

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

¹⁰⁵

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