IN THE MATTER OF AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNITED STATES-MEXICO-CANADA AGREEMENT

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)

- between -

Coeur Mining, Inc.

(the "Claimant")

and

United Mexican States

(the "Respondent")

ICSID Case No. UNCT/22/1

PROCEDURAL ORDER No. 4

Tribunal
Ms. Sabina Sacco, President
Mr. Pierre Bienvenu, Ad. E.
Prof. Hugo Perezcano Díaz

Secretary of the Tribunal
Ms. Veronica Lavista

28 May 2024

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I. SCOPE OF THIS ORDER

1. This Procedural Order No. 4 ("**PO4**") addresses the Claimant's request to strike certain expert reports from the record.

II. PROCEDURAL BACKGROUND

2. On 31 July 2023, the Claimant submitted its Statement of Claim, accompanied *inter alia* by the Witness Statements of [redacted], and [redacted] and the Expert Reports of Mr. Noel Matthews and Mr. Edison Uribe G.

3. On 4 December 2023, the Parties agreed to bifurcate the jurisdictional phase of the proceedings.

4. On 13 December 2023, the Respondent submitted its Memorial on Jurisdiction.

5. After consulting with the Parties, on 9 January 2024 the Tribunal issued Procedural Order No. 2, including a revised procedural calendar for the bifurcated phase.

6. On 1 February 2024, the Claimant filed its Counter-Memorial on Jurisdiction, accompanied *inter alia* by the Second Expert Report of Mr. Edison Uribe G.

7. On 12 February 2024, the United States of America (the "**United States**") submitted a non-disputing party submission (the **"United States' NDP Submission**"), which was accompanied by:

   a. The United States' Memorial on its Preliminary Objection in *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/21/63 ("**TC Energy**"), dated 12 June 2023;

   b. The United States' Reply on its Preliminary Objection in *TC Energy,* dated 27 December 2023;

   c. Two expert reports by Professor Hervé Ascensio in *TC Energy* (Professor Ascensio's [First] Expert Report dated 8 June 2023, and his Second Expert Report dated 22 December 2023);

   d. Two expert reports by Professor Richard Gardiner in *TC Energy* (Professor Gardiner's [First] Expert Report dated 9 June 2023, and his Supplementary Report dated 22 December 2023 (together with the reports referred to in para. (c) above, the "**NDP Reports**").

8. On 8 March 2024, the Respondent submitted its Reply on Jurisdiction, which was accompanied, *inter alia*, by the Expert Report of Professor Christian Tams (the "**Tams Report**").

9. By letter of 15 March 2024 ("**Claimant's Application**"), the Claimant requested the Tribunal to:

   a. Order the Respondent to produce certain documents relating to the negotiating history of Annex 14-C of the USMCA (the "**Requested Documents**") and instruct the United States to produce the Requested Documents ("**Claimant's Document Production Request**").

   b. Declare that the Tams Report and the NDP Reports are inadmissible evidence, and direct that they be stricken from the record ("**Claimant's Request to Strike**"). In the case of the Tams Report, the Claimant sought as an alternative relief that the Tribunal treat the Tams Report as the equivalent of additional legal argument by counsel on the legal questions that fall to be determined by the Tribunal.

10. On 25 March 2024, the Respondent filed its response to the Claimant's Application ("**Mexico's Response**").

11. On 26 March 2024, in light of the Claimant's Application and Mexico's Response, the Tribunal suspended the procedural calendar and vacated the hearing dates.

12. After considering the Parties' positions, on 2 April 2024 the Tribunal:[1]

   a. Opened a limited document production phase (the "**Document Production Phase**") to address the Claimant's Document Production Request;

   b. Invited further submissions from both Parties on the admissibility of the Tams Report;

   c. Invited the Parties to jointly propose a revised procedural calendar, including dates for the Parties to circulate a joint proposal for a confidentiality order that would apply to the Requested Documents, should the Tribunal order their production.

[1] Letter to the Parties dated 2 April 2024.

13. On 8 April 2024, the Claimant filed its additional submission on the Tams Report (the "**Claimant's Reply**").

14. On 9 April 2024, the Parties jointly proposed a revised procedural calendar.

15. On 15 April 2024, the Respondent filed its response to the Claimant's Reply ("**Mexico's Rejoinder**").

16. On 16 April 2024, the Tribunal confirmed the schedule for the Document Production Phase.

17. The present order addresses the Claimant's Request to Strike, as well as the alternative relief sought in relation to the Tams Report.[2] The Tribunal will first address the Claimant's requests in connection with the Tams Report, before turning to its request in connection with the NDP Reports.

III. THE CLAIMANT'S REQUEST TO STRIKE THE TAMS REPORT

A. The Claimant's position

18. The Claimant requests the Tribunal to declare that the Tams Report is inadmissible evidence, and direct that it be removed from the record.[3] Alternatively, the Claimant requests the Tribunal to "treat the Tams Report for what it is: just more counsel argument on the legal questions before the Tribunal."[4]

19. The Claimant advances three arguments in support of its request.

20. First, the Claimant argues that the Tams Report amounts to legal argument and not expert evidence. Pursuant to the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"), experts should contribute to the proceedings with their specific expertise in a manner that will assist the tribunal in reaching a determination, but they should not be entitled to plead the case that should be made by counsel or repeat the submissions by the appointing-party.[5] According to the Claimant, other

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2 The Claimant's Document Production Request shall be addressed in a separate order.

3 Claimant's Application, p. 10; Claimant's Reply, p. 4.

4 Claimant's Application, p. 10; Claimant's Reply, p. 4.

5 Claimant's Application, p. 7.

cases[6] and leading practitioners[7] confirm that "elaborating on matters of international law and applying these to the facts of the case is the job of counsel, not of an expert witness."[8]

21. The Claimant submits that, in accordance with the principle of *iura novit curia,* only the members of the Tribunal are qualified to determine the ultimate jurisdictional question and to draw conclusions about its application to the facts of this case.[9] Here, however, the Tams Report "seeks to submit supposed expert testimony on the ultimate legal question before the Tribunal—namely, whether Annex 14-C can be interpreted to cover the measures complained of by Claimant."[10] In particular, Prof. Tams has:

    a. Set out his purported "proper understanding" of terms in Annex 14-C, applying customary international law rules of interpretation, and referring to relevant case law.[11]

    b. Considered whether, on 22 January 2021 (date of the SAT Decision), NAFTA obligations "were binding on Mexico, and thus could at all be breached", for which he has analyzed (i) the termination of NAFTA "and its [p]resumptive [e]ffect on [t]reaty [o]bligations", (ii) whether Annex 14-C reflects the Parties' "[a]greement to [d]eviate from the [d]efault [r]ule", and (iii) the legal and factual submissions made by the Claimant in its Counter-Memorial on Jurisdiction.[12]

    c. Concluded that, based on the terms of Annex 14-C, the USMCA Protocol and the USMCA as a whole, Annex 14-C, paragraph 1, does not "extend the 'life' of obligations imposed by Section A of Chapter 11 of NAFTA", and determines that, as a factual matter, "the impugned SAT Decision adopted on 22 January 2021

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6 The Claimant relies on **Appendix 10**, *Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada*, ICSID Case No. ARB/17/13, Award, 19 March 2020, and **Appendix 04**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador* (II), PCA Case No. 2009-23.

7 **Appendix 07**, Blackaby, Nigel & Wilbraham, Alex, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 31(3) ICSID REV. 655 (2016); **Appendix 06**, Fidel v. Felecia & Faraz, [2015] DIFC CA 002, Claim No. CA 002/2015, November 23, 2015 (Chief Justice Michael Hwang); **Appendix 05**, Judith Gill, 'The Development of Argument in Arbitration as an Afterthought – Is It Time to Recalibrate Our Approach?', in PRACTICING VIRTUE – INSIDE INTERNATIONAL ARBITRATION (David Caron et al. eds., 2015).

8 Claimant's Application, p. 8.

9 Claimant's Application, p. 8.

10 Claimant's Application, p. 7 and Claimant's Reply, p. 1.

11 Claimant's Application, p. 7, referring to the Tams Report, Section IV.

12 Claimant's Application, p. 7, referring to the Tams Report, ¶¶ 30, 54-58 and Section V.

falls outside of the scope of Annex 14-C and, thus, outside of the Tribunal's jurisdiction."[13]

22. According to the Claimant, Prof. Tam's legal arguments on these matters amount to counsel argument, and it is improper for the Respondent to attempt to introduce them as alleged independent expert evidence. The Tribunal does not need Prof. Tams to explain "first principles" of the Vienna Convention on the Law of Treaties ("VCLT"), nor how they should be applied to Annex 14-C of the USMCA: in the Claimant's submission, Prof. Tams is "no more qualified than either counsel to argue issues of public international law or the Tribunal to decide them."[14]

23. The Claimant clarifies in its Reply that it does not object to the Respondent presenting Prof. Tam's views as additional legal argument by counsel, or to the Tribunal treating it as such. "What the Tribunal should not do is afford any greater weight to the legal arguments made by Prof Tams in his Report than that of the Parties' arbitration counsel."[15]

24. Second, the Claimant contends that the Tams Report is belated. Pursuant to Procedural Order No. 1 ("**PO1**"), the Parties were required to produce all evidence with their first exchange of submissions. The second exchange of submissions was limited to "(i) responding to the allegations of fact and legal arguments, or (ii) addressing new facts that have arisen after the first submissions."[16] Accordingly, the Respondent should have submitted any expert reports with its Memorial on Jurisdiction. The Respondent has not explained why it did not do so, when (in the Claimant's submission) it clearly could have, as the issues addressed by the Tams Report are the same as those raised in the Respondent's Memorial on Jurisdiction.[17]

25. Third, the Claimant argues that the Tams Report causes it prejudice. Because it was filed with the Respondent's Reply, the Claimant only has three weeks to review "an unexpected thirty-page report plus supporting documentation, which should have been provided three months ago."[18] As a result, the Claimant has been deprived of a reasonable opportunity to respond.

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13 Claimant's Application, p. 7, referring to the Tams Report, ¶ 84.

14 Claimant's Reply, p. 3.

15 Claimant's Reply, p. 3.

16 Claimant's Application, p. 9.

17 Claimant's Application, p. 9; Claimant's Reply, p. 3.

18 Claimant's Application, p. 9.

B. The Respondent's position

26. The Respondent opposes the Claimant's request to strike the Tams Report, also for three main reasons.

27. First, the Respondent submits that the Claimant confuses the admissibility of the Tams Report with the Tribunal's authority to assess the relevance, materiality, and weight of the report,[19] and seeks to pre-empt that authority.[20]

28. According to the Respondent, nothing precludes a party from offering an expert legal opinion on issues of international law or treaty interpretation, particularly when a tribunal must decide a difficult legal question.[21] While the Respondent agrees that it is for the Tribunal to determine how Annex 14-C is to be interpreted and applied in this case, this does not prevent the Tribunal from considering expert legal opinions on specific issues of treaty interpretation that are relevant to the questions before it. Rather, the Tribunal's decision-making process includes the evaluation of these reports.[22] The mere consideration of an expert legal opinion does not compromise the Tribunal's own legal reasoning or decision-making capacity. Pursuant to PO1, the IBA Rules, NAFTA Chapter 11, and the UNCITRAL Rules, the Tribunal is "authorized to determine the relevance, materiality, and weight of any expert opinion offered by a party", but "is not required to adopt such a report, defer to it, or agree with it." [23]

29. The Respondent submits that Prof. Tam's report qualifies as admissible expert evidence, as it is an independent legal opinion rendered on a specific issue that supports the Respondent's response to the allegations made by the Claimant in its Counter-Memorial on Jurisdiction.[24] Specifically, the Tams Report offers legal expert evidence on a novel and untested question of investment law that will have to be decided from first principles in accordance with the VCLT.[25]

30. The Respondent denies that Prof. Tam's opinions amount to counsel argument, or that they are not independent. The Claimant has made no attempt to substantiate its allegations to the contrary. As to the Claimant's allegation that Prof. Tams is "no more

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19 Mexico's Response, p. 6; Mexico's Rejoinder, p. 1.

20 Mexico's Rejoinder, p. 3.

21 Mexico's Rejoinder, p. 2.

22 Mexico's Response, p. 6,

23 Mexico's Response, p. 6.

24 Mexico's Response, p. 7.

25 Mexico's Response, p. 6; Mexico's Rejoinder, p. 1.

qualified" than counsel or the Tribunal members on questions of international law, the Claimant will have an opportunity to challenge Prof. Tam's qualifications at the hearing.[26]

31. The Respondent further denies that the case law and legal authorities support the Claimant's position that legal expert evidence is inadmissible. It alleges that it is common for tribunals to admit legal expert evidence on specific issues of treaty interpretation and jurisdiction.[27] In any event, the limited examples cited by the Claimant do not support the argument that legal expert evidence on questions of international law should be struck from the record.[28] As to academic articles, the Respondent alleges that "all of the Claimant's submissions and appendices in support of its position can be traced directly back to Mr. [Donald] Donovan,"[29] whose views, preferences, and arguments are not sufficient to justify excluding the Tams Report.[30]

32. Second, the Respondent denies that the Tams Report is untimely. In its view, nothing in PO1 precludes the Parties from "adducing an expert legal opinion in the second exchange of submissions, provided that it is part of their response to allegations of fact and/or legal arguments made by the other party in the first round of submissions."[31] The Respondent alleges that it "properly submitted Professor Tams' expert legal opinion as part of its response to the allegations raised in the Claimant's Counter-Memorial on Jurisdiction with respect to the interpretation of Annex 14-C."[32]

33. Third, the Respondent denies that the Claimant has suffered any prejudice. Nothing prevents the Claimant from submitting an expert legal opinion with its Rejoinder on Jurisdiction in response to the allegations raised by the Respondent and the legal expert evidence in the Tams Report, especially after the changes in the procedural calendar, which now gives the Claimant several additional weeks to prepare its Rejoinder.[33]

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26 Mexico's Rejoinder, pp. 2-3.

27 Mexico's Response, p. 7, referring to **Annex II**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Award, 31 January 2022, and **Annex III**, *Manuel García Armas and others v. Bolivarian Republic of Venezuela*, PCA No. 2016-08, Award on Jurisdiction, 13 December 2019.

28 Mexico's Response, p. 8.

29 Mexico's Rejoinder, p. 4.

30 Mexico's Rejoinder, p. 5.

31 Mexico's Response, p. 8

32 Mexico's Response, p. 8.

33 Mexico's Response, p. 8; Mexico's Rejoinder, p. 6.

C. Analysis

34. The Claimant requests that the Tams Report be excluded from the record or, alternatively, that the Tribunal grant it no more weight than it would give to counsel argument. The Claimant's principal request relates to the admissibility of the Tams Report as expert evidence; its alternative request can be understood to relate to its status in the record of these proceedings and the weight that should be afforded to it by the Tribunal, should the Tams Report be admitted. The Tribunal addresses these issues in turn.

1. Admissibility of the Tams Report

35. Whether expert evidence is admissible in this case rests essentially on three questions:

a. First, does it qualify as independent expert evidence pursuant to PO1?

b. Second, has it been submitted in accordance with the relevant procedural rules?

c. Third, is its exclusion warranted on grounds such as those set out in Article 9.2 or 9.3 of the IBA Rules?

36. The Tribunal finds that the Tams Report satisfies the standard derived from these three questions.

37. First, the Tribunal finds that the Tams Report qualifies *prima facie* as independent expert evidence. Pursuant to PO1, "[e]ach Party may retain and produce evidence prepared by one or more experts, who shall be independent of that Party."[34] The Tribunal agrees with the Claimant that experts should bring specific expertise with the aim of assisting the Tribunal in its decision-making process. However, nothing in PO1, the UNCITRAL Rules, the NAFTA, the USMCA or the IBA Rules prevents such expertise from being legal.[35]

38. In his report, Prof. Tams opines on, *inter alia*, the interpretation of certain terms in Annex 14-C, and on whether NAFTA obligations were binding on the USCMA Parties after its termination. Both of these are legal questions that are relevant to the Tribunal's decision on jurisdiction. While it is true that Prof. Tams also opines on how the law should be applied to the facts, the Tribunal does not find this to bar the admissibility of his report. As with factual and quantum experts, the Tribunal is capable of

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[34] PO1, ¶ 57.

[35] The Tribunal notes that the IBA Rules' definition of "Party-Appointed Expert" is broad: "a person or organization appointed by a Party in order to report on specific issues determined by the Party[.]"

distinguishing a legal expert's opinions on matters of principle and their application to the facts. Further, as the Respondent has pointed out, the Tribunal is not required to accept an expert's opinions; it has full discretion to assess their weight.[36]

39. The Claimant also argues that Prof. Tams is "no more qualified" than counsel or the Tribunal members on the issues on which he is opining. The Tribunal notes that Prof. Tams is a Professor of International Law at two prestigious universities, so *prima facie* he appears qualified for his engagement as an expert in international law. In any event, the Claimant will have the opportunity to challenge Prof. Tams's qualifications in its written pleadings or at the hearing. As to the Claimant's assertion that the Tribunal does not "need" Prof. Tams's views, whether or not the Tams Report is useful is ultimately a question to be decided by the Tribunal when it comes to determine the weight, relevance, and materiality of the evidence; it does not relate to its admissibility.

40. Second, the Tribunal finds that the Tams Report was submitted in accordance with the rules set out for the submission of expert evidence in PO1. The Tams Report meets the formal requirements set out in paras. 58-59 of PO1, and was submitted with the Respondent's Reply on Jurisdiction, pursuant to para. 20 of PO1.

41. The Claimant argues that the report was untimely because it should have been submitted with the Respondent's Memorial on Jurisdiction. The Tribunal is not persuaded by this argument: para. 20 of PO1 allows for the submission of evidence (including expert evidence) that is responsive to arguments made by the other party in its previous submission.[37] In the Tribunal's view, the Tams Report meets this requirement. Indeed, the Tribunal notes that the Tams Report directly engages with the interpretation of Annex 14-C of the USCMA advanced by the Claimant in its Counter-Memorial on Jurisdiction.[38] In all appearance, therefore, the Tams Report did support the Respondent's response to the Claimant's Counter-Memorial on Jurisdiction, and was thus timely submitted with the Respondent's Reply on Jurisdiction.

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36 See PO1, ¶ 23; Article 9.1 of the IBA Rules.

37 PO1, ¶ 20 ("In the second exchange of submissions (i.e., Reply and Rejoinder), the Parties shall limit themselves to (i) responding to allegations of fact and legal arguments made by the other Party in the first exchange of submissions, and (ii) addressing new facts that have arisen after the Statement of Claim or Statement of Defense, respectively. Together with their Reply and Rejoinder, respectively, the Parties may only file additional evidence intended to answer or refute evidence or facts first alleged by the other Party in its previous pleading, including documents obtained during the document production phase, to the extent that the Party wishes to rely on them, or evidence not otherwise known (or that could not have been known) to a Party at the time of the submission of the Statement of Claim or Statement of Defense (as relevant), and except for new facts and arguments arising from the documents obtained in the document production phase.").

38 See, e.g., **RER-001**, Tams Report, ¶¶ 48-49; 54-59; 64-73; 75.

42. Third, the Tribunal does not find that the Tams Report's exclusion is warranted by other reasons, including, for instance, those set out in Articles 9.2 and 9.3 of the IBA Rules.

43. The Claimant also argued that the timing of the Tams Report was highly prejudicial because it was filed only a few weeks before the Claimant had to file its Rejoinder on jurisdiction. In light of the suspension of the proceedings, this concern has been overtaken by events. The Claimant has had ample time to consider the Report and the Tribunal will ensure that it has a reasonable opportunity to file rebuttal evidence, should it decide to do so.

44. For the reasons set out above, the Tribunal denies the Claimant's request to exclude the Tams Report as expert evidence.

2. The Claimant's alternative request

45. Having denied the Claimant's request that the Tams Report be held inadmissible, the Tribunal must also deny the Claimant's alternative request, namely, that the Tams Report be treated as counsel argument.

46. This leaves open the question of the weight to be afforded to the evidence of Prof. Tams, a question that will properly be addressed at a later stage of these proceedings.

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47. Ultimately, the Claimant's requests advance the position that, as a rule, in international arbitral proceedings the law should be argued by counsel rather than be the subject of expert evidence. To paraphrase an author relied upon by the Claimant, it is urged that it is no more appropriate or necessary for a legal expert to testify on the applicable international law before an international arbitral tribunal than it would be for a party arguing a case in the English courts under English law to adduce expert evidence from a professor of English law on the relevant English law principles.[39] All the more so, the Claimant further argues, when the legal expert goes as far as to offer an opinion on the ultimate question that falls to be determined by the tribunal.

48. While some practitioners in their writings defend the position advocated by the Claimant, it remains that, in practice, arbitral tribunals frequently hear - and often find assistance - in expert evidence on legal issues, particularly where, the question at issue is a novel or complex question of international investment law.

[39] **Appendix 07**, Blackaby, Nigel & Wilbraham, Alex, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 31(3) ICSID REV. 655 (2016), p. 661.

IV. THE CLAIMANT'S REQUEST TO STRIKE THE NDP REPORTS

49. The Tribunal now turns to the Claimant's request to strike the NDP Reports from the record.

A. The Claimant's position

50. The Claimant requests the Tribunal to declare as inadmissible evidence and exclude from the record "the four expert reports by Profs. Gardiner and Ascensio appended to the NDP Submission […] which the Tribunal has been invited to rely on by the United States, and which Mexico has in turn endorsed in its Reply."[40]

51. The Claimant advances two main arguments in support of its request.

52. First, the Claimant submits that, like the Tams Report, the NDP Reports constitute improper evidence because they refer to matters that go to the ultimate jurisdictional question in dispute in the *TC Energy* case and in this arbitration. In the Claimant's view, these arguments should be addressed by counsel and not by experts.[41]

53. Second, the Claimant argues that the process by which the NDP Reports have been introduced in this arbitration is prejudicial to it and impairs its due process rights. Specifically, because the NDP Reports have not been filed by a party to the proceedings, the Claimant is unable to cross-examine these experts. This impairs the Claimant's right to be heard and to have a full opportunity to present its case.[42]

B. The Respondent's position

54. The Respondent opposes the Claimant's request. In its view, pursuant to para. 15.1 of the Terms of Appointment (the "**ToA**"), para. 78 of PO1, Article 1128 of NAFTA, and Article 14.D.7(2) of the USMCA, the United States is entitled to make submissions on questions of interpretation of NAFTA or any applicable USMCA provisions.

55. According to the Respondent, this is exactly what the United States has done. It is now for the Tribunal to determine the relevance, materiality, and weight of the NDP Submission and the NDP Reports appended to it.[43]

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40 Claimant's Application, p. 10.

41 Claimant's Application, p. 11.

42 Claimant's Application, p. 11.

43 Mexico's Response, p. 9.

C. Analysis

56. Before addressing the Claimant's request, the Tribunal starts by noting that the United States filed a 4-page NDP Submission advancing its position on questions of interpretation of the USMCA and the NAFTA, in particular with respect to the possibility for investors to file claims for alleged breaches of NAFTA obligations that occurred after the NAFTA was terminated. In its NDP Submission, the United States notes that it has "explained in more detail its interpretation of Annex 14-C to the USMCA in its submissions in support of the preliminary objection in [*TC Energy*]," and "directs the Tribunal to these submissions, along with the accompanying expert reports of Professor Richard Gardiner and Professor Hervé Ascensio, who also address the interpretation of Annex 14-C", which the United States has appended to its NDP Submission "for ease of reference."[44]

57. The Claimant has only requested the exclusion of the NDP Reports, not that of the United States' memorials in *TC Energy*. The Tribunal understands that the Claimant accepts that these memorials may be filed to supplement the United States' position on the interpretation of the NAFTA and USCMA, and should be understood to be a part of the United States' NDP Submission. The Tribunal will therefore not address their admissibility.

58. Instead, the Claimant's request focuses on the admissibility of the NDP Reports as evidence introduced in these proceedings through the United States NDP Submission. To determine the Claimant's request, it suffices for the Tribunal to observe that, under the procedural rules applicable to this case, and considering the legitimate interests of both the Disputing and Non-Disputing Parties, it is not open to the United States as a Non-Disputing Party to file the NDP Reports as part of its NDP submission. The Tribunal reaches that conclusion for the following reasons.

59. Pursuant to the Terms of Appointment ("**ToA**") and PO1, non-disputing NAFTA Parties or the non-disputing USMCA Annex Party ("**NDPs**") may make submissions on questions of interpretation of the NAFTA or any applicable USMCA provisions subject to NAFTA Article 1128 and USMCA Article 14.D.7(2) of the USMCA, and in accordance with the rules set out in PO1.[45] In turn, PO1 sets out rules related to the timing, language, format and filing of NDP submissions.[46] PO1 further provides that

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44 United States' NDP Submission, ¶ 6.

45 PO1, ¶ 78; ToA, ¶ 15.1.

46 PO1, ¶¶ 79-80.

NDPs may attend hearings and are entitled to receive a copy of written submissions, subject to confidentiality obligations.[47]

60. The Tribunal finds 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 Disputing Parties' due process rights.

61. The taking of evidence (including the submission and assessment of legal expert evidence) in this case is governed by detailed rules that have been put in place in PO1 to ensure that the Disputing Parties can fully exercise their right to present their case and challenge the other Disputing Party's case and the evidence adduced in support thereof. In particular, PO1 specifies the requirements that expert reports must meet, and sets forth specific rules for these reports to be responded to and/or challenged, both in writing and at the hearing, and ultimately assessed by the Tribunal. A Disputing Party's right to challenge expert evidence adduced by the other Party includes the right to cross-examine the expert, not only with respect to the substance of his or her report but also with respect to his or her qualifications and independence. Specific time limits are set out in advance for a Disputing Party to submit rebuttal expert evidence and call the expert to the hearing.

62. None of these procedural safeguards exist for the NDP Reports included as part of the United States NDP submission. Even if the Tribunal were amenable to put some of these safeguards in place, this would greatly disrupt the proceedings. Moreover, by proposing to submit in this case the expert reports that it has filed in the *TC Energy* case but not those that were filed in response by the claimant in that case, the United States is presenting this Tribunal with only one side of the expert evidence that has been adduced in this parallel case.[48] In sum, the Tribunal is of the view that allowing the United States to include the NDP reports in its NDP Submission in this case would impair the Disputing Parties' due process rights, as well as their legitimate interest in an efficient procedure, and would undermine the integrity of these proceedings.

63. For these reasons, the Tribunal finds that the NDP Reports are not admissible and directs that they should be excluded from the Unites States NDP Submission and removed from the record of this arbitration.

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47 PO1, ¶ 81.

48 The Respondent has averred that in *TC Energy* the claimant has submitted, in response to the expert reports submitted by the United States, an expert legal opinion by Christoph Schreuer regarding the interpretation of Annex 14-C of the USMCA (see Respondent's letter dated 25 March 2025, p. 2.) This report has not been included in the United States NDP Submission.

V. ORDER

64. For the reasons set out above, the Tribunal:

a. DENIES the Claimant's request that the Tams Report be declared inadmissible, and be removed from the record of the arbitration;

b. DENIES the Claimant's alternative request that the Tams Report be treated as counsel argument;

c. GRANTS the Claimant's request that the NDP Reports be declared inadmissible, and DIRECTS that these reports should be excluded from the Unites States NDP Submission and removed from the record of this arbitration; and

d. DECIDES that costs in relation to the Claimant's application of 15 March 2025 will be determined at a subsequent stage of the arbitration.

On behalf of the Tribunal,

[Signed]

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Sabina Sacco
President of the Tribunal

Date: 28 May 2024