, the Biden administration had assumed office (on January 20, 2021). Mr. Gharbieh’s March 2, 2021 agreement with Mr. Mandell’s explanation establishes that USTR’s institutional understanding of Annex 14-C remained consistent across administrations—at least until litigation pressures created incentives to adopt a different interpretation.

96. It is worth recalling that an internal Mexican document confirms the United States’ expansive interpretation of Annex 14-C, because at one point in the negotiations, Mexico’s representatives understood that the United States was proposing to “extender la vigencia del capítulo de inversión 3 años después de que termine la vigencia del TLCAN”.¹⁵⁶ This document clearly confirms not only that the United States proposed a temporal extension of the entire investment chapter of NAFTA, including NAFTA’s substantive protections, and thus independently corroborates the contents of Mr. Mandell’s March 2, 2021 email, but also that the United States’ proposal did not remain an internal one, but was communicated to the treaty partners.
97. In light of all of the above, I find that Mr. Mandell’s email has probative value (albeit not as *travaux préparatoires*) and is of assistance, although not, to use the words of the majority of this Tribunal, “to establish the common intention of the Contracting States.”¹⁵⁷ But stopping there, as the majority does, fails to acknowledge the real value of the email exchange: it clearly demonstrates what the United States agreed to when drafting and agreeing on Annex 14-C, namely the extension of NAFTA’s substantive protections during the three-year transition period. This is relevant, because it puts the United States’ contemporaneous intent in clear contrast with the position adopted later in its defensive briefs as well as in its NAFTA Article 1128 submissions. In other words, only after facing exorbitant potential liability did the United States reverse its position in favor of the

¹⁵⁶ Internal Report of the Investment Group of the Ministry of Economy of Mexico, attached to an email from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 4 May 2018, R-0015.

¹⁵⁷ Majority Opinion, para. 207.

restrictive interpretation of Annex 14-C now advanced by Mexico. In my opinion, this means that the United States' reversal of position, which is not only inconsistent with its intention at the time of drafting Annex 14-C but also clearly litigation-driven, militates against the United States' defensive briefs and NAFTA Article 1128 submissions being accorded any value in a subsequent-practice-analysis under Article 31(1)(b).

VIII. MR. SMITH RAMOS' WITNESS STATEMENT AND TESTIMONY

98. What has been said above also holds true regarding Mexico's position and submissions.

This can unmistakably be derived from the witness statement of Kenneth Patrick Smith Ramos, the former Chief Negotiator for the United Mexican States regarding the USMCA¹⁵⁸ the testimony of which the majority of the Tribunal considers, however, to have limited probative value,¹⁵⁹ because "as chief negotiator of a major treaty, [he] supervised a significant number of different work streams each involving numerous sometimes complex issues, and who, by the nature of his position, did not have detailed direct knowledge of all the discussions occurring among negotiating delegations."¹⁶⁰ I am not contesting this statement by the majority of the Tribunal. However, I find that it is not relevant that Mr. Smith Ramos may well not have "knowledge of *all* the discussions" had during the drafting process. But in light of the details proffered by Mr. Smith Ramos in relation to the issue at hand, meaning the three-year extension of NAFTA protections to NAFTA post-termination measures, it is evident that he had direct knowledge of it, which should not come as a surprise, given its importance. This is why I find it convincing when Mr. Smith Ramos states that he "can confirm that the Mexican position regarding the legacy investment claims provisions [. . .] was to ensure that all of the substantive provisions of NAFTA Chapter 11, as well as the ISDS mechanism, would be extended for three years after the NAFTA had been replaced by the new agreement [. . .]. It was clear that investors could make claims under Annex 14-C with respect to legacy investments for breaches of NAFTA Chapter 11 that occurred during the three year transition period of

¹⁵⁸ See Witness Statement of Kenneth Patrick Smith Ramos, p. 3 (para. 5); Transcript Hearing Day 1, p. 209, line 20 – p. 210, line 7; Claimant's Counter-Memorial on Jurisdiction, p. 5 (para. 2).

¹⁵⁹ See Majority Opinion, para. 205.

¹⁶⁰ Ibid.

NAFTA (July 1, 2020 to July 1, 2023), and not just claims with respect to breaches that occurred before the date of termination of NAFTA.”¹⁶¹

99. I find Mr. Smith Ramos’ witness statement convincing. His testimony is based on direct personal knowledge arising from his participation in the negotiations from their very commencement through their conclusion. Furthermore, Mr. Smith Ramos does not merely state a conclusion, but also explains the basis for his understanding, stating that “[t]here was no doubt on the scope of Annex 14-C discussion on this subject because it was understood, as proposed by the United States as early as Round 4 of the negotiations, that the goal was to extend the substantive protections to investors as established in Chapter 11 of the NAFTA for a duration of three years.”¹⁶² This explanation establishes critical facts: first, that the United States held the understanding attributed to it by Mr. Mandell in his March 2, 2021 email, as also evidenced by documents on the record,¹⁶³ and, second, that Mexico shared this understanding. It also establishes that the issue at hand arose “as early as [in] Round 4” and, therefore, was not an afterthought or last minute addition.

100. Mr. Smith Ramos further testifies that “[d]uring the course of the negotiations the US counterpart communicated to the Mexican negotiating team, drafts and USTR communications that synthesized and expressed the US position on the workings of Annex 14-C. It was clear to me, and to our negotiating team, that the US understood that NAFTA 1994 would apply to legacy investments and protect such investments against measures arising during the three-year timeframe that violated Section A NAFTA Chapter 11.”¹⁶⁴ This demonstrates that Mexico’s understanding did not result from misapprehension or unilateral assumption. Rather, it derived from direct communications from United States negotiators who “synthesized and expressed the US position”.

101. I note that Mr. Smith Ramos does not rest his testimony solely on recollection, and these are some of the details referred to earlier.¹⁶⁵ He identifies specific internal Mexican

¹⁶¹ Witness Statement of Kenneth Patrick Smith Ramos, pp. 11-12 (para. 25).

¹⁶² Witness Statement of Kenneth Patrick Smith Ramos, p. 12 (para. 26).

¹⁶³ See Internal Report of the Investment Group of the Ministry of Economy of Mexico, attached to an email from Guillermo Malpica and Aristeo Lopez to Kenneth Smith Ramos, 4 May 2018, R-0015.

¹⁶⁴ Witness Statement of Kenneth Patrick Smith Ramos, p. 13 (para. 28).

¹⁶⁵ See *supra* para. 98.

documents,¹⁶⁶ spanning from October 2017 through May 2018, covering seven months of negotiations, reflecting Mexico's contemporaneous understanding of the scope of Annex 14-C. He identifies these documents by date, author, recipients, and subject matter. According to Mr. Smith Ramos, these documents "all demonstrate that at no point was there a discussion regarding the possibility of imposing temporal limitations regarding measures taken during the transition period."¹⁶⁷ Mexico could have produced these documents to show that they contradicted Mr. Smith Ramos' statements and recollection, but refused to do so, as the record shows. In my opinion, this permits the inference that the documents would corroborate rather than contradict Mr. Smith Ramos' account. The same holds true for Mexico's refusal to call any of the persons identified by Mr. Smith Ramos as being the authors and recipients of the documents mentioned above. This permits an even more powerful inference that Mr. Smith Ramos' testimony accurately reflects Mexico's understanding of the broad scope of Annex 14-C. In other words, the fact that Mr. Smith Ramos' evidence stands un rebutted by any other Mexican negotiator materially strengthens its probative value.

102. Furthermore, I find that Mr. Smith Ramos's cross-examination confirmed not only his testimony's accuracy, but also Mr. Smith Ramos's integrity, as this exchange with Professor Kaufmann-Kohler shows. The Chair stated: "You were a Government official for a very long time, a little under three decades. And I assume that in this position you defended the interest of your country because that was what you were supposed to do. Now you made a choice to come forward with testimony that was against the position of your country, and it has struck – I've asked myself what motivated you to make this choice of coming forward? It is not something usual, I would say, at least from my experience in investor-State dispute settlements, and one might disprove the position, but you could just disprove in silence. Here you made a choice to speak up. So it's a true question, how come you made this move?"¹⁶⁸ Mr. Smith Ramos answer was forthright, and it is worth producing it here in full: "I can explain. Most of my professional life I have worked on International Trade Negotiations. I had the honor and the privilege to start working at a

¹⁶⁶ See Witness Statement of Kenneth Patrick Smith Ramos, pp. 13-15 (para. 31).

¹⁶⁷ Witness Statement of Kenneth Patrick Smith Ramos, p. 14 (para. 31).

¹⁶⁸ Transcript Hearing Day 1, p. 311, lines 6-20.

very young age, fresh out of school, and the original NAFTA negotiations. I was their Director General for North America, and was the -- my main function was as NAFTA coordinator back in the year 2000s. And the objective was to ensure that both U.S. and Canada complied with the commitments and the agreement and that México as well complied, not just in the Ministry of Economy, but the different agencies, because I have always been convinced that it is precisely by honoring our international commitments, by providing legal certainty, that we can ensure more investment coming into México, more trade, and more well-being for our population. Having said that, in this case in particular, I thought it was important to set the record straight and to clarify what the position of the three governments that negotiated the USMCA, México, Canada, and the United States, was at the time of the negotiation and the conclusion and what the objectives were. I do understand that this position that the Mexican Government held and what led to the outcome of the negotiations is not the same position that the Mexican Government is taking today, and I understand that in other cases the U.S. Government has also taken a different position. But I thought it was important in terms of the legacy or, let's call it the long-term impact of the USMCA, to make sure that, you know, the truth was told in terms of how the Agreement was negotiated and what the outcome was.”¹⁶⁹

103. Mr. Smith Ramos explained his motivation for his testimony as stemming from professional responsibility for the negotiation he had led, not pecuniary advantage, as Mexico seemed to suggest during the evidentiary hearing by way of its questions during cross-examination of Mr. Smith Ramos¹⁷⁰ as well as general comments made on that occasion.¹⁷¹ I am indeed convinced that he testified out of commitment to truth and professional responsibility, not out of financial interest, as the majority seems to imply when highlighting that Mr. Smith Ramos is “now in private practice”.¹⁷² The fact that his evidence stands un rebutted when Mexico could have produced negotiators to rebut Mr. Smith Ramos’ account and, thus, put his credibility into question, materially strengthens the probative value of Mr. Smith Ramos’ evidence and his credibility.

¹⁶⁹ Transcript Hearing Day 1, p. 312, line 1 – p. 313, line 12.

¹⁷⁰ See Transcript Hearing Day 1, p. 303, line 9 – p. 304, line 6.

¹⁷¹ See Transcript Hearing Day 2, p. 559, lines 4-7.

¹⁷² Majority Opinion, para. 205.

104. In my opinion, when credible testimony from a chief negotiator is detailed, specific, based on direct knowledge, which Mr. Smith Ramos certainly had regarding the issue at hand, unchallenged by the party whose negotiating position he describes, not contradicted by any contemporaneous documentary evidence, and contrary to that party's current litigation interests, such testimony deserves full acceptance as convincing evidence of original treaty intent. The alleged "subsequent practice" argument put forth by Mexico does not.
105. The converging results of the Mandell email addressed in the previous section of this Dissenting Opinion and the Smith Ramos testimony addressed in the present one create an evidentiary foundation that exposes a litigation-driven volte-face, which contradicts the existence of the subsequent practice by the NAFTA/USMCA Parties claimed by Mexico. These results demonstrate a stark contrast between the original understanding evidenced by the Mandell email and the Smith Ramos testimony and the subsequent defensive positions taken. When Mr. Mandell concluded his email with the question "[Our] friends across the border aren't questioning this, are they?"¹⁷³, he expressed surprise at the possibility that Mexico and Canada might not share the expansive interpretation. This demonstrates that the restrictive interpretation now advanced by Mexico was so contrary to the original understanding that even its possibility was surprising to one of the principal negotiators.
106. This about-face, as well as the purely reactive nature of the subsequent conduct by the NAFTA/USMCA Parties, as determined by the above chronological analysis,¹⁷⁴ negates the existence of "subsequent practice" under Article 31(3)(b) VCLT, as claimed by Mexico. Inter alia, this is because "an element of good faith is necessary in any 'subsequent practice in the application of the treaty'",¹⁷⁵ as stated in the commentary to Conclusion 4 of the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties. Shifting positions for litigation-related reasons, while certainly legitimate, contradicts this good faith requirement, as this

¹⁷³ C-0121-ENG.

¹⁷⁴ See *supra* paras. 72 et seq.

¹⁷⁵ ILC's Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, UN Doc. A/73/10, Chapter IV, 2018, Commentary to Conclusion 4, p. 32 (para. 19), CS-0047.

requirement excludes opportunistic litigation arguments contradicting the original understanding of the Treaty Parties. This is also due to the fact that, as Professor Schreuer pointed out, “treaties for the protection of investments are not merely agreements between States. They create standards of protection as well as remedies for private investors who act in reliance on the undertakings contained in these treaties.”¹⁷⁶ “Under a theory that allows unfavourable ex post facto interpretations by informal agreement of the States parties to an investment treaty, it would be possible for States first to attract investors with promises of protection and then, when faced with investment arbitration, to withdraw these promises by an agreed interpretation.”¹⁷⁷ This is particularly pertinent in the present arbitration, where the original interpretation contradicts the litigation-driven one.

IX. CONCLUSION

107. Taking all of the above into account, I conclude that the additional temporal requirement that State measures must have occurred prior to the termination of NAFTA cannot be read into Annex 14-C. Instead, Annex 14-C also allows claims concerning State measures adopted after NAFTA’s termination but during the three-year transition period to fall under its remit, provided the four textual conditions identified earlier¹⁷⁸ are met, as they are in this arbitration.

108. In light of this, I find that the Tribunal has jurisdiction over Claimant’s claim.

¹⁷⁶ Second Legal Opinion by Christoph Schreuer, pp. 12-13 (para. 42).

¹⁷⁷ Id. at p. 13 (para. 44), citing to *Infinito Gold Inc. v. Republic of Costa Rica*, Award, 3 June 2021, CS-0052-ENG, where, in para. 339, the Tribunal stressed that a subsequent agreement or practice of the Contracting States to a treaty providing rights for investors could infringe due process rights: “Even if the Tribunal could infer an “agreement” from the Contracting States’ submissions, quod non, this agreement would postdate the commencement of this arbitration and the Tribunal could not take it into consideration in favour of one litigant to the detriment of the other without incurring the risk of breaching the latter’s due process rights.” (Id. at p. 13 (para. 45)).

¹⁷⁸ See *supra* para. 25.

[Signature]

Prof. Franco Ferrari

Arbitrator