IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION RULES

LEGACY VULCAN, LLC

*Claimant*

*-and-*

UNITED MEXICAN STATES

*Respondent.*

ICSID CASE NO. ARB/19/1

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# SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the Tribunal's revised procedural calendar for Claimant's ancillary claim (dated April 13, 2023), and ICSID Arbitration Rule 37(2) (2006), the United States of America makes this submission on questions of interpretation of the NAFTA and the United States-Mexico-Canada Agreement (USMCA). The United States does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.[*] The United States maintains the positions set out in its first written submission in this case, dated June 7, 2021, and in the oral submission delivered on July 26, 2021.

[*] In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

## NAFTA Article 1105 (Minimum Standard of Treatment)

2. As the United States explained in its first written submission in this case, (a) the customary international law minimum standard of treatment is the applicable standard in NAFTA Article 1105; (b) customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation; and (c) the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[1]

3. The United States is aware of no general and consistent State practice and *opinio juris* establishing that the customary international law minimum standard of treatment requires States to provide the same due process in administrative decision-making as in adjudicatory proceedings.[2] To the contrary, any assessment of administrative decision-making under the minimum standard of treatment must acknowledge "the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[3]

4. In addition, the principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" (i.e., *pacta sunt servanda*) is established in customary international law,[4] not in Chapter Eleven of the NAFTA. The good faith principle applies as between the States Parties to the treaty, and does not extend to third parties outside of the treaty relationship. As such, it is not an obligation owed to investors, and claims alleging breach of the

[1] *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Submission of the United States of America ¶¶ 2-11 (June 7, 2021).

[2] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award ¶¶ 9.22-9.25, 9.27 (Aug. 25, 2014) ("*Apotex Holdings* Award") (rejecting claim based on alleged failure by the United States to provide adequate due process in decision-making by the U.S. Food and Drug Administration, including because claimants had failed to establish that elements of due process that may be relevant in "proceedings of a formal adjudicative character" were part of the customary international law minimum standard of treatment as applied to administrative decision-making).

[3] *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000); *Apotex Holdings* Award ¶¶ 9.37-9.39.

[4] *See* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (reflecting the customary international law principle).

good faith principle in a Party's performance of its NAFTA obligations do not fall within the limited jurisdictional grant for investor-State disputes afforded in Section B.[5]

5. Furthermore, it is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[6] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[7] Accordingly, a claimant "may not justifiably rely upon the principle of

[5] *See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 135-36, ¶¶ 270-271 (June 27) (holding, with respect to a claim based on customary international law duties alleged to be "implicit in the rule *pacta sunt servanda*," that "the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain [such] a claim"). *See also Mobil Investments Canada Inc. v. Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶ 170 (July 13, 2018) (explaining, in discussing the good faith principle, that "Chapter Eleven of NAFTA confers upon the Tribunal jurisdiction only with regard to disputes concerning alleged breaches of Chapter Eleven itself. While the Tribunal is empowered by Article 1131(1) of NAFTA to 'decide the issues in dispute in accordance with this agreement and applicable rules of international law', that does not give it the jurisdiction to hear a dispute concerning an alleged breach not of Chapter Eleven but of other rules of international law.").

[6] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105, ¶ 94 (Dec. 20) (internal quotation marks omitted); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, 1998 I.C.J. 275, 297, ¶ 39 (June 11). *See also Mobil Investments Canada Inc. v. Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶ 168 (July 13, 2018) ("[B]oth Parties, as well as Mexico and the United States are clear that the principle of good faith forms part of international law and is relevant to the manner in which a State is required to perform its treaty obligations, but that it does not constitute a separate source of obligation where none would otherwise exist. The Tribunal agrees with this view which is based upon clear statements to that effect by the International Court of Justice.").

[7] This consistent and longstanding position relying on decisions of the ICJ and previous arbitral tribunals has been articulated in repeated submissions by the United States to NAFTA tribunals. *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America ¶ 7 (July 25, 2014) ("It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations,' but 'it is not in itself a source of obligation where none would otherwise exist.'"); *Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada,* NAFTA/UNCITRAL, PCA Case No. 2009-04, Submission of the United States of America ¶ 6 (Apr. 19, 2013) (same); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, U.S. Counter-Memorial at 94 (Dec. 22, 2008) ("[C]ustomary international law does not impose a free-standing, substantive obligation of 'good faith' that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant 'may not justifiably rely upon the principle of good faith' to support a claim."); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of Respondent United States of America at 29 n.93 (Aug. 6, 2004) ("[Claimant] appears to argue that customary international law imposes a general obligation of 'good faith' independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that 'the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist'.").

good faith" to support a claim,[8] absent a specific treaty obligation, and the NAFTA contains no such obligation, either in Article 1105 or otherwise.

## NAFTA Article 1114 (Environmental Measures)

6. Article 1114 informs the interpretation of other provisions of NAFTA Chapter Eleven, and provides a forceful protection of the right of States Parties to adopt, maintain or enforce measures to ensure that investment is undertaken in a manner sensitive to environmental concerns.[9] Chapter Eleven was not intended to undermine the ability of governments to take measures based upon environmental concerns, even when those measures may affect the value of an investment, if otherwise consistent with the Chapter.

## Contributory Fault

7. It is well established that a claimant may not be awarded reparation for losses to the extent of its contribution to such losses, and nothing in the NAFTA indicates otherwise. This is reflected in Article 39 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which provides: "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[10]

[8] *Land and Maritime Boundary (Cameroon v. Nigeria)*, Judgment, 1998 I.C.J. 275, 297, ¶ 39 (June 11).

[9] *See, e.g.*, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, U.S.-Oman FTA/ICSID Case No. ARB/11/33, Award ¶ 387 (Nov. 3, 2015) (observing that the analogous provision of the U.S.-Oman Free Trade Agreement "provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is undertaken in a manner sensitive to environmental concerns, provided it is not otherwise inconsistent with the express provisions") (internal quotation marks omitted); *see also David R. Aven v. Republic of Costa Rica*, CAFTA-DR/ICSID Case No. UNCT/15/3, Final Award ¶ 412 (Sept. 18, 2018).

[10] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 39 (U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2)). *See also id.*, Commentary ¶ 1 ("Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but *where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission*. Its focus is on situations which in national law systems are referred to as 'contributory negligence', 'comparative fault', 'faute de la victime', etc.") (emphasis added).

## USMCA Annex 14-C

8. Paragraph 1 of Annex 14-C provides the USMCA Parties' consent, with respect to "legacy investments," to the submission of claims for breaches of certain NAFTA obligations that allegedly occurred after the NAFTA entered into force and before it was terminated. That paragraph states:

> Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
>
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
>
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
>
> (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.[11]

Paragraph 3 of Annex 14-C provides an additional three years past the NAFTA's termination for the submission of such claims.[12]

9. The USMCA Parties did *not* consent in Annex 14-C to the submission of claims for alleged breaches of NAFTA obligations that occurred *after* the NAFTA terminated. Indeed, there could be no breach of the NAFTA's obligations after it terminated because those obligations were no longer binding on the Parties. As explained in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[13]

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[11] USMCA Annex 14-C, ¶ 1 (footnotes omitted).

[12] *See* USMCA Annex 14-C, ¶ 3.

[13] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13 (U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2)).

10. The NAFTA terminated and the USMCA entered into force on July 1, 2020.[14] The default position in customary international law, reflected in Article 70(1)(a) of the Vienna Convention on the Law of Treaties, is that "[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention . . . releases the parties from any obligation further to perform the treaty[.]"[15]

11. The NAFTA did not contain a survival provision binding the Parties to continue performing its obligations for a period post-termination. Nor did the USMCA Parties make such a commitment, explicitly or implicitly, with respect to the NAFTA's obligations in the USMCA. Thus, once the NAFTA terminated and the USMCA entered into force, the USMCA Parties ceased to be bound by the NAFTA's obligations, including the substantive investment obligations in Section A of NAFTA Chapter 11. Accordingly, there could be no breach of those obligations after the NAFTA's termination and no claim alleging such a post-termination breach could be submitted to arbitration under Paragraph 1 of Annex 14-C.

12. The United States has explained in more detail its interpretation of Annex 14-C to the USMCA in its Memorial on its Preliminary Objection, dated June 12, 2023, in *TC Energy Corp. & TransCanada Pipelines Limited v. United States*, ICSID Case No. ARB/21/63. For ease of reference, the United States has appended its Memorial hereto, along with the accompanying expert reports of Professor Richard Gardiner and Professor Hervé Ascensio, who also address the interpretation of Annex 14-C.

[14] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada provides: "Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA." *See* USMCA Annex 14-C, ¶¶ 3, 5-6 (discussing the "termination of NAFTA 1994").

[15] Vienna Convention on the Law of Treaties, art. 70(1)(a), May 23, 1969, 1155 U.N.T.S. 331. Although the United States is not a party to the Vienna Convention, it has recognized since at least 1971 that the Convention is an "authoritative guide" to treaty law and practice. *See* Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties (Oct. 18, 1971), S. Ex. L. 92d Cong., 1st Sess., *reprinted in* 65 DEP'T ST. BULL. No. 1694, at 684, 685 (Dec. 13, 1971).

*Respectfully submitted*,

Lisa J. Grosh
*Assistant Legal Adviser*
John D. Daley
*Deputy Assistant Legal Adviser*
David M. Bigge
*Chief of Investment Arbitration*
Nathaniel E. Jedrey
*Attorney Adviser*
Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

July 21, 2023

APPENDIX:

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

2) Expert Report of Professor Richard Gardiner, *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America,* ICSID Case No. ARB/21/63 (June 9, 2023)

3) Expert Report of Professor Hervé Ascensio, *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America,* ICSID Case No. ARB/21/63 (June 8, 2023)

IN THE ARBITRATION UNDER THE UNITED STATES-MEXICO-CANADA AGREEMENT AND THE ICSID ARBITRATION RULES BETWEEN

TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED

*Claimants*

*-and-*

UNITED STATES OF AMERICA

*Respondent.*

ICSID CASE NO. ARB/21/63

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# THE UNITED STATES OF AMERICA'S MEMORIAL ON ITS PRELIMINARY OBJECTION

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Lisa J. Grosh
*Assistant Legal Adviser*
John D. Daley
*Deputy Assistant Legal Adviser*
David M. Bigge
*Chief of Investment Arbitration*
Julia H. Brower
Nathaniel E. Jedrey
Melinda E. Kuritzky
Mary T. Muino
Alvaro J. Peralta
David J. Stute
Isaac D. Webb
*Attorney-Advisers*
Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

June 12, 2023

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1. In accordance with the Tribunal's Procedural Order No. 2 of April 13, 2023, the United States hereby submits its Memorial on its Preliminary Objection to the Tribunal's jurisdiction under Annex 14-C to the United States-Mexico-Canada Agreement ("USMCA"), as well as the expert reports of Professor Richard Gardiner and Professor Hervé Ascensio.[1]

# I. Introduction

2. The United States objects to the Tribunal's jurisdiction because the USMCA Parties' consent to arbitration in Annex 14-C is limited to claims for the breach of certain obligations under the North American Free Trade Agreement ("NAFTA") and Claimants cannot assert a breach of the NAFTA. The reason is simple: the NAFTA terminated on July 1, 2020, and Claimants' claims are based exclusively on an event – President Biden's revocation of the permit for the Keystone XL pipeline – that occurred more than six months later, on January 20, 2021. The permit revocation could not have breached the NAFTA because it occurred at a time when the United States was, as a result of the NAFTA's termination, no longer bound to perform the relevant NAFTA obligations.

3. In an effort to remedy this dispositive flaw in their jurisdictional case, Claimants argue that Annex 14-C does more than extend the USMCA Parties' consent to the arbitration of claims based on alleged breaches of the NAFTA. Claimants contend that Annex 14-C, in combination with the Protocol Replacing the NAFTA with the USMCA (the "USMCA Protocol"), contains an implicit agreement by the USMCA Parties that, despite the NAFTA's termination and the absence of any survival provision in the NAFTA itself, the NAFTA's substantive investment

[1] In this memorial, the United States cites Professor Gardiner's Report as "Gardiner Report ¶ X" and Professor Ascensio's Report as "Ascensio Report ¶ X".

obligations would continue to bind them for three additional years beyond the NAFTA's termination.

4. Claimants cannot, however, point to any language in Annex 14-C reflecting such an agreement. No provision of Annex 14-C states that the substantive investment obligations in Section A of NAFTA Chapter 11 "shall continue to apply" or "shall remain in force" with respect to investors or their investments for any period of time after the NAFTA's termination. Rather, Annex 14-C provides only the USMCA Parties' "consent[], with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B" of NAFTA Chapter 11 and Annex 14-C, for alleged breaches of Section A of NAFTA Chapter 11, and specifies that such consent "shall expire three years after the termination of NAFTA 1994." The consent to arbitrate claims for an additional three years after the NAFTA's termination did not extend the substantive obligations themselves for an additional three years.

5. Nor does the USMCA Protocol help Claimants. The fact that the USMCA Parties' termination of the NAFTA was "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA" cannot transform Annex 14-C into an agreement to extend the application of the NAFTA simply because it refers to the NAFTA. Rather, this "without prejudice" language accomplishes precisely what it says, ensuring that those parts of the USMCA that refer to the NAFTA are effective despite the fact that the NAFTA was itself terminated.

6. If the USMCA Parties had agreed to bind themselves to perform the NAFTA's substantive investment obligations for three additional years after the NAFTA had been terminated, that commitment would have been clear and unequivocal. Its absence from Annex 14-C is just as clear. Indeed, Professor Gardiner, whose well-regarded treatise on treaty

interpretation has been cited by both parties in this case, and Professor Ascensio, an expert in, among other topics, Article 70 of the Vienna Convention on the Law of Treaties, both opine that the USMCA Parties consented in Annex 14-C only to arbitration of claims based on alleged breaches occurring before the NAFTA's termination.[2]

7. Claimants' claims are outside the scope of Annex 14-C and the Tribunal has no jurisdiction to hear them. They must be dismissed.

## II. Claimants Have Failed to Establish the Tribunal's Jurisdiction Over Their Claims

8. A State's consent to arbitration is paramount for the jurisdiction of an arbitral tribunal hearing a dispute against that State.[3] Consent is the "cornerstone" of jurisdiction in investor-State arbitration,[4] and it is therefore axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent.[5] Claimants have the burden to establish the United States' consent to

[2] Gardiner Report ¶ F.2; Ascensio Report ¶¶ 8, 33.

[3] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74, ¶ 125 (2009) **(RL-010)** ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); *AsiaPhos Ltd. & Norwest Chemicals Pte Ltd. v. China*, ICSID Case No. ADM/21/1, Award ¶ 59 (Feb. 16, 2023) **(RL-047)** ("[T]he jurisdiction of any arbitral tribunal should be based on the clear and unambiguous consent of both parties to have their dispute resolved by arbitration. This applies, in particular, in investment disputes where one of the parties is a sovereign State, which generally enjoys jurisdictional immunity from being sued in any kind of proceedings outside of its own State courts. Only where a State has waived its jurisdictional immunity by expressing its consent to have a dispute resolved by international arbitration in a clear and unambiguous manner does an arbitral tribunal have jurisdiction to decide on that dispute.") (internal citations omitted).

[4] As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965) **(RL-012)**.

[5] *Renco Group Inc. v. Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) **(RL-013)** ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru."). *See also* CHRISTOPH SCHREUER, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 (Peter Muchlinski et al., eds., 2008) **(RL-014)** (explaining that "[l]ike any form of arbitration, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); BORZU SABAHI ET AL., INVESTOR-STATE ARBITRATION 309, ¶ 9.01 (2d ed. 2019) **(RL-015)** (explaining that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

arbitrate this dispute.[6] Because Claimants have failed to carry their burden, the Tribunal cannot exercise jurisdiction over this dispute.

9. The alleged basis for the USMCA Parties' consent to arbitration and the Tribunal's jurisdiction is Annex 14-C (Legacy Investment Claims and Pending Claims).[7] The Tribunal's task in this phase of the case is therefore to interpret Annex 14-C, guided by the customary international law principles reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention").

10. Paragraph 1 of Annex 14-C defines the scope of the USMCA Parties' consent to arbitration:

> Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
>
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
>
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
>
> (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.[8]

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[6] *ICS Inspection & Control Services Ltd. v. Argentina*, PCA Case No. 2010-09, Award on Jurisdiction ¶ 280 (Feb. 10, 2012) **(RL-048)** ("The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined."). *See also Pugachev v. Russia*, Award on Jurisdiction ¶ 248 (June 18, 2020) **(RL-049)** (noting that "[i]t is an accepted principle of international law that the claimant in an arbitration bears the legal burden of showing that the tribunal has jurisdiction to consider its claim").

[7] The USMCA's other dispute resolution annexes, Annexes 14-D and 14-E, do not cover claims by Canadian investors.

[8] Annex 14-C, ¶ 1 (footnotes omitted) **(C-0002)**. The version of the USMCA that Claimants have submitted as Exhibit C-0002 does not appear to include the changes agreed in the December 10, 2019 Protocol of Amendment to the USMCA. Nevertheless, for ease of reference during this phase of the proceedings, the United States will continue to refer to Exhibit C-0002.

11. Paragraph 1 specifies that the Parties' consent to arbitration is limited to claims that allege breaches of the three sets of NAFTA obligations enumerated in subparagraphs (a) to (c).[9] As explained in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[10] Accordingly, in order to establish that their claims based on the January 2021 revocation of the Keystone XL pipeline can be submitted to arbitration under Paragraph 1 of Annex 14-C, Claimants must show that the NAFTA's obligations remained binding on the United States – and could, therefore, be breached by the United States – *when* that act occurred.[11] If not, Claimants' claims are outside the scope of Annex 14-C.

12. The NAFTA terminated as of the USMCA's entry into force on July 1, 2020.[12] Pursuant to customary international law principles reflected in Article 70 of the Vienna Convention, the

[9] Paragraph 1 places other conditions on the Parties' consent, which will be discussed in more detail below. *See infra* ¶¶ 25-32.

[10] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001) **(RL-023)**. *See also* Ascensio Report ¶ 28 ("A breach must relate to a legal rule in force; if not, there would be no obligation and, consequently, no breach.").

[11] As Professor Schreuer observed with respect to consent to arbitration limited to claims alleging violations of a specific treaty: "[T]he entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law. For instance, under the NAFTA, the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA itself." CHRISTOPH SCHREUER, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 859-60 (Peter Muchlinski et al., eds., 2008) **(RL-014)**. Though Professor Schreuer's comments focused on a treaty's entry into force, his reasoning is equally sound as applied to a treaty's termination. *See also* Humphrey Waldock, Third Report on the Law of Treaties 11 (¶ 4), U.N. Doc. A/CN.4/167 (1964) **(RL-050)** ("[W]hen a jurisdictional clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit *ratione temporis* the application of the jurisdictional clause. The reason is that the 'disputes' with which the clause is concerned are *ex hypothesi* limited to 'disputes' regarding the interpretation and application of the substantive provisions of the treaty which, as has been seen, do not normally extend to matters occurring before the treaty came into force.").

[12] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada ¶ 1 **(R-0001)** ("Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, *shall supersede the NAFTA*, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.") (emphasis added). *See also* Annex 14-C, ¶ 3 **(C-0002)** ("A Party's consent under paragraph 1 shall expire three years after *the termination of NAFTA 1994*.")

NAFTA's termination "release[d] the parties from any obligation further to perform the treaty," subject to an agreement by the Parties, in the NAFTA or elsewhere, to extend the application of those obligations.[13] The NAFTA itself contains no survival provision and, accordingly, the Tribunal's jurisdiction hinges on whether the USMCA memorializes an agreement to be bound by the NAFTA's substantive investment obligations for a period after the NAFTA's termination. This is the critical question before the Tribunal.

13. Claimants have argued that Paragraph 1 of Annex 14-C, in addition to defining the scope of the USMCA Parties' consent to arbitration, also extends the substantive obligations in Section A of NAFTA Chapter 11. As the United States will demonstrate in the sections that follow, it does not. Annex 14-C extends the Parties' *consent to arbitrate* alleged breaches of the obligations in NAFTA Chapter 11, Section A for a period of three years after the NAFTA terminates. It does not extend *the obligations themselves* past the NAFTA's termination. As Professor Gardiner confirms: "[T]he consent in Annex 14-C is consent only to submission to arbitration of claims alleging breach of obligations relating to acts and events taking place before the NAFTA, as the source of those obligations, was superseded on 1 July 2020."[14] Professor Ascensio is in accord: "Annex 14-C does not apply to claims alleging breaches of NAFTA occurring after its termination[.]"[15]

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(emphasis added); *id.*, ¶ 5 ("For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by *the termination of NAFTA 1994*, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.") (emphasis added); *id.*, ¶ 6(a) ("'legacy investment' means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of *termination of NAFTA 1994*, and in existence on the date of entry into force of this Agreement") (emphasis added).

[13] Vienna Convention on the Law of Treaties, art. 70(1)(a) **(RL-016)**.

[14] Gardiner Report ¶ F.2.

[15] Ascensio Report ¶ 8. *See also id.* ¶ 33 ("Annex 14-C of USMCA, which contains the State's consent to arbitration, relates to violations of NAFTA that occurred when this treaty was in force. It does not cover an alleged

14. The January 2021 permit revocation therefore cannot constitute a breach of the NAFTA.[16] Claimants' claims based on the permit revocation are, accordingly, outside the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C and must be dismissed.

### A. Annex 14-C, Interpreted in Accordance with Article 31 of the Vienna Convention, Does Not Extend the Application of the NAFTA's Substantive Investment Obligations

15. Article 31(1) of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[17] As the International Law Commission explained in its commentary on the draft text of the Vienna Convention, Article 31 "is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[18]

16. As reflected in the three sections that follow, a good faith interpretation of Annex 14-C's terms **(1)** in accordance with their ordinary meaning, **(2)** in context, and **(3)** in light of the

breach of the NAFTA due to events that took place after it terminated, *i.e.*, after 1st July 2020, as in the present case.").

[16] Accordingly, Claimants' repeated refrain that their claims satisfy all elements set out in Paragraphs 1 and 3 of Annex 14-C is wrong. *See, e.g.*, Claimants' Rejoinder Regarding Respondent's Request for Bifurcation ¶ 25 (Mar. 22, 2023) ("Claimants' Rejoinder on Bifurcation").

[17] Vienna Convention on the Law of Treaties, art. 31(1) **(RL-016)**.

[18] International Law Commission, Draft Articles on the Law of Treaties with commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 220 (¶ 11), U.N. Doc. A/CN.4/SER.A/1966/Add.l **(CL-032)**; *id.* 223 (¶ 18). *See also* Gardiner Report ¶ A.7 ("The rules of the Vienna Convention on the Law of Treaties 1969 apply. These rules have been accepted internationally as stating the customary international law rules for interpretation of treaties. Under these rules the starting point is the text.") (citations omitted). Claimants' attempted use of statements by former government officials to suggest that the U.S. interpretation of Annex 14-C is not in "good faith" (Claimants' Rejoinder on Bifurcation ¶¶ 19-23) is wholly inconsistent with Article 31's focus on the treaty text. The statements that Claimants have identified may be taken into account, if at all, only as supplementary means of interpretation under Article 32 of the Vienna Convention. As explained below, however, these statements do not assist the Tribunal in answering the interpretive question before it. *See infra* ¶¶ 65, 84-92.

USMCA's object and purpose confirms unequivocally that the USMCA Parties did not bind themselves to apply the NAFTA's substantive investment obligations after its termination.

### 1) Annex 14-C's Text Contains No Agreement to Extend the NAFTA's Substantive Investment Obligations

#### a. The Overall Structure of Annex 14-C Demonstrates That It Provides Consent to Arbitrate, but Does Not Extend Substantive Obligations

17. Annex 14-C contains no text that constitutes an agreement by the USMCA Parties to bind themselves to the continued application of the NAFTA's substantive investment obligations for three years after its termination.[19] There is little need to take the interpretive exercise further because Claimants' reading falls at this first hurdle.

18. Annex 14-C is not a complex provision. Each of its paragraphs has a single clear function. Paragraphs 1, 2, and 3 establish the substantive and temporal scope of the USMCA Parties' consent to arbitration. Specifically,

- Paragraph 1 establishes the scope of the USMCA Parties' consent to arbitration.
- Paragraph 2 provides that such consent, together with the submission of a claim to arbitration, shall satisfy the requirements of certain other international agreements.
- Paragraph 3 imposes a temporal limit on the USMCA Parties' consent, providing that it "shall expire three years after the termination of NAFTA 1994."

[19] As Professor Ascensio concludes, "the analysis of USMCA shows that there is no transition period provided for in it, but that some specific provisions make reference to certain NAFTA provisions in order to extend their effect over time. Under Chapter 14 of USMCA, only Annex 14-C contains provisions of this type. They allow the NAFTA investor-to-State arbitration procedure to continue to be used to resolve the category of disputes named 'legacy investment claims'. But there is no provision for the substantive obligations of NAFTA to be extended." Ascensio Report ¶ 32.

19. Paragraphs 4 and 5 deal with proceedings initiated pursuant to the Parties' consent to arbitration. Paragraph 4 provides that arbitrations initiated under Paragraph 1 within the three-year time limit provided in Paragraph 3 may proceed to conclusion, and that "the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3." Paragraph 5 provides that an arbitration initiated while the NAFTA was in force may proceed to conclusion, unaffected by the NAFTA's termination. Finally, Paragraph 6 provides definitions applicable to Annex 14-C.[20]

20. Critically, not one of these six paragraphs says anything about the continued application of the NAFTA's substantive investment obligations to investors or their investments.

21. Claimants' jurisdictional argument hinges on the text of Paragraph 1 of Annex 14-C. In Claimants' view, Paragraph 1 of Annex 14-C performs double duty, embodying both the USMCA Parties' consent to arbitration *and* a purported agreement to remain bound by the NAFTA's substantive investment obligations for a further three years. But only the former commitment appears in the text; there is no mention of the latter. Paragraph 1 states that the USMCA Parties "consent" to the arbitration of certain alleged NAFTA breaches, not that they agree to the extension of any of the NAFTA's substantive obligations.

22. The remaining paragraphs of Annex 14-C reinforce the conclusion that Paragraph 1 deals solely with the USMCA Parties' consent to arbitration. Paragraph 2 addresses the effect of "[t]he *consent* under paragraph 1" in combination with the submission of a claim to arbitration.[21] Paragraph 3 provides that "[a] Party's *consent* under paragraph 1 shall expire three years after the

[20] Annex 14-C also includes two footnotes, which are discussed in further detail below (¶¶ 47-58), but for present purposes it is enough to say that neither includes an agreement to the extended application of the NAFTA's substantive obligations.
[21] Annex 14-C, ¶ 2 **(C-0002)** (emphasis added).

termination of NAFTA 1994."[22] The specific language of Paragraph 3 is telling. Had Paragraph 1 been intended to memorialize an agreement between the USMCA Parties to extend the application of the NAFTA's substantive investment obligations, not only would such an intent be evident from the text of that provision – and, to be clear, it is not – but one would also expect Paragraph 3 expressly to relieve the Parties from any obligation further to perform the NAFTA's obligations after three years. It does not do so. Instead, Paragraph 3 ends only the USMCA Parties' consent to arbitrate legacy investment claims, further confirming that such consent is Paragraph 1's sole object.

23. Paragraph 4 is also consistent with this conclusion. Paragraph 4 provides that, "[f]or greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion," and that "the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of *consent* referenced in paragraph 3."[23] Again, the focus is on the USMCA Parties' consent: such consent is given in Paragraph 1 and expires pursuant to Paragraph 3.

24. Finally, the text of Footnote 21, which creates a carveout from Paragraph 1, has a similar effect. In describing the carveout, Footnote 21 provides that "Mexico and the United States do not *consent* under paragraph 1" with respect to a specific category of investors.[24] Again, the focus is on the "consent" provided by the USMCA Parties under Paragraph 1. There is no reference to an agreement by the Parties to extend the application of the NAFTA's substantive investment obligations, nor any attempt to carve investors out from that purported commitment.

[22] *Id.*, ¶ 3 (emphasis added).
[23] *Id.*, ¶ 4 (emphasis added).
[24] *Id.*, ¶ 1 n.21 (emphasis added). *See also infra* ¶¶ 50-55.

### b. Paragraph 1 of Annex 14-C Is Not an Agreement to Extend the NAFTA's Substantive Investment Obligations

25. Paragraph 1, the critical paragraph for Claimants' arguments, sets out the three key parameters of the USMCA Parties' consent to arbitration. None of these parameters includes an agreement of the Parties to extend the NAFTA's substantive obligations.

#### *i. Claims Must Relate to a "Legacy Investment"*

26. Paragraph 1 limits the Parties' consent to arbitrate to "legacy investments." "Legacy investment" is defined in Paragraph 6 of Annex 14-C 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."[25] This definition limits the USMCA Parties' consent to arbitration in two ways: (1) the investment must have been established or acquired during the period when the NAFTA was in force and, (2) the investment must still have been in existence on the date the USMCA entered into force. It therefore excludes from the USMCA Parties' consent investments that both pre-date the NAFTA, and investments that, despite having been established or acquired while the NAFTA was in force, were no longer in existence on the date the USMCA replaced the NAFTA.

27. In their bifurcation briefing, Claimants argued that the final clause in Annex 14-C's definition of "legacy investment" – requiring that an investment be "in existence" as of the USMCA's entry into force – supports their interpretation of the Annex. According to Claimants, this clause shows that the USMCA Parties were "focused on providing continuing protection of legacy investments."[26] This is not an "ordinary meaning" textual analysis. Such an analysis, had Claimants conducted one, would have confirmed that there is no discussion of "continu[ed]

[25] *Id.*, ¶ 6(a).
[26] Claimants' Rejoinder on Bifurcation ¶ 61 (emphasis omitted).

protection" of investments through the extension of substantive obligations of the NAFTA; rather, the definition of "legacy investments" merely serves to define and limit the scope of the USMCA Parties' consent to arbitrate.

28. In any event, Claimants' argument makes little sense. The final clause of the "legacy investment" definition – which, again, excludes investments that were not in existence when the USMCA entered into force – is redundant with respect to measures taken *after* the date the USMCA entered into force, as such measures could not have had any effect on an investment that had ceased to exist *before* that date, regardless of the definition of "legacy investment."

29. Rather, the limitation on consent provided by the "legacy investment" definition only makes sense with respect to measures taken *before* the USMCA entered into force. The "legacy investment" definition serves to foreclose the USCMA Parties' consent to arbitrate NAFTA claims with respect to investments that were established or acquired while the NAFTA was in force but were no longer "in existence" as of the entry into force of the USMCA. This category of investments could only have been affected by measures taken while they were in existence, *i.e.*, measures taken before the USMCA's entry into force. Accordingly, the "legacy investment" definition does not support Claimants' assertion that the USMCA Parties were focused on providing protection of legacy investments under the NAFTA that would continue after the USMCA's entry into force.

*ii. Claims Must Be Submitted to Arbitration in Accordance with Section B of NAFTA Chapter 11*

30. Paragraph 1 indicates that claims must be submitted to arbitration in accordance with Section B of NAFTA Chapter 11. NAFTA Chapter 11 was divided into two sections: Section A established the substantive obligations each Party undertook with respect to covered investors and

investments, while Section B provided the investor-State dispute resolution mechanism for allegations of breach of the substantive obligations of Section A. The USMCA's investor-State dispute resolution mechanism is sharply curtailed compared to Section B of NAFTA Chapter 11.[27] Annex 14-C indicated the USMCA Parties' consent that, for three years after the termination of the NAFTA, investors with "legacy investments" alleging NAFTA breaches could continue to utilize the broader investor-State dispute resolution mechanism set out in Section B of NAFTA Chapter 11.

### *iii. Claims Must Allege a Breach of One of the Specified NAFTA Obligations*

31. The final clause of Paragraph 1 limits the scope of the USMCA Parties' consent to arbitration to claims for breach of the obligations included in NAFTA Chapter 11, Section A, and two articles of NAFTA Chapter 15. As Professor Gardiner opines, "[a]n obligation under Section A of Chapter 11 is one binding on the states parties to that treaty when the acts or events that are the subject of claims in the arbitration occurred."[28] Thus, this limitation necessarily excludes (1) any claims not arising under the specified NAFTA clauses, and (2) claims based on acts occurring when the USMCA Parties were not bound by the specified NAFTA obligations. Nothing in the final clause of Paragraph 1 could be read to extend the application of the specified NAFTA obligations past the NAFTA's termination.[29] And any argument that Paragraph 1 has such an effect cannot be based on an "ordinary meaning" analysis.

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[27] For example, under Annex 14-D investors must first resort to local remedies before commencing investor-State arbitration, and can only bring investor-State claims for direct expropriation, national treatment, and most-favored-nation treatment. USMCA, Arts. 14.D.3(1)(a)(i), 14.D.5(1) **(C-0002)**. Except with respect to investors eligible to submit claims under Annex 14-E, claims for indirect expropriation and minimum standard of treatment must be advanced by the investor's home State.

[28] Gardiner Report ¶ E.3.

[29] Ascensio Report ¶ 28 ("Since the substantive provisions of the NAFTA have ceased to be in force on 1st July 2020, there can be no 'breach' of a substantive NAFTA obligation related to foreign investments after that date,

32. In sum, Paragraph 1 does nothing more than memorialize the USMCA Parties' consent to extend by three years the time during which a claimant with a "legacy investment" might assert a breach of the NAFTA and utilize the NAFTA's dispute resolution mechanism. Nowhere in Annex 14-C is there an agreement by the USMCA Parties to continue to be bound by the substantive obligations of NAFTA Chapter 11, Section A, during that same three-year period. Claimants seek to insert additional language in Paragraph 1, to the effect that the substantive obligations under Section A shall continue to apply for three years despite the NAFTA's termination. But that would be treaty revision, not treaty interpretation.

#### 2) The Context of Annex 14-C Confirms That It Does Not Extend the NAFTA's Substantive Investment Obligations

33. The context of Annex 14-C further confirms that it cannot be read as an agreement to extend the application of the NAFTA's substantive investment obligations. Four aspects of the context in which Annex 14-C must be interpreted support the ordinary meaning of Paragraph 1: **(a)** the Preamble to the USMCA ("Preamble") and the USMCA Protocol; **(b)** the placement of Annex 14-C within the USMCA; **(c)** the footnotes to Annex 14-C; and **(d)** Article 34.1 of the USMCA.

##### a. The Preamble and the USMCA Protocol Emphasize the NAFTA's Termination and Its Replacement by the USMCA

34. The Preamble and the USMCA Protocol provide two points of supportive context for the U.S. interpretation of Annex 14-C. Both the Preamble and the USMCA Protocol make clear, *first*, that the USMCA Parties were bringing the NAFTA to an end and, *second*, that they were replacing it with a new and different trade and investment regime set out in the USMCA.

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unless the USMCA extends such substantive obligations. As this expert sees no language in Annex 14-C or otherwise extending the substantive obligations of NAFTA Chapter 11, Section A, the 'breach of an obligation' necessarily refers to a breach of NAFTA predating its termination.").

35. Beginning with the Preamble, it states in its third paragraph that the USMCA Parties had resolved to:

> REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region;[30]

36. The USMCA Protocol, which is titled in full the "Protocol *Replacing* the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada"[31] has similar language. The USMCA Protocol states in Paragraph 1 the USMCA Parties' agreement that: "Upon entry into force of this Protocol, the USMCA . . . shall *supersede* the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[32]

37. Annex 14-C itself was also drafted with the NAFTA's termination firmly in mind, referring to it in three of the Annex's six paragraphs.[33] For example, Paragraph 3 of Annex 14-C states: "A Party's consent under paragraph 1 shall expire three years after the *termination* of NAFTA 1994."[34]

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[30] Preamble to the USMCA ¶ 3 **(C-0002)**.
[31] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada **(R-0001)** (emphasis added).
[32] *Id.* ¶ 1 **(R-0001)** (emphasis added).
[33] Notably, Annex 14-C is one of the few parts of the USMCA, other than the USMCA Protocol and Preamble, that mentions the NAFTA's termination.
[34] Annex 14-C, ¶ 3 **(C-0002)** (emphasis added); *see also id.* ¶ 5 ("For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by *the termination of NAFTA 1994*, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.") (emphasis added); *id.* ¶ 6 ("'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[]") (emphasis added).

38. The Preamble and the USMCA Protocol, together with the references to the NAFTA's termination in Annex 14-C, show that the USMCA Parties intended to leave the NAFTA behind in favor of the USMCA. The Preamble and the USMCA Protocol are wholly consistent with the U.S. interpretation of Annex 14-C, which ensures that the USMCA Parties' conduct after the agreement's entry into force with respect to investors and their investments would be assessed exclusively under Chapter 14 of the USMCA. Chapter 14, as compared to Chapter 11 of the NAFTA, includes entirely new provisions (*e.g.*, USMCA Articles 14.15 (Subrogation) and 14.17 (Corporate Social Responsibility)) and numerous revisions and clarifications to the text regarding substantive investment obligations. Moreover, claims alleging breach of the Chapter 14 obligations are subject to the USMCA's more restrictive investor-State dispute settlement regime, as embodied in Annexes 14-D and 14-E.

39. Claimants' interpretation of Annex 14-C would, by contrast, result in a period after the USMCA's entry into force during which the USMCA Parties' conduct would, with respect to legacy investments, be subject to two distinct sets of substantive investment obligations and could be the subject of arbitration under investor-State dispute settlement regimes in two different international agreements. Such an overlap is nowhere expressly contemplated by the USMCA Parties,[35] and Claimants' interpretation of Annex 14-C is incompatible with the Preamble and USMCA Protocol.

[35] As discussed below, the United States has, in certain instances, permitted the temporary coexistence of an older bilateral investment treaty and a new free trade agreement with the same counterparty. *See infra* ¶¶ 76-77. However, where it has done so, the United States and its counterparties have been clear about this intention by leaving the bilateral investment treaty in force. Here, by contrast, the United States and its counterparties terminated the NAFTA. The termination of the NAFTA, among other things, makes it clear that the USMCA Parties did not intend for the NAFTA's substantive investment obligations to be in force at the same time as the USMCA's substantive investment obligations.

40. In their bifurcation briefs, Claimants attempted to put the USMCA Protocol to a very different use. Rather than focusing on the stated purpose of the USMCA Protocol – namely, the replacement of the NAFTA with the USMCA – Claimants instead drew attention to the "without prejudice" phrase at the end of Paragraph 1. Claimants argued that this phrase means that "when provisions of USMCA refer to provisions of NAFTA 1994, the NAFTA provisions remain applicable despite the fact that USMCA replaced NAFTA 1994."[36]

41. The problem with Claimants' reading of the USMCA Protocol is that it does not say anything about "NAFTA provisions remain[ing] applicable" following the NAFTA's termination. Rather, Paragraph 1 of the USMCA Protocol seeks only to avoid "prejudice" to those USMCA provisions that refer to the NAFTA. These provisions must, in accordance with the USMCA Protocol, be permitted to function as written, despite the termination of the provisions of the NAFTA to which those references relate. The application of the UMSCA Protocol's "without prejudice" language therefore depends entirely on the meaning of each of the USMCA provisions at issue.

42. Paragraph 1 of Annex 14-C memorializes the USMCA Parties' consent to arbitration of claims alleging certain breaches of the NAFTA (which could only arise while the NAFTA was still in force), under the dispute resolution framework in NAFTA Chapter 11, Section B. The "without prejudice" language in the USMCA Protocol ensures that this consent is given force. It eliminates the possibility of any dispute over whether the consent in Paragraph 1 of Annex 14-C is valid, despite the termination of the NAFTA and the consequent withdrawal of the Parties'

[36] Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection ¶ 27 (Feb. 10, 2023) ("Claimants' Observations on Bifurcation"). *See also* Claimants' Rejoinder on Bifurcation ¶ 27 (asserting that "the only way to 'avoid prejudice' to the USMCA provisions that refer to provisions of NAFTA 1994 is to give effect to those NAFTA provisions.").

consent to arbitration of NAFTA claims reflected in NAFTA Article 1122. The "without prejudice" language in the USMCA Protocol cannot, however, be read to supplement Paragraph 1 of Annex 14-C with an additional commitment to extend the application of the NAFTA's substantive investment obligations, which is entirely absent from its text.[37]

43. The Preamble and the USMCA Protocol therefore both support the U.S. interpretation of Annex 14-C. Consistent with the Preamble and the USMCA Protocol, Annex 14-C allows for claims based on alleged breaches of the NAFTA occurring while the NAFTA was in force, while likewise ensuring that alleged breaches occurring after the USMCA entered into force would be subject to the USMCA's substantive investment obligations and (more limited) investor-State dispute settlement regime.[38]

### b. Annex 14-C Is a Dispute Resolution Annex and Does Not Impose Substantive Investment Obligations

44. The structure of the USMCA provides further contextual support for the ordinary meaning of Annex 14-C. The USMCA separates the articles relating to the Parties' substantive investment obligations from those relating to investor-State dispute settlement, including provisions reflecting the Parties' consent to arbitration. The USMCA's substantive investment obligations are set out in the main body of Chapter 14, whereas the provisions on investor-State dispute settlement are in

[37] Similarly, in USMCA Article 5.19, the Parties agreed to establish a Sub-Committee on Origin Verification. Among this Sub-Committee's functions is, according to Article 5.19(3)(b), "developing and improving the NAFTA 1994 Audit Manual and recommending verification procedures." USMCA, Art. 5.19(3)(b) **(C-0002)**. Nothing in this Article suggests that the relevant NAFTA obligations on origin verification still applied, but the USMCA Protocol's "without prejudice" clause avoids any confusion about whether the Sub-Committee could undertake this task despite the NAFTA's termination. Similarly, Article 10.12(15) requires the USMCA Parties to maintain or amend certain statutes related to antidumping and countervailing duties in their domestic legislation. USMCA, Art. 10.12(15) **(C-0002)**. Among the statutes to be maintained are those each Party listed in its Annex to NAFTA Article 1904.15. The "without prejudice" clause simply ensures that the termination of the NAFTA does not render that reference a dead letter. Again, nothing in this reference to NAFTA in USMCA Article 10.12(15) suggests that the "without prejudice" clause in the USMCA Protocol meant that NAFTA Article 1904.15 itself "remain[ed] applicable," as Claimants argue.

[38] The USMCA also offers State-to-State dispute settlement under Chapter 31.

Annexes 14-C, 14-D, and 14-E. This separation mirrors the structure of NAFTA Chapter 11, in which Section A contained the agreement's substantive investment obligations and Section B contained provisions – including provisions expressing the Parties' consent to arbitration – related to investor-State dispute settlement.[39]

45. The separation of the USMCA Parties' substantive investment obligations from the provisions governing investor-State dispute resolution reflects, among other things, the distinct nature of the consent to arbitration.[40] Consent to arbitration is an offer that the parties to an investment treaty extend, subject to certain conditions, to individual investors, and "[t]he perfected consent is not a treaty but an agreement between the host State and the investor."[41] The agreement to be bound by specific substantive investment obligations is, by contrast, more typical of commitments that treaty parties make to each other.[42]

46. The terms of Annex 14-C must therefore be read in light of their placement outside of the main body of Chapter 14 – which contains the substantive investment obligations of the USMCA

[39] MEG N. KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 37 (2006) **(RL-051)** ("Section A of Chapter 11 sets forth the primary obligations of the Parties, while Part B sets forth the investor-State dispute resolution mechanism."); *see also id.* 38 ("Section B . . . sets forth the dispute resolution procedures for arbitration that an investor of one NAFTA Party may institute against one of the other NAFTA Parties in which it is making, seeks to make, or has made an investment. Section B contains no substantive rights or obligations, but is devoted to the mechanism by which an investor may seek redress.").

[40] Gardiner Report ¶ A.6 ("Consent underlies obligations relating to the arbitral process. In treaties, these obligations are typically in a set of provisions essentially distinct from the substantive provisions on treatment of investments. . . . Thus, the treaty structure of both the NAFTA and USMCA includes a body of substantive rules for treatment of investments and a body of jurisdictional and procedural rules for arbitration of disputes over the substantive rules.").

[41] CHRISTOPH SCHREUER, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 864 (Peter Muchlinski et al., eds., 2008) **(RL-014)**.

[42] Indeed, underlining the distinction between substantive investment obligations and consent to arbitration, there are numerous treaties that include substantive investment protections, but that do not include a State's consent to arbitrate disputes related to those protections directly with investors (such protections may, depending on the treaty, be subject to interstate dispute resolution provisions). For example, the U.S.-Australia Free Trade Agreement (2004) includes a full chapter on investment but does not include a consent to arbitrate directly with investors. United States-Australia Free Trade Agreement, U.S.-Aus., Chapter 11, May 18, 2004 **(RL-052)**. The United States also maintains numerous Friendship, Commerce, and Navigation Treaties or Treaties of Amity that include protections for foreign investors but do not include consent to arbitrate directly with those investors. Treaty of Friendship, Commerce and Navigation, U.S.-Den., Oct. 1, 1951, 421 U.N.T.S. 105 **(RL-053)**.

Parties – and in one of the investor-State dispute resolution annexes. This context confirms that Annex 14-C does not itself bear on the substantive investment obligations that bind the USMCA Parties. Again, it concerns only the USMCA Parties' consent to arbitration, and no language in Annex 14-C extended the NAFTA's substantive investment obligations beyond its termination.

### c. The Footnotes to Annex 14-C Are Consistent with the U.S. Interpretation

47. Claimants rely on Footnote 20 and, more heavily, on Footnote 21 to Annex 14-C to support their interpretation of the Annex. But these footnotes do not assist Claimants.

48. Footnote 20 states that, "[f]or greater certainty, the relevant provisions in" various NAFTA chapters "apply with respect to . . . a claim" submitted to arbitration pursuant to Paragraph 1 of Annex 14-C. As use of the words "for greater certainty" signals,[43] Footnote 20 merely acknowledges that the relevant parts of the NAFTA that may relate to a claim brought under Paragraph 1, including definitions (NAFTA Chapter 2) and exceptions/reservations (NAFTA Chapter 21 and Annexes), apply to "a claim" based on breaches that occurred while the NAFTA was in force, despite the NAFTA's termination.[44] It is a straightforward application of the general principle of intertemporal law that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[45] Pursuant to this principle, an act occurring while the NAFTA was in force

[43] As a general practice, the United States uses the words "for greater certainty" in its international trade and investment agreements to introduce confirmation regarding the meaning of the agreement. In other words, the phrase "for greater certainty" signals that the text it introduces reflects the understanding of the United States and the other treaty party or parties of what the provisions of the agreement would mean even if the text following the phrase were absent.

[44] *See supra* ¶¶ 12-13, 17-32 (showing that the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C is limited to claims based on alleged breaches occurring after the NAFTA entered into force and before it terminated on July 1, 2020).

[45] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 13, [2001] 2 Y.B. Int'l L. Comm. 1, 57 (¶ 1), U.N. Doc. A/56/10 (2001) **(RL-054)** (internal citations omitted).

must be assessed in accordance with the substantive investment obligations of the NAFTA, while an act occurring after the NAFTA's termination and the USMCA's entry into force must be assessed in accordance with the USMCA's substantive investment obligations.[46] Footnote 20 is therefore wholly consistent with the U.S. interpretation of Annex 14-C, as described above, and it provides no support for Claimants' erroneous interpretation.

49. It should be underlined that the reason for the confirmation provided in Footnote 20 is that the NAFTA was terminated, including the relevant provisions referenced in Footnote 20, consistent with the USMCA Protocol discussed above. Footnote 20 carefully and explicitly limits the post-termination application of the provisions mentioned therein to a claim that is submitted pursuant to the consent provided in Paragraph 1 of Annex 14-C. Nothing in Footnote 20 purports to expand the set of claims that can be submitted pursuant to that consent. Certainly nothing in Footnote 20 expressly indicates the USMCA Parties' agreement to be bound by the obligations in Section A of NAFTA Chapter 11 for an additional three years after termination.

50. Footnote 21 is similarly unhelpful to Claimants. Footnote 21 provides that:

> 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).

51. Footnote 21 addresses potential claims under Annex 14-C by claimants who are also eligible to submit claims under Annex 14-E, such as, for example, a claimant alleging that one of the USMCA Parties adopted a wrongful measure prior to the NAFTA's termination which

[46] Breaches of the USMCA's substantive investment obligations, as reflected in Chapter 14, may be submitted to arbitration under Annexes 14-D and 14-E, but these annexes do not extend to Canadian investors (nor may U.S. and Mexican investors submit claims to arbitration under these annexes against Canada).

continues after the USMCA entered into force (and is also wrongful under the USMCA). Pursuant to Footnote 21, such a claimant cannot submit a claim related to the measure under Annex 14-C if that claimant would also be eligible to submit a claim under Annex 14-E. Footnote 21 funnels claimants who are eligible to use Annex 14-E into the USMCA's new dispute settlement regime, consistent with the USMCA's object and purpose, as discussed below.

52. Claimants' attempt to turn Footnote 21 to their benefit is convoluted and hinges on an attempt to rewrite the footnote so that it becomes *inutile* under the U.S. interpretation of Annex 14-C. Ignoring Footnote 21's text, Claimants contend that the footnote only applies where a claim for the same alleged breach and the same damages could be brought under both Annex 14-C and Annex 14-E. Claimants argue that because that would be impossible under the U.S. interpretation of Annex 14-C, the footnote is *inutile* unless Claimants' interpretation is accepted.[47]

53. But as the scenario described in paragraph 51 demonstrates, Claimants are incorrect. Footnote 21 does have a function under the ordinary meaning of Annex 14-C, because it carves out from the consent to arbitration in Paragraph 1 of Annex 14-C "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)."[48] There is no requirement in the text that the investor be eligible to submit the "same" claim or a claim for the "same damages" under both Annex 14-C and Annex 14-E for Footnote 21 to apply. Rather, the footnote focuses on a discrete class of investors: those that are eligible "to submit claims" under Annex 14-E, which turns in significant part on the characteristics of the investor. As Professor Gardiner explains, "[i]n the footnote's formulation the denial of consent is related to the 'investor'

[47] Claimants' Rejoinder on Bifurcation ¶ 42.
[48] USMCA, Annex 14-C, ¶ 1 n.21 **(C-0002)** (emphasis added).

being 'eligible to submit claims' under Annex 14-E, not to any specific claim being the subject of a possible arbitration under Annex 14-E."[49] Annex 14-E is only open to investors that enter into government contracts in specific sectors, such as oil and gas and power generation.[50] Under Footnote 21, Annex 14-E investors – who are afforded broader recourse to investor-State dispute settlement under the USMCA than other Chapter 14 investors – are ineligible for the extended three-year period to bring NAFTA Chapter 11 claims under Annex 14-C. Thus, contrary to Claimants' assertion, Footnote 21 is not limited to situations in which an investor has a single identical claim for the "same damages" arising under both the USMCA and the NAFTA.

54. Claimants attempt to salvage their position by arguing that the interpretation of Footnote 21 described above "would lead to absurd results," because hypothetical investors with large claims arising under Annex 14-C but small claims arising under Annex 14-E would be forced to abandon the large claim in favor of the small one.[51] This is neither an absurd result[52] nor one that is particularly unfair, as the default outcome under the NAFTA was that termination would have immediately eliminated all options for the submission of claims for alleged breaches of the NAFTA to investor-State dispute settlement. Instead, the USMCA Parties agreed in Annex 14-C to extend the period for most claimants with legacy investments to file claims under the NAFTA by three years, but likewise agreed to channel potential claimants with both Annex 14-C and Annex 14-E claims into the latter, which is part of the USMCA's new investor-State dispute resolution

[49] Gardiner Report ¶ C.11.
[50] USMCA, Annex 14-E, ¶¶ 2(a)(i)(A), 6(a), (b) **(C-0002)**. An investor must also be able to allege a breach of Chapter 14 of the USMCA, as well as loss or damage "by reason of, or arising out of, that breach," in order to submit a claim to arbitration under Annex 14-E. *Id.* ¶ 2(a)(i), (ii).
[51] Claimants' Rejoinder on Bifurcation 21-22. To the best of the United States' knowledge, there is no such investor in reality.
[52] Gardiner Report ¶ C.11 ("There is nothing manifestly absurd or unreasonable in concluding that consent is not given for any legacy investment to be the subject of an arbitration where an investor is eligible to submit any claims to arbitration that would come within paragraph 2 of Annex 14-E.").

mechanism. This agreement is consistent with the termination of the NAFTA in favor of the more circumscribed investor-State dispute settlement provisions of the USMCA.

55. Claimants' interpretation of Footnote 21 must therefore be rejected. Footnote 21 has clear utility under the U.S. interpretation of Annex 14-C, as explained above, and it therefore provides no support for Claimants' position. The fact that the proper reading of Footnote 21 does not produce the outcome to which Claimants or their hypothetical investor may think they are entitled does not render the provision *inutile*.

56. Even if Claimants were correct about Footnote 21's supposed lack of effectiveness – which they are not – it would have little bearing on the interpretive issue before the Tribunal. As demonstrated above, Annex 14-C does not contain an agreement between the USMCA Parties to bind themselves to apply the NAFTA's substantive investment obligations after the NAFTA's termination. Claimants cannot use Footnote 21's purported lack of utility under the U.S. interpretation of Annex 14-C to add such an agreement into the text. The principle of *effet utile* does not permit the radical revision that Claimants propose.[53]

57. The Tribunal's duty in this case is to interpret Annex 14-C, not to revise it.[54] The International Court of Justice (ICJ) and ICSID tribunals have recognized that *effet utile* cannot be

[53] *See* International Law Commission, Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 219 (¶ 6), U.N. Doc. A/CN.4/SER.A/1966/Add.l **(CL-032)** ("Properly limited and applied, the maxim [*ut res magis valeat quam pereat*] does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty."). The Commission did not include a separate provision on *effet utile* in the Vienna Convention because "to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of 'effective interpretation'." *Id.* In their bifurcation briefing, Claimants cited to the Draft Articles on the Law of Treaties with Commentaries on *effet utile*, but failed to include the text quoted above. *See* Claimants' Observations on Bifurcation ¶ 32, n.55.

[54] *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶ 84 (Dec. 8, 2008) **(RL-055)** (noting that the duty of an ICSID Tribunal, like the duty of an international court, is "to interpret the Treaties, not to revise them") (quoting *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania (Second Phase),* 1950 I.C.J. 221, 229 (July 18) ("*Interpretation of Peace Treaties*") **(RL-056)**). *Id*. ¶ 82 (finding that "the terms (the

used as a pretext to revise a treaty.[55] In the *Interpretation of Peace Treaties*, for example, the ICJ concluded that "the rule of effectiveness" could not justify the Court attributing to the dispute settlement provisions in the relevant peace treaties a meaning that would be contrary to their letter and spirit, on the pretext of remedying a default for which the treaties at issue had made no provision.[56] Footnote 21's alleged lack of effectiveness cannot, therefore, be used as a basis to change the ordinary meaning of Annex 14-C's terms.

58. In sum, Footnotes 20 and 21 do not support Claimants' interpretation of Annex 14-C.

### d. Article 34.1 Confirms that the USMCA Parties Did Not Extend the NAFTA's Substantive Investment Obligations

59. Unlike Annex 14-C, in Article 34.1 (Transitional Provision from NAFTA 1994) the USMCA Parties expressly agreed that certain provisions of the NAFTA, namely Chapter 19, "shall continue to apply" in certain circumstances despite the NAFTA's termination.[57] This language

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text) of a treaty must always be adhered to, for the reason that a treaty expresses the mutual will of the Contracting States"). *See also* International Law Commission, Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 219 (¶ 6), U.N. Doc. A/CN.4/SER.A/1966/Add.l **(CL-032)** (noting that the ICJ has indicated that "to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty"); *id.* 220-21 (¶ 11) ("the [International] Court [of Justice] has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain.").

[55] *See Interpretation of Peace Treaties*, 1950 I.C.J. at 229 **(RL-056)** (noting that "[i]t is the duty of the Court to interpret the Treaties, not to revise them"); *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶ 84 (Dec. 8, 2008) **(RL-055)**; *Banro American Resources, Inc. et al. v. Democratic Republic of Congo*, ICSID Case No. ARB/98/7, Award ¶ 6 (Sept. 1, 2000) **(RL-057)** ("The Tribunal is certainly aware of the general principle of interpretation whereby a text ought to be interpreted in the manner that gives it effect *–ut magis valeat quam pereat.* However, this principle of interpretation should not lead to confer, *a posteriori*, to a provision deprived of its object and purpose a result that goes against its clear and explicit terms.").

[56] *Interpretation of Peace Treaties*, 1950 I.C.J. at 229-30 **(RL-056)** (the Court declining to find that an intended three-member commission could properly be constituted with two members only, despite the illegal refusal of one of the parties to appoint its arbitrator and although the whole purpose of the jurisdictional clause was thereby frustrated). *See also South West Africa (Second Phase)*, 1966 I.C.J. 6, 48 ¶ 91 (July 18) **(RL-058)** (endorsing the Court's holding in *Interpretation of Peace Treaties*).

[57] Gardiner Report ¶ C.6 (observing that Article 34.1 "allow[s] for a small number of features of the NAFTA to continue to have effect after the entry into force of the USMCA introduced the superseding regime" but "do[es] not provide for the investment regime of NAFTA to continue to apply from the point at which it was superseded"); Ascensio Report ¶ 19 (Article 34.1 "makes no reference to the NAFTA provisions offering substantial protection to foreign investment and whose breach could lead to arbitration between foreign investors and States (Section A of Chapter 11, Article 1503(2), and Article 1502(3)); nor does it mention the procedural protection offered by Chapter 11, Section B.").

confirms that the USMCA Parties did not intend to extend any other NAFTA obligations, including the substantive investment obligations in NAFTA Chapter 11, after the NAFTA's termination. Had they so intended, they would have included a reference to Chapter 11 in Article 34.1, or would have expressly specified in Annex 14-C that the NAFTA obligations referenced therein "shall continue to apply" after the NAFTA's termination subject to a temporal limitation.[58] As a Panel constituted pursuant to USMCA Article 31 explained when interpreting Article 34.1:

> In the view of the Panel, the NAFTA and the USMCA are separate treaties. Indeed, upon the entry into force of the USMCA, the NAFTA came to an end, "but without prejudice to those provisions set forth in USMCA that refer to the provisions of NAFTA." It would have been possible for the Parties to have inserted a provision in the USMCA providing for the continuation of all obligations under the NAFTA as obligations under the USMCA. But they did not do so. The Parties created self-standing USMCA obligations even though such obligations were stated in "identical or nearly identical form" to obligations under NAFTA. Where the Parties wanted to carry over specific NAFTA obligations, such as NAFTA Chapter Nineteen, they did so explicitly in Article 34.[59]

60. Claimants argue that USMCA Article 34.1 supports their interpretation of Annex 14-C, because it limits the applicability of NAFTA Chapter 19 "to final determinations published by a Party before the entry into force of [the USMCA]."[60] This text, Claimants contend, shows that the USMCA Parties knew how "to impose a temporal limitation on measures that could be challenged" in dispute settlement and could have done so in Annex 14-C.[61] But Claimants miss

[58] Another potential approach is reflected in Chapter 4, footnote 82, of the USMCA, which expressly provides that a specified "transition" period "may include providing . . . treatment" under certain NAFTA provisions to eligible passenger vehicles or light trucks. USMCA, Chapter 4, Appendix, Art. 8(2)(a) n.82 **(C-0002)**. There is no reference to "providing treatment" under NAFTA Chapter 11, Section A, in Annex 14-C.

[59] *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report ¶ 41 (Feb. 1, 2022) **(RL-059)** (internal citations omitted). The Panel also noted that the reference to a "smooth transition" in USMCA Article 34.1(1) cannot be treated as an implicit carryover of the NAFTA obligations into the USMCA when there are no other words in the USMCA doing that. *Id*. ¶ 42.

[60] USMCA, Art. 34.1(4) **(C-0002)**.

[61] Claimants' Observations on Bifurcation ¶ 24; Claimants' Rejoinder on Bifurcation ¶ 49.

the broader point about Article 34.1, which is that such a temporal limit with respect to Chapter 19 was only necessary because the article also contains express language stating that "Chapter Nineteen of NAFTA 1994 *shall continue to apply*" after the USMCA's entry into force. Again, there is no reference in Article 34.1 to the continuing applicability of NAFTA Chapter 11, Section A, nor is there any comparable language in Annex 14-C. Accordingly, no temporal limitation was necessary with respect to claims under NAFTA Chapter 11.

### 3) The Object and Purpose of the USMCA Was to Replace the NAFTA, Not Extend It

61. As noted above, the USMCA Parties expressly resolved in the Preamble to "REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement" to support trade and economic growth in the region. The USMCA Protocol similarly states that the USMCA "shall supersede the NAFTA," and Annex 14-C itself repeatedly references the NAFTA's termination.[62] Not only did the USMCA expressly supersede and replace the NAFTA overall, but the USMCA specifically replaced the old investor-State dispute settlement regime of the NAFTA with a new regime, one that Canada chose not to join. The new USMCA regime is narrower than the one in Chapter 11 of the NAFTA, with express limitations not included in the NAFTA.[63]

62. The U.S. interpretation of Annex 14-C is consistent with the object and purpose of the USMCA because it ensures that investor claims based on allegedly wrongful conduct occurring after the USMCA's entry into force will be governed by the USMCA's new substantive obligations and circumscribed dispute settlement regime. Accordingly, it confines legacy investment claims,

[62] RICHARD K. GARDINER, TREATY INTERPRETATION 213, 218 (2d ed. 2015) **(RL-060)** (noting that while the preamble is a source of guidance on the object and purpose of a treaty, both the Vienna Convention and practice make it clear that an interpreter needs to take into account the whole treaty).
[63] *See supra* ¶ 30 & n.27.

which are governed by the NAFTA's substantive obligations, to conduct occurring prior to the USMCA's entry into force. Claimants' interpretation of Annex 14-C would, on the other hand, effectively delay the implementation of the USMCA's new regime for three years, maintaining significant parts of the NAFTA in force. This is hardly consistent with the USMCA Parties' stated purpose that the USMCA "replace" and "supersede" the NAFTA upon its entry into force.[64]

63. Claimants argue that the Preamble supports their interpretation of Annex 14-C, but they ignore the part of the Preamble that is unfavorable to their theory.[65] In support, Claimants quote a few general principles stated in the Preamble indicating a desire to promote clarity, transparency, and predictability in the "legal and commercial framework."[66] None of these broad, aspirational phrases even remotely suggests an intent by the USMCA Parties to extend the substantive obligations of the NAFTA beyond its termination. To the contrary, the Preamble explicitly states that the USMCA was intended to replace the NAFTA. Indeed, having just one set of substantive obligations apply to the Parties and investors after the USMCA's entry into force – rather than two differing sets of obligations for a period of three years, as Claimants propose – provides far greater clarity, transparency, and predictability.

64. There is nothing unclear, nontransparent, or unpredictable about the United States' interpretation of Annex 14-C. In the absence of a survival clause in the NAFTA, there was no expectation that investors would be able to bring an investor-State arbitration under Chapter 11 of

[64] Ascensio Report ¶ 30 ("If the claimants' interpretation were to be followed, it would mean that, during a period of three years after the entry into force of USMCA, the NAFTA chapter relating to investment would not be replaced by the USMCA, but would continue to apply as it stands, in terms of both substance and dispute settlement. This would also result in a three-year overlap with the substantive provisions of USMCA Chapter 14 for investments existing at the time of the entry into force of the Protocol.").
[65] Claimants' Observations on Bifurcation ¶ 35; Claimants' Rejoinder on Bifurcation ¶ 12.
[66] Claimants' Observations on Bifurcation ¶ 36; Claimants' Rejoinder on Bifurcation ¶ 18.

the NAFTA following its termination.[67] As explained above, the object and purpose of the USMCA was to terminate the NAFTA and replace it with a new agreement that included a new investor-State dispute settlement regime. Accordingly, Annex 14-C provided holders of legacy investments three additional years following the NAFTA's termination to submit claims to arbitration based *only* on breaches that occurred while the NAFTA was in force.

### B. Resort to Supplementary Means of Interpretation Is Unnecessary but, in Any Event, Confirms the U.S. Position

65. Article 32 of the Vienna Convention provides that "[r]ecourse *may* be had" to supplementary means of interpretation "to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[68] Because the application of Article 31 to Annex 14-C unambiguously establishes that it does not extend the application of the NAFTA's substantive investment obligations beyond the NAFTA's termination, and because there is nothing manifestly absurd or unreasonable about this choice of the USMCA Parties, there is no need for the Tribunal to consider supplementary means of interpretation.[69]

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[67] *See, e.g.*, Sidley Conference Invitation, USMCA – What Does NAFTA 2.0 Mean for Investor Protection in North America and Beyond? (Oct. 2018), https://www.sidley.com/en/insights/events/2018/10/usmca-what-does-nafta-2-0-mean-for-investor-protection-in-north-america-and-beyond **(R-0005)** ("If USMCA is implemented, investor-state arbitration to enforce key investor protections will be eliminated for U.S.-Canada investors and significantly restricted for U.S.-Mexico investors."); Sidley Cross-Border Energy Update, Keys to Success in Cross-Border Energy Trade (Nov. 2019), https://www.sidley.com/-/media/publications/keys-to-success-in-crossborder-energy-trade.pdf **(R-0006)** ("Currently, under NAFTA, you can bring cases in arbitration – what is generally called investor-state dispute settlement or ISDS – and that has been significantly cut back. There are provisions in the USMCA that will extend it for certain types of energy investments, but perhaps not all, and it's pretty circumscribed, so that's a real loss for our client base.").

[68] Vienna Convention on the Law of Treaties, art. 32 **(RL-016)** (emphasis added).

[69] Gardiner Report ¶ F.3 ("[T]here is nothing in the interpretative process to suggest an outcome that leaves the meaning [of Annex 14-C] ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Hence, no requirement arises to seek to determine the meaning from supplementary means of interpretation."). *See also Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶ 79 (Dec. 8, 2008) **(RL-055)**

66. Nevertheless, should the Tribunal have recourse to supplementary means in order "to confirm the meaning resulting from the application of article 31," the supplementary means before the Tribunal either confirm the interpretation set out in the preceding section or are of little help in the interpretive process. Below, the United States discusses three categories of documents outside the four corners of the USMCA that could be taken into account as supplementary means of interpretation: **(1)** relevant NAFTA provisions and their relationship to the provisions of Annex 14-C; **(2)** the USMCA Parties' past practice with respect to treaties other than the NAFTA; and **(3)** statements of current or former officials of the USMCA Parties.

### 1) Annex 14-C's Text Mirrors NAFTA Provisions That Relate to the Consent to Arbitration, Not the Imposition of Substantive Investment Obligations

67. Chapter 11 of the NAFTA provides a useful comparator in analyzing the terms of Annex 14-C. Two points, in particular, are worth emphasizing. *First*, Paragraphs 1 and 2 of Annex 14-C closely resemble NAFTA Articles 1116(1)/1117(1) and 1122, which concern the NAFTA Parties' consent to arbitration. This is illustrated in the color-coded table below, which shows the similarities between the two sets of provisions. In the table below, the green text in the USMCA Annex 14-C column derives from NAFTA Article 1122(1), the blue text derives from NAFTA Articles 1116/1117, and the orange text derives from NAFTA Article 1122(2).

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("Judgments of international tribunals (the PCIJ and ICJ) contain pronouncements to the effect that where the ordinary meaning of words (the text) is clear and they make sense in the context, there is no occasion at all to have recourse to other means of interpretation."); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, 2002 I.C.J. 624, 652-53, ¶¶ 52-53 (Dec. 17) **(RL-061)** (after expressing the Court's conclusion on the interpretation of the text at issue "when read in context and in the light of the [treaty's] object and purpose," explaining that "the Court does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the [treaty] and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention") (citations omitted); *Conditions of Admission of a State to Membership in the United Nations*, 1948 I.C.J. 57, 63 (May 28) **(RL-062)** ("The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.").

| NAFTA | USMCA Annex 14-C |
|---|---|
| **Article 1122(1)**<br><br>Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.[70]<br><br>**Article 1116**[71]<br><br>**1.** An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:<br><br>(a) Section A or Article 1503(2) (State Enterprises), or<br><br>(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,<br><br>and that the investor has incurred loss or damage by reason of, or arising out of, that breach. | **1.** Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:<br><br>(a) Section A of Chapter 11 (Investment) of NAFTA 1994;<br><br>(b) Article 1503(2) (State Enterprises) of NAFTA 1994; and<br><br>(c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994. |
| **Article 1122(2)**<br><br>The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:<br><br>(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;<br><br>(b) Article II of the New York Convention for an agreement in writing; and<br><br>(c) Article I of the InterAmerican Convention for an agreement. | **2.** The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:<br><br>(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;<br><br>(b) Article II of the New York Convention for an "agreement in writing"; and<br><br>(c) Article I of the Inter-American Convention for an "agreement". |

[70] The "procedures set out in this Agreement" are those contained in Section B of NAFTA Chapter 11. NAFTA, Chapter 11, Section B **(C-0001)**.

[71] Article 1117(1) is, in relevant part, nearly identical to Article 1116(1), except that it addresses the submission of a claim by "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." NAFTA, art. 1117(1) **(C-0001)**.

68. NAFTA Articles 1116(1)/1117(1) and 1122 are part of the investor-State dispute resolution framework established in Section B of NAFTA Chapter 11, and are not part of the substantive obligations detailed in NAFTA Chapter 11, Section A. Article 1122 provides the NAFTA Parties' consent to arbitration and Articles 1116(1) and 1117(1) specify the types of claims that an investor may submit pursuant to this consent. Self-evidently, these articles impose no substantive investment obligations on the NAFTA Parties.

69. Accepting Claimants' interpretation of Annex 14-C would require the Tribunal to conclude that the terms of NAFTA Articles 1116(1)/1117(1) and 1122, when transposed with minor modifications into Annex 14-C, took on a wholly new function beyond the one that they performed in the NAFTA. According to Claimants, these terms not only set the scope of the Parties' consent but also embody an agreement to extend the NAFTA's substantive investment obligations for three years beyond termination. Claimants have not, however, identified any additional text that would account for this supplemental functionality, nor can they. To the contrary, as the above table shows, the changes are minor and none of the new text could be read to embody an agreement to extend the obligations in Section A of NAFTA Chapter 11.

70. The *second* point of similarity between NAFTA Articles 1116(2) and 1117(2) and Annex 14-C relates to the length of the USMCA Parties' consent to arbitration of legacy investment claims, which Paragraph 3 of Annex 14-C specifies shall last three years. This corresponds to the limitations period set out in NAFTA Articles 1116(2) and 1117(2), which provide that an investor may not make a claim "if more than *three years* have elapsed from the date on which the [investor/enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the [investor/enterprise] has incurred loss or damage."[72] Accordingly, under

[72] NAFTA, arts. 1116(2) & 1117(2) **(C-0001)** (emphasis added).

Paragraph 3 of Annex 14-C, investors who have claims based on pre-termination breaches receive a period consistent with the period allotted to them under the NAFTA to bring those claims, even if they accrued immediately before the NAFTA's termination (*e.g.*, on June 30, 2020).[73] In essence, Annex 14-C did nothing more than preserve the three-year claims limitation period in NAFTA Chapter 11 for most investors.

71. The relationship between Annex 14-C and relevant provisions in Section B of NAFTA Chapter 11 further confirms that the USMCA Parties did not agree in Annex 14-C to the extension of the NAFTA's substantive investment obligations. Rather, Annex 14-C merely extended the period for bringing a claim alleging a breach of the NAFTA, consistent with the provisions it mirrored in NAFTA Chapter 11, Section B.

#### 2) Annex 14-C Does Not Contain the Language That the USMCA Parties Have Previously Used to Prolong the Obligations of a Terminated Treaty

72. Beyond the NAFTA, which was the USMCA's direct antecedent, the USMCA Parties' past treaty practice also confirms the meaning of Annex 14-C reached under Article 31 of the Vienna Convention. This practice discloses how the USMCA Parties draft language to

[73] In their bifurcation briefs, Claimants complained that the three-year period in Annex 14-C does not conform in all respects to the three-year period that investors would have had under NAFTA Articles 1116(2) and 1117(2) because it does not account for the possibility that an investor may not learn about the loss or damage incurred as a result of an alleged breach until sometime after the breach has occurred. *See* Claimants' Observations on Bifurcation ¶¶ 41-43; Claimants' Rejoinder on Bifurcation ¶ 29. The United States has explained the impracticality of addressing this specific scenario, which would require an effectively indefinite extension of the USMCA Parties' consent to arbitration with respect to legacy investment claims. Reply to Claimants' Observations on the Request for Bifurcation of Respondent United States of America ¶ 36 n.34 (Mar. 2, 2023) ("U.S. Reply on Bifurcation"). In any event, the alignment between the three-year period covered by Annex 14-C and NAFTA Articles 1116(2) and 1117(2) need not be perfect to support the U.S. interpretation of the Annex. Claimants have also suggested that the use of three-year "transition periods" in other agreements that replaced legacy bilateral investment treaties lacking limitations periods, or containing limitations periods of different lengths, undermines U.S. reliance on the correspondence between Annex 14-C and NAFTA Articles 1116(2) and 1117(2). *See* Claimants' Rejoinder on Bifurcation ¶ 30. But these other agreements are irrelevant (indeed, the majority do not even involve a USMCA Party). The fact that State Parties in other situations involving other agreements adopted a three-year "transition period" provides no insight on why the USMCA Parties limited their consent to arbitration to three years in Annex 14-C.

memorialize an agreement that a treaty's provisions will apply for some period after the treaty has been terminated. The absence of any language in Annex 14-C similar to what the USMCA Parties have previously drafted for this purpose supports the conclusion that the Parties did not intend for Annex 14-C to have this effect with respect to the NAFTA's substantive investment obligations.

73. Each of the USMCA Parties' model bilateral investment treaties ("BITs") contains language that extends the application of the BIT's obligations for a specified period after its termination. For example, the U.S. Model BIT achieves post-termination survival in a single clear sentence:

> For ten years from the date of termination, all other Articles *shall continue to apply to covered investments* established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.[74]

74. This provision extends the substantive obligations in the terminated treaty for a period of ten years past termination. The Canadian and Mexican models use similar language for the same purpose.[75]

75. These model treaties show that the USMCA Parties had readily available language that could, with minor modifications, have been used to memorialize an agreement to extend the

[74] 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) **(RL-017)** (emphasis added); *see also* 2004 U.S. Model Bilateral Investment Treaty, art. 22(3) **(RL-018)** ("For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.").

[75] 2021 Canada Model Agreement for the Promotion and Protection of Investments, art. 57(4) **(RL-019)** ("In respect of investments or commitments to invest made prior to the date of termination of this Agreement, Articles 1 through 56, as well as paragraphs 1 and 2 of this Article, shall remain in force for 15 years."); 2014 Canada Model Agreement for the Promotion and Protection of Investments, art. 42(4) **(RL-020)** ("In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, Articles 1 to 41 inclusive, as well as paragraphs 1 and 2 of this Article, shall remain in force for a period of 15 years."); 2004 Canada Model Agreement for the Promotion and Protection of Investments, art. 52(3) **(RL-021)** ("In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles 1 to 51 inclusive, as well as paragraphs (1) and (2) of this Article, shall remain in force for a period of fifteen years."); 2008 Mexican Model of Investment Promotion and Protection Agreement, art. 30(4) **(RL-022)** ("This Agreement shall continue to be effective for a period of ten years from the date of termination only with respect to investments made prior to such date.").

application of the NAFTA's substantive investment obligations beyond the termination of the agreement. The USMCA Parties could have included, either in Annex 14-C or Article 34.1, a statement such as: "Section A of Chapter 11 (Investment) of NAFTA 1994 *shall continue to apply* to legacy investments . . . ." Fatally for Claimants' claims, however, the Parties did not include this or similar language in the USMCA.[76]

76. Also relevant are examples (which Claimants themselves raised in their bifurcation briefing)[77] in which the United States and its counterparty chose *not* to terminate a legacy BIT despite the entry into force of a new free trade agreement between them. For instance, the United States did not terminate BITs with Morocco and Panama after entering into free trade agreements with both States. The United States likewise left its BIT with Honduras in force after both States became parties to the CAFTA-DR. Rather than terminate the legacy BITs in each of these examples, the State Parties suspended their dispute resolution provisions, subject to express exceptions allowing investors to continue submitting claims to arbitration under the BIT for ten years based on preexisting investments or disputes.[78] The substantive obligations under the BIT, which was not terminated, therefore remained in force despite the later free trade agreement. This arrangement allowed claimants with qualifying investments to submit claims to arbitration for alleged breaches of the BIT both pre- *and* post-dating the entry into force of the subsequent free trade agreement.

[76] As noted above, the USMCA Parties included similar language in Article 34.1 with respect to NAFTA Chapter 19, but not with respect to NAFTA Chapter 11. *See supra* ¶¶ 59-60.
[77] *See* Claimants' Observations on Bifurcation ¶ 34 n.59.
[78] United States-Morocco Free Trade Agreement, U.S.-Morocco, arts. 1.2(1), 1.2(4), June 15, 2004 **(CL-049)**; United States-Panama Trade Promotion Agreement, U.S.-Pan., arts. 1.3(1), 1.3(3), June 28, 2007 **(RL-063)**; Letter from Shaun Donnelly, U.S. State Department to Norman Garcia, Honduras Ministry of Industry and Commerce Regarding Relationship of CAFTA-DR to U.S.-Honduras BIT, Aug. 5, 2004 **(CL-048)**; Dominican Republic-Central America-United States Free Trade Agreement, art. 1.3(1), Aug. 5, 2004 **(RL-044)**.

77. The approach that the United States took with respect to the Morocco, Panama, and Honduras BITs therefore demonstrates another avenue that would have been available to the USMCA Parties if they had wanted the NAFTA's substantive investment obligations to remain in force after entering into the USMCA. Rather than adopt this approach, the USMCA Parties terminated the NAFTA. This contrast further confirms that Annex 14-C does not allow claims based on conduct postdating the USMCA's entry into force.

78. In their bifurcation briefs, Claimants highlighted four other past treaties involving either Canada or Mexico, each of which replaced a legacy BIT with a new agreement, as purported support for their interpretation of Annex 14-C. These treaties are not relevant to the interpretive issue before the Tribunal because they address a different legal situation. Claimants rely on these treaties because they include express language limiting claims under the legacy BITs to alleged breaches occurring before the new agreement entered in force. Claimants suggest that, if the USMCA Parties had wanted to limit the NAFTA claims that could be submitted to arbitration under Annex 14-C in the same way, they could have included similar language. But Claimants' argument skips a critical step: the type of express limitation that is found in Claimants' examples is only necessary where the treaty parties have included language, whether in the legacy BIT or in the new agreement, that would otherwise result in the legacy BIT's substantive obligations continuing to bind them post-termination. The NAFTA, however, included no survival clause, and the USMCA Parties included no language in Annex 14-C binding them to continue applying the NAFTA's substantive investment obligations. Accordingly, the absence of an express temporal limitation of the type that appears in Claimants' examples tells the Tribunal nothing.

79. Unlike the NAFTA, each of the legacy BITs at issue in Claimants' examples contained a survival clause providing that the BIT's provisions would remain in force for between 10 and 20

years following termination, with respect to investments (or, in some cases, commitments to invest) made prior to the date of termination.[79] In drafting language to address the transition from the legacy BIT to the new agreement, Canada, Mexico, and their counterparties were therefore operating under a different set of default conditions. Rather than releasing the Parties from any obligation further to perform the legacy BITs, as in the case of the NAFTA, termination would by default have resulted in a lengthy period of overlap, during which both the legacy BIT and the new agreement would continue to apply. The parties to these treaties therefore chose to eliminate the period of overlap through language in the later treaty – which was unnecessary for the NAFTA.

80. In addition to survival clauses in the legacy BITs, three of Claimants' examples also included language in the new agreement that would, standing alone, have confirmed the ongoing applicability of the legacy BITs' substantive obligations.[80] Beginning with the Canada-Peru and

[79] *See* Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru, art. 52(3), Nov. 14, 2006, U.N.T.S. No. 55972 **(RL-034)**; Treaty Between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments, Can.-Pan., art. XVIII(2), Sep. 12, 1996, 3080 U.N.T.S. 379 **(RL-035)**; Agreement Between the Government of the United Mexican States and the Government of Australia on the Promotion and Reciprocal Protection of Investments, Austl.-Mex., art. 24(3), Aug. 23, 2005, 2483 U.N.T.S. 247 **(RL-036)**; Agreement Between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments, art. XV(4), Can.-Croat., Feb. 3, 1997, 3087 U.N.T.S. 261 **(RL-037)**; Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments, Can.-Czech, art. XV(8), May 6, 2009, U.N.T.S. No. 53345 **(RL-038)**; Agreement Between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, Can.-Hung., art. XIV(3), Oct. 3, 1991, 3068 U.N.T.S. 313 **(RL-039)**; Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, Can.-Lat., art. XVIII(7), May 5, 2009, U.N.T.S. No. 53591 **(RL-040)**; Agreement Between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, Can.-Pol., art. XIV, Apr. 6, 1990, U.N.T.S. No. 52655 **(RL-041)**; Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, Can.-Rom., art. XVIII(7), May 8, 2009, U.N.T.S. No. 53574 **(RL-042)**; Agreement Between the Slovak Republic and Canada for the Promotion and Protection of Investments, Can.-Slovk., art. XV(7), July 20, 2010, 2817 U.N.T.S. 57 **(RL-043)**.

[80] Claimants' fourth example is the Canada-European Union Comprehensive Economic and Trade Agreement ("CETA"). *See* Claimants' Rejoinder on Bifurcation ¶¶ 55-56. As noted, the legacy BITs terminated by the CETA all had survival clauses. Claimants assert that CETA Article 30.8(1)'s termination of the legacy BITs abrogated their survival clauses and that, as a result, there should have been no need to limit the claims that could have been brought under these BITs to situations in which "the treatment that is object of the claim was accorded when the agreement was not terminated." CETA art. 30.8(2)(a) **(CL-037)**. Even if the CETA Parties intended Article 30.8(1) to abrogate the legacy BITs' survival clauses, this does not exclude the possibility that Article 30.8(2)(a) was intended as further confirmation that the survival clauses would not be honored to their full extent. The point

Canada-Panama Free Trade Agreements, both suspended a preexisting BIT subject to the following caveat: "*the [BIT] shall remain operative for a period of fifteen years* after the entry into force of this Agreement for the purpose of any breach of the obligations of the [BIT] that occurred before the entry into force of this Agreement."[81] As this excerpt shows, the temporal limitation on claims under the legacy BIT followed language stating that the BIT "shall remain operative" for a specified period.[82] In light of this broad language providing for the continued operation of each legacy BIT, an express limitation was required to ensure that investors would only be able to bring claims based on alleged breaches occurring before the BIT's suspension. In the absence of such language, the continued operation of the BIT would permit the submission of claims based on both pre- and post-suspension breaches.

81. The language in the Mexico-Australia side letter regarding the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is similar and is irrelevant for the same reason. The side letter provides that "*[t]he [BIT] shall continue to apply for a period of three years* from the date of termination to any investment . . . which was made before the entry into force of the Agreement . . . with respect to any act or fact that took place or any situation that

remains that the CETA Parties drafted Article 30.8 against the background of legacy agreements that contained survival clauses. As a result, it has little relevance to the interpretation of Annex 14-C, which was negotiated to replace an agreement (the NAFTA) that did not. Claimants' argument with respect to CETA Article 30.8 also fails because the CETA Parties were not attempting to allow for claims based on alleged breaches postdating the termination of the Parties' legacy BITs. What Claimants must establish for their interpretation of Annex 14-C to prevail is that the USMCA Parties agreed to bind themselves to apply the NAFTA's substantive investment obligations for a period after the NAFTA's termination. The CETA Parties did not include any such agreement in Article 30.8 with respect to the obligations in the relevant legacy BITs and so a comparison of the text of that Article with Annex 14-C shows only that it is absent from both.

[81] Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, art. 845(2), May 29, 2008 **(CL-035)** (emphasis added); *see also* Free Trade Agreement Between Canada and the Republic of Panama, Can.-Pan., art. 9.38(2), May 14, 2010 **(CL-036)** (same).

[82] Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, art. 845(2), May 29, 2008 **(CL-035)** (emphasis added). *See also* Free Trade Agreement Between Canada and the Republic of Panama, Can.-Pan., art. 9.38(2), May 14, 2010 **(CL-036)** (same).

existed before the date of termination."[83] While the temporal limitation is present here, it is again necessitated by a broad statement that the legacy BIT "shall continue to apply"[84] for a specified period after the new agreement's entry into force.

82. Neither Annex 14-C nor any other part of the USMCA, however, includes language specifying that the NAFTA's substantive investment obligations "shall remain operative" or "shall continue to apply" for any period. There was, accordingly, no need for an express temporal limitation on the claims for breach of the NAFTA that could be asserted under Annex 14-C because such claims are inherently limited to the period when the NAFTA was in force.[85]

83. For the foregoing reasons, relevant past treaty practice of the USMCA Parties confirms that Annex 14-C does not contain an agreement to extend the application of the NAFTA's substantive investment obligations after its termination.

### 3) Statements by Current or Former Officials of the USMCA Parties Do Not Support Claimants' Position

84. Claimants have identified several statements by current and former officials regarding the USMCA that, in Claimants' view, support their reading of Annex 14-C. These statements, however, provide little insight on the interpretive question before the Tribunal, which again is whether the USMCA Parties bound themselves to apply the NAFTA's substantive investment obligations after its termination. Many of the statements are vague and none expressly address this question, let alone provide a considered analysis that could be persuasive to the Tribunal.

[83] Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (Mar. 8, 2018) **(CL-038)** (emphasis added).
[84] *Id*.
[85] *See, e.g., supra* ¶¶ 11-13.

85. As the United States explained during the bifurcation phase, the statements that Claimants have identified are notable primarily because they do not say clearly that a holder of a legacy investment is entitled to assert a claim under Annex 14-C based on an alleged breach of the NAFTA occurring after its termination.[86] Claimants do not dispute this but argue that the statements imply that such claims would be viable.[87] Claimants are, in many cases, wrong about the implications to be drawn from the statements that they have identified. For example, the various references to submitting "NAFTA claims"[88] or "claim[s] for a breach of the investment obligations under the NAFTA"[89] during the period covered by Annex 14-C provide no help to the Tribunal. Both Claimants and the United States agree that Annex 14-C permits the submission of NAFTA claims – the dispute is whether "NAFTA claims" are limited to those that arose from breaches that occurred while the NAFTA was still in force, or whether the USMCA Parties agreed to the extended application of the NAFTA's substantive investment obligations such that they could continue to be breached despite the NAFTA's termination. In any event, this evidence is of no value for the Tribunal's interpretive exercise.

86. Claimants draw particular attention to a WilmerHale client alert listing a former employee of the Office of the U.S. Trade Representative ("USTR") as one of four "contributors."[90] The client alert suggests that Annex 14-C might be used to challenge a Mexican electricity law enacted after the USMCA entered into force. The relevance of a law firm "client alert" issued roughly two

[86] U.S. Reply on Bifurcation ¶ 38.
[87] Claimants' Rejoinder on Bifurcation ¶ 20.
[88] U.S. Department of State, "2021 Investment Climate Statements: Canada" **(C-093)**.
[89] Michelle Hoffman, "Canada-United States-Mexico Agreement," The Canadian Bar Association (Feb. 1, 2019) **(C-103)**. *See also* Global Affairs Canada, "The Canada-United States-Mexico Agreement: Economic Impact Assessment" (Feb. 26, 2020) **(C-097)**.
[90] John F. Walsh, David J. Ross, Danielle Morris, and Lauren Mandell, "Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims" (Mar. 18, 2021) **(C-102)**.

years after the USTR negotiator left government service could only be minimal at best.[91] WilmerHale posted the client alert while the individual at issue was a lawyer in private practice, not a government official, and the intent of the document was to solicit interest from potential clients with business interests in Mexico: "WilmerHale stands ready to assist clients with respect to dispute settlement options under the USMCA and other trade and investment agreements with respect to Mexico's amended Electricity Industry Law."[92] Moreover, the client alert does not explain the legal basis in the text of Annex 14-C for the views that it contains. It merely asserts these views. The WilmerHale client alert cannot, therefore, assist the Tribunal in its interpretation of Annex 14-C.

87. Claimants' argument also ignores other public statements by officials of the USMCA Parties that do not fit their narrative. For example, the Deputy Prime Minister of Canada, Chrystia Freeland, issued a statement on the USMCA's entry into force explaining that the new agreement "*removes* the investor-state dispute resolution system, which has allowed large corporations to sue the Canadian government for regulating in the public interest. Known as ISDS, this has cost Canadian taxpayers more than $275 million in penalties and legal fees."[93] This echoed earlier statements by Ms. Freeland – who was Minister of Foreign Affairs during negotiation of the USMCA – including in an October 19, 2018 op-ed:

> Perhaps one of the achievements I'm most proud of is that the investor-state dispute resolution system, which in the past allowed foreign companies to sue Canada, *will be gone*. This means that Canada can make its own rules, about public health and safety, for

[91] Lauren Mandell, LinkedIn Profile (last visited May 15, 2023) **(R-0007)** (indicating Mr. Mandell departed USTR in May 2019).
[92] John F. Walsh, David J. Ross, Danielle Morris, and Lauren Mandell, "Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims" (Mar. 18, 2021) **(C-102)**. *See also id.* ("Many observers believe the law may . . . violate Mexico's commitments under international trade and investment agreements, including the United States-Mexico-Canada Agreement (USMCA) . . . .").
[93] Statement by the Deputy Prime Minister on the entry-into-force of the new NAFTA, at 2 (June 30, 2020) **(R-0008)** (emphasis added).

> example, without the risk of being sued by foreign corporations. Known as ISDS, this provision has cost Canadian taxpayers more than $300 million in penalties and legal fees.[94]

88. Unlike the statements in the WilmerHale client alert that Claimants attribute to the former USTR negotiator, Ms. Freeland's statements were made in her official capacity, shortly after the USMCA negotiations concluded. Ms. Freeland made no reference to investors' continued ability to hold Canada to the NAFTA's substantive investment obligations for three years after its termination. To the contrary, she was unequivocal that Canada would be free of "the risk of being sued by foreign corporations" for actions taken after the USMCA entered into force.

89. Ms. Freeland's description of the USMCA's ISDS provisions mirrors statements made by Mexican officials in their official capacities. For example, the Undersecretary for North America in Mexico's foreign ministry put out a factsheet stating: "It was agreed that the **Investor-State Dispute Settlement** mechanism [under the USMCA] will **not apply to Canada**."[95] Again, there was no qualification suggesting that the NAFTA's substantive investment obligations would continue to bind Canada for an additional three years. More recently, Mexico has expressed a consistent view of Annex 14-C in *Legacy Vulcan v. Mexico*, where claimants submitted an ancillary claim based on an alleged breach that occurred almost two years after the NAFTA's termination. Mexico objected to the tribunal's jurisdiction over the ancillary claim noting that Annex 14-C "grants investors a three-year period to claim a breach of the NAFTA that occurred before the NAFTA was terminated . . . [it] does not extend the protections of Section A of Chapter

[94] *Chrystia Freeland says the new trade deal prevented possible widespread economic disruption*, Canada's National Observer (Oct. 19, 2018) **(R-0009)** (emphasis added). *See also* Deputy Prime Minister letter to party leaders regarding the new NAFTA (Jan. 26, 2020) **(R-0010)** ("The investor-state dispute resolution system – which has allowed large corporations to sue the Canadian government for regulating in the public interest – *is now gone.* Known as ISDS, this has cost Canadian taxpayers more than $275 million in penalties and legal fees.") (emphasis added).

[95] Secretaría de Relaciones Exteriores, United States – Mexico – Canada Agreement (USMCA): Investment and Investor-State Dispute Settlement Mechanism (emphases in original) **(R-0011)**.

XI of the NAFTA for an additional three years."[96] Mexico also indicated that the "USMCA Parties did not consent to allow NAFTA claims to be based on measures subsequent to the entry into force of the USMCA."[97]

90. The Canadian and Mexican understanding of how the USMCA curtailed ISDS coincides with the skeptical views of ISDS held by the lead U.S. negotiator of the USMCA, the U.S. Trade Representative Robert Lighthizer. Prior to, during, and after the negotiations, Ambassador Lighthizer made his concerns about ISDS known. During a March 2017 hearing, Ambassador Lighthizer stated that ISDS was "troubling to me on a variety of issues and on a variety of levels."[98] Ambassador Lighthizer expanded on these views during a March 2018 hearing, in the midst of the USMCA negotiations:

> We are skeptical about ISDS for a variety of reasons, which I would like to go into if I have a second to do it. Number one, on the U.S. side there are questions of sovereignty. Why should a foreign national be able to come in and not have the rights of Americans in the American court system but have more rights than Americans have in the American court system? It doesn't strike me -- it strikes me as something . . . at least we ought to at least be skeptical of and analyze. . . . On the outgoing side there are many people who believe that in some circumstances, and I can discuss the varieties of them, in some circumstances it's more of an outsourcing issue.[99]

91. Finally, after the USMCA negotiations were completed, Ambassador Lighthizer addressed several questions on ISDS during a June 2019 hearing, during which he reiterated his view that

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[96] *Legacy Vulcan, LLC v. United Mexican States,* ICSID Case No. ARB/19/1, Mexico's Counter-Memorial on the Ancillary Claim (Dec. 19, 2022), ¶ 409 (English free translation) ("otorga a los inversionistas un periodo de tres años para reclamar un incumplimiento del TLCAN que haya ocurrido antes de que el TLCAN fuera terminado . . . no extiende las protecciones de la Sección A del Capítulo XI del TLCAN por otros tres años adicionales") (Spanish original) **(RL-064)**.

[97] *Id.*, ¶ 414 (English free translation) ("Partes del T-MEC no dieron su consentimiento para permitir que reclamaciones del TLCAN se basen en medidas posteriores a la entrada en vigor del T-MEC.") (Spanish original).

[98] President's Trade Policy Agenda and Fiscal Year 2018 Budget, Hearing Before the Senate Committee on Finance, S. Hrg. 115–247, at 21 (June 21, 2017) **(R-0012)**.

[99] U.S. Trade Policy Agenda, Hearing Before the House Committee on Ways & Means, Serial No. 11-FC08, at 19-20 (Mar. 21, 2018) **(R-0013)**.

ISDS leads to outsourcing.[100] While specifically discussing the "changes in ISDS" under Annex 14-D[101] and Annex 14-E,[102] which Ambassador Lighthizer argued "improved the situation" from the perspective of those who are opposed to ISDS,[103] he never suggested that investors could, under Annex 14-C, continue to rely on the NAFTA's broader ISDS framework for recourse against the USMCA Parties based on actions taken after the USMCA entered into force.

92. As the foregoing demonstrates, statements by current or former officials of the USMCA Parties do not support Claimants' position.

## III. Conclusion

93. Annex 14-C does not include an express agreement to extend the NAFTA's substantive investment obligations past its termination. Nor can it be read to have provided such an extension implicitly. The sole interpretive question before the Tribunal must, accordingly, be resolved in favor of the United States.

94. The consequences of that conclusion are clear. The NAFTA's termination released the United States and the other NAFTA Parties from any further obligations under its substantive provisions. The United States was therefore not bound by the NAFTA's substantive investment obligations when President Biden revoked the permit for the Keystone XL pipeline on January 20, 2021. As a result, the permit revocation cannot have breached the NAFTA's substantive investment obligations. Claimants' claims based on the permit revocation accordingly are outside

[100] 2019 Trade Policy Agenda: Negotiations with China, Japan, the EU, and UK; new NAFTA/USMCA; U.S. Participation in the WTO; and other matters, Hearing Before the House Committee on Ways & Means, Serial No. 116-27, at 85 (June 19, 2019) **(R-0014)**.
[101] *Id.* at 61.
[102] Asked about a "loophole whereas U.S. oil and gas, for example, this particular industry, can still contractually sue the Mexican government," Mr. Lighthizer responded: "If you say, 'How would I distinguish the oil and gas industry from other industries,' I would say it's, to me, that allowing ISDS that would incentivize moving a factory to Mexico is something that I think is a mistake and is bad, as in a subsidy, but that doesn't apply to a natural resource where the industry has to go there." *Id.* 85-86.
[103] *Id.* at 86.

the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C, which is limited to claims for breach of specified NAFTA obligations.

95. In light of the above, the United States respectfully requests the Tribunal to conclude that it lacks jurisdiction over Claimants' claims and to dismiss them in their entirety.[104]

*Respectfully submitted*,

Lisa J. Grosh
*Assistant Legal Adviser*
John D. Daley
*Deputy Assistant Legal Adviser*
David M. Bigge
*Chief of Investment Arbitration*
Julia H. Brower
Nathaniel E. Jedrey
Melinda E. Kuritzky
Mary T. Muino
Alvaro J. Peralta
David J. Stute
Isaac D. Webb
*Attorney-Advisers*
Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

[104] The United States' bifurcated jurisdictional objection is without prejudice to other jurisdictional objections or defenses that the United States may raise in other phases of this arbitration.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

*TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED*

*v.*

*UNITED STATES OF AMERICA*

(ICSID Case No. ARB/21/63)

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# EXPERT REPORT OF PROFESSOR RICHARD GARDINER

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**Report on the Interpretation of Annex 14-C to the Agreement between the United States of America, the United Mexican States, and Canada attached to the Protocol signed at Buenos Aires, 30 November, 2018 ("USMCA")**

## Preliminary Statement

The U.S. Department of State has requested a Report in connection with the proceedings before the Tribunal for the jurisdictional phase of the arbitration. My Report focuses on the interpretation of certain provisions of the USMCA, in particular Annex 14-C and the consent expressed in such provisions in light of the jurisdictional issues presented in this proceeding. To this end, I have reviewed documents in the public domain, including:

- The North American Free Trade Agreement
- The Agreement Between the United States of America, the United Mexican States, and Canada
- Request for Bifurcation of Respondent United States of America
- Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objection
- Reply to Claimants' Observations on the Request for Bifurcation of Respondent United States of America
- Claimants' Rejoinder regarding Respondent's Request for Bifurcation

I have had no previous relationship with or interest in any of the parties to this arbitration, nor do I have a connection to the matters in dispute.

My Report represents my true professional assessment of the matters to which it refers based on my academic research and on experience in the application of international law.

## Statement of Qualifications

I have a degree in law from Oxford University and a Masters degree from London University where my studies included specialist international law areas. I was an assistant legal adviser at the Foreign and Commonwealth Office for some twelve years. For the next twenty years I was lecturer, then senior lecturer, at University College London. I am now an Honorary Professor at University College London. I have written and contributed to many books and articles on international law topics and in other areas of law. My book *Treaty Interpretation*, published by Oxford University Press, is now in its second edition.

A copy of my *curriculum vitae* is appended at the end of this Report.

## A. Introduction

### The Issue

**A.1** The difference between the parties in this arbitration is over the interpretation and application of Annex 14-C to the USMCA which is itself attached as an annex to The Protocol ['the Protocol'] Replacing the North American Free Trade Agreement ['NAFTA'] with the Agreement Between the United States of America, the United Mexican States, and Canada, signed at Buenos Aires, the 30th day of November, 2018 ['USMCA'].[1] The Protocol provides that upon its entry into force:

'the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.'

**A.2** The core issue is whether the consent to arbitration expressed in Annex 14-C to the USMCA is effective to establish the jurisdiction of an Arbitral Tribunal to entertain a dispute over matters occurring after the NAFTA was superseded.

### The Treaty and Arbitration Matrix

**A.3** A preambular paragraph to the USMCA states as its objective the resolve of the parties to:

> REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region;

That replacement took effect when the USMCA superseded the NAFTA on entry into force on 1 July 2020 but, in accordance with Article 1 of the Protocol, 'without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.'

**A.4** The NAFTA and USMCA both include provisions setting up regimes for acceptance and treatment of investments made by investors of one party within the territory of another party. These are in Section A of Chapter 11 (Investment) of NAFTA 1994 and Chapter 14 of USMCA.

**A.5** There is no provision in the USMCA expressly indicating that the NAFTA provisions regarding treatment of investments continued to have effect in respect of investments which continued in existence after the USMCA superseded the NAFTA regime. Had there been any such continuation it would have been necessary to include provisions indicating which investment treatment was to prevail in relation to acts or events at any particular time. Host states would otherwise have been in the position of having to apply two differing regimes to the same investment or make an unguided choice. No treaty provision in the Protocol or associated instruments suggests that this was contemplated or regulated.

**A.6** The regime for treatment of investments was complemented under the NAFTA by a system for resolution of disputes between investor and host state, as is that under the USMCA. Provisions of both treaties follow generally well-recognised procedures for

[1] An amending Protocol of 10 December 2019 concerns matters not relevant to the present issues.

international arbitration. Such procedures include a strict requirement for consent to arbitration of disputes arising over interpretation or application of a particular treaty's provisions. Consent is typically given by treaty or ad hoc. Consent goes to the foundation of the constitution, jurisdiction and functioning of an arbitral tribunal. Such consent is an essential and prominent feature of arbitration over investment disputes. Consent underlies obligations relating to the arbitral process. In treaties, these obligations are typically in a set of provisions essentially distinct from the substantive provisions on treatment of investments. Thus provisions on consent are part of the law which governs the existence and functioning of an arbitral tribunal. The provisions on treatment of investments constitute the law to be applied by the tribunal (sometime specified to apply in conjunction with international law). Thus, the treaty structure of both the NAFTA and USMCA includes a body of substantive rules for treatment of investments and a body of jurisdictional and procedural rules for arbitration of disputes over the substantive rules.

## The Interpretation Regime

**A.7** The rules of the Vienna Convention on the Law of Treaties 1969 ('1969 Vienna Convention') apply.[2] These rules have been accepted internationally as stating the customary

[2] The rules are stated in Part III, Section 3 of the Convention 'Interpretation of Treaties', arts 31-33 **(RG-0001)**:

*Article 31 General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(*c*) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32*
*Supplementary means of interpretation*
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(*a*) leaves the meaning ambiguous or obscure; or
(*b*) leads to a result which is manifestly absurd or unreasonable.

*Article 33 Interpretation of treaties authenticated in two or more languages*
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

international law rules for interpretation of treaties. Under these rules the starting point is the text. However, the general rule provides that it is the 'treaty' which is to be interpreted. Thus it is not solely the part of the text central to a dispute which is to be interpreted, but all parts of the treaty germane to the interpretation in issue. All the elements of the general rule of interpretation that are present in any instance need to be considered and drawn into the interpretative reasoning.

**A.8** In the present case, therefore, analysis needs to identify the relevant parts of the treaties to identify the complete context. The terms of these texts must be examined to establish their ordinary meaning in their context and in the light of the object and purpose of the treaty. The context is to be ascertained as including the elements indicated in Article 31(2) of the 1969 Vienna Convention. Article 31(3) requires that account must also be taken of any agreements of the parties as to meaning subsequent to conclusion of the treaty or of practice amounting to such an agreement (if any), and of 'any relevant rules of international law applicable in the relations between the parties'. This latter part of the general rule envisages 'systemic interpretation'. This requires considering a treaty as part of international law, taking into consideration related international law obligations, including any other relevant treaties.

## B. Treaty Texts

### Material Provisions

**B.1** The starting point for interpretation is identification of the relevant texts. The whole of the treaty (and other elements identified in the 1969 Vienna Convention, Article 31) is admissible as context but only those provisions necessary for establishing the relevant interpretation are identified here. Relevant texts include:

**TEXT I**

PROTOCOL REPLACING THE NORTH AMERICAN FREE TRADE AGREEMENT WITH THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA

The United States of America, the United Mexican States, and Canada (the "Parties"),

*Having regard to* the *North American Free Trade Agreement*, which entered into force on January 1, 1994 (the "NAFTA"),

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

*Having undertaken* negotiations to amend the NAFTA pursuant to Article 2202 of the NAFTA that resulted in the Agreement between the United States of America, the United Mexican States, and Canada (the "USMCA");

HAVE AGREED as follows:

1. Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.

2. Each Party shall notify the other Parties, in writing, once it has completed the internal procedures required for the entry into force of this Protocol. This Protocol and its Annex shall enter into force on the first day of the third month following the last notification.

3. Upon entry into force of this Protocol, the *North American Agreement on Labor Cooperation*, done at Mexico, Washington, and Ottawa on September 8, 9, 12, and 14, 1993 shall be terminated.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Protocol.

DONE at Buenos Aires, this 30th day of November, 2018, in triplicate, in the English, Spanish, and French languages, each text being equally authentic.[3]

## TEXT II

## CHAPTER 14 USMCA

### Article 14.2: Scope

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) covered investments; and

(c) with respect to Article 14.10 (Performance Requirements) and Article 14.16 (Investment and Environmental, Health, Safety, and other Regulatory Objectives), all investments in the territory of that Party.

2. A Party's obligations under this Chapter apply to measures adopted or maintained by:

(a) the central, regional, or local governments or authorities of that Party; and

[3] The French and Spanish texts are not reproduced or reviewed here, the English text being used here following the presumption in the 1969 Vienna Convention, Article 33(3) that the terms of the treaty have the same meaning in each authentic text.

(b) a person, including a state enterprise or another body, when it exercises any governmental authority delegated to it by central, regional, or local governments or authorities of that Party.

3. For greater certainty, 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 Agreement.

4. For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

[Footnotes omitted]

**Article 14.1: Definitions**

**Article 14.3: Relation to Other Chapters**

**Article 14.4: National Treatment**

**Article 14.5: Most-Favored-Nation Treatment**

**Article 14.6: Minimum Standard of Treatment**

**Article 14.7: Treatment in Case of Armed Conflict or Civil Strife**

**Article 14.8: Expropriation and Compensation**

**Article 14.9: Transfers**

**Article 14.10: Performance Requirements**

**Article 14.11: Senior Management and Boards of Directors**

**Article 14.12: Non-Conforming Measures**

**Article 14.13: Special Formalities and Information Requirements**

**Article 14.14: Denial of Benefits**

**Article 14.15: Subrogation**

**Article 14.16: Investment and Environmental, Health, Safety, and other Regulatory Objectives**

**Article 14.17: Corporate Social Responsibility**

[The texts of these provisions and of other elements of Chapter 14 are not reproduced here]

## TEXT III

## CHAPTER 34 USMCA

## FINAL PROVISIONS

### Article 34.1: Transitional Provision from NAFTA 1994

1. The Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement.

2. Issues under consideration, including documents or other work under development, by the Commission or a subsidiary body of NAFTA 1994 may be continued under any equivalent body in this Agreement, subject to any decision by the Parties on whether and in what manner that continuation is to occur.

3. Membership of the Committee established under Article 2022 of NAFTA 1994 may be maintained for the Committee under Article 31.22.4 (Alternative Dispute Resolution).

4. Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement.

5. With respect to the matters set out in paragraph 4, the Secretariat established under Article 30.6 of this Agreement shall perform the functions assigned to the NAFTA 1994 Secretariat under Chapter Nineteen of the NAFTA 1994 and under, for Chapter Nineteen, the domestic implementation procedures adopted by the Parties in connection therewith, until the binational panel has rendered a decision and a Notice of Completion of Panel Review has been issued by the Secretariat pursuant to the Rules of Procedure for Article 1904 Binational Panel Reviews.

6. With respect to claims for preferential tariff treatment made under NAFTA 1994, the Parties shall make appropriate arrangements to grant these claims in accordance with NAFTA 1994 after entry into force of this Agreement. The provisions of Chapter Five of NAFTA 1994 will continue to apply through those arrangements, but only to goods for which preferential tariff treatment was claimed in accordance with NAFTA 1994, and will remain applicable for the period provided for in Article 505 (Records) of that Agreement.

## TEXT IV

## ANNEX 14-C

## LEGACY INVESTMENT CLAIMS AND PENDING CLAIMS

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

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

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

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

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

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

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

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

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

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

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

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

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

6. For the purposes of this Annex:

(a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of

termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;

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

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

**ANNEX 14-E**

**MEXICO-UNITED STATES INVESTMENT DISPUTES RELATED TO COVERED GOVERNMENT CONTRACTS**

1. Annex 14-D (Mexico-United States Investment Disputes) applies as modified by this Annex to the settlement of a qualifying investment dispute under this Chapter in the circumstances set out in paragraph 2.[29]

2. In the event that a disputing party considers that a qualifying investment dispute cannot be settled by consultation and negotiation:

(a) 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,[30] provided that:

(A) the claimant is:

(1) a party to a covered government contract, or

(2) engaged in activities in the same covered sector in the territory of the respondent as an enterprise of the respondent that the claimant owns or controls directly or indirectly and that is a party to a covered government contract, and …

**[Footnotes omitted. The Annex is not reproduced here in extenso]**

## C. Application of the General Rule for Interpretation of Treaties

### Text I

**C.1** This establishes that the provisions of the USMCA supersede the NAFTA, except to the extent and effect of references in the USMCA to provisions of the NAFTA. 'Supersede' has an ordinary meaning of displacing something by something else which takes its position.[4] The context indicates that the term is used here in regulating treaty relations. Thus the term 'supersede' in a treaty takes effect in accordance with the customary international law rules reflected in the 1969 Vienna Convention. These rules provide for a treaty to be considered terminated by being superseded by a later treaty on the same subject matter and by the expression of the intention of the parties to that effect.[5] The NAFTA was thus terminated by being superseded by the USMCA as indicated by the Protocol and with the limited transitional and continuation arrangements mentioned in the Protocol. The Protocol entered into force on 1 July 2020.

**C.2** The phrase 'without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA' is to be read in conjunction with those provisions of the USMCA that do refer to the NAFTA. Such references in the USMCA indicate differing functions which are preserved by the "without prejudice" provision. There are no references to NAFTA in the Articles constituting Chapter 14 (Investment) of the USMCA. In Chapter 14 references to NAFTA are only present in its Annex 14-C.

### Text II

**C.3** This Chapter has the title 'Investment'. Its substantive provisions constitute a regime for treatment of investments. USMCA Article 14.2 sets out the scope of the Chapter principally in terms of personal scope (art 14.2 (1)(a): 'investors of another Party') and material scope (art 14.2 (1)(b): 'covered investments'). However, Article 14.2 para (3) touches on the temporal scope of the Chapter indicating (for greater certainty) that it does not create obligations 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 [the USMCA]' except to the extent of the provisions in Annex 14-C (Legacy Investment Claims and Pending Claims). Thus Annex 14-C is identified here as being an exception in relation to matters pre-dating the USMCA. This sets a basis for understanding Annex 14-C to relate to acts, facts or situations within the investment treatment regime in force under NAFTA, not that under USMCA.

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[4] Merriam-Webster.com Dictionary online offers the definitions **(RG-0002)**: "Supersede." '1 a: to cause to be set aside; b: to force out of use as inferior; 2: to take the place or position of; 3: to displace in favor of another.' <https://www.merriam-webster.com/dictionary/supersede> accessed 1 Jun. 2023.

[5] 1969 Vienna Convention, art 59 **(RG-0001)**:
'(1) A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:
(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. …'

**C.4** Articles 14.4 to 14.17 set out the USMCA regime for treatment of investments. This regime differs from that in Section A of Chapter 11 (Investment) of NAFTA both formally and substantively. The USMCA regime differs formally in that it is a regime having a different treaty basis from that of Section A of Chapter 11 of NAFTA. It differs substantively in that some texts of the NAFTA provisions are omitted, some different text is included in the USMCA, and some portions of text of the USMCA which are broadly similar to those of the NAFTA contain changed words or phrases. The effect of the formal and substantive differences between the two regimes is that the application of treaty provisions in respect of an investor and investment requires election between the two investment regimes as only one could properly and effectively apply to a given set of acts and events.

**C.5** Further, in the USMCA treatment of investments regime there are several provisions included 'for greater certainty'. Such provisions in a treaty succeeding one in the same subject area may be included to reflect solutions to issues under the predecessor treaty that have been subject to debate, the express clarification of which forms part of the bargain of the later treaty.[6]

**Text III**

**C.6** Article 34.1, a provision in the final clauses of the USMCA, sets out 'Transitional Provision from NAFTA 1994'. These are six paragraphs dealing with miscellaneous arrangements for the transition. They do not establish any uniform or prescribed period of transition. They allow for a small number of features of the NAFTA to continue to have effect after the entry into force of the USMCA introduced the superseding regime. They do not provide for the investment regime of NAFTA to continue to apply from the point at which it was superseded.

**Text IV**

**C.7** Annex 14-C contains provisions within the category mentioned in the Protocol and in Article 14.2 USMCA (Scope) as referring to provisions of the NAFTA. The Annex contains provisions governing the Annex's material, temporal and personal scope. The central feature of the Annex is consent by the states parties to submission of certain claims to arbitration. The material scope is that such claims relate to a 'legacy investment' and allege breach of an obligation under the 'investment', 'state enterprise', or 'monopolies and state enterprise' regimes of the 1994 NAFTA.

**C.8** Paragraph 1 of the Annex sets out the consent of the states parties, with respect to a legacy investment, to the submission of a claim to arbitration. The claim is to be submitted in accordance with Section B of Chapter 11 of NAFTA 1994 and the Annex. Section B of the

[6] An example of a 'for greater certainty' provision is USMCA Article 14.6, para 4:

> 'For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.'

NAFTA Chapter is the Section which deals with arbitration as a possible means of settlement of disputes. It includes in section 1122 the consent of the NAFTA states parties to submission of claims to arbitration.

**C.9** The subject matter of any such arbitration is a claim alleging breach of an obligation under Section A (the investment regime) of Chapter 11 of NAFTA (or other provisions of the NAFTA not relevant here). The obligations potentially in issue are those which concerned the treatment of investors and investments while Section A was in force. Thus in the treaty structure of the NAFTA, Section B of Chapter 11 provides for the process of arbitration in which consent is an essential element for establishing the jurisdiction of an arbitral tribunal. Section A sets out the treaty obligations which form part of the law to be applied by any such arbitral tribunal. Thus consent in Section B is in a part of the treaty structure distinct from the regime of obligations on treatment of investors in Section A.

**C.10** 'Legacy investment' is defined by reference to material, personal and temporal elements. The material and personal elements are identified by reference to definitions of 'investment' and 'investor'. The temporal element is that the relevant investment must have been established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and been in existence on the date of entry into force of the USMCA, that is the date on which the USMCA rules for treatment of investments superseded those of the NAFTA.

**C.11** Footnote 21 of Annex 14-C provides that consent is not granted for a legacy investment claim if a putative claimant is an investor that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E. No such exception is made in respect of potential claimants whose eligibility to submit claims to arbitration is regulated by Annex 14-D. Annex 14-E can be loosely described as concerned with arbitration of claims by investors having covered government contracts at a time when a claim could be submitted to arbitration if the investor were not excluded. The context in which the footnote is located might be thought to suggest that the note refers to exclusion of a particular putative legacy dispute. The wording clearly indicates otherwise. In the footnote's formulation the denial of consent is related to the 'investor' being 'eligible to submit claims' under Annex 14-E, not to any specific claim being the subject of a possible arbitration under Annex 14-E. Whether an investor is someone who would be eligible to submit claims under Annex 14-E is a matter for investigation of facts. There is nothing manifestly absurd or unreasonable in concluding that consent is not given for any legacy investment to be the subject of an arbitration where an investor is eligible to submit any claims to arbitration that would come within paragraph 2 of Annex 14-E.[7]

**C.12** Paragraph 2 of Annex 14-C declares that the consent given in paragraph 1 is effective for specified arbitral purposes. This refers to other treaties on arbitration which make written consent, agreement in writing, or agreement a pre-requisite for their application in relation to

[7] The context may assist in identifying the ordinary meaning of terms used in a treaty. It cannot change the ordinary meaning when this is quite clear, nor allow an interpreter to adjust the wording of a treaty or to read into it words which are not there. Good faith does not permit this. Vattel states that 'When a deed is worded in clear and precise terms, when its meaning is evident, and leads to no absurdity, there is no ground for refusing to admit the meaning which the deed naturally presents.' E de Vattel, *The Law of Nations*, Book II, Chap XVII, of *The Interpretation on Treaties* (1758 edition, trans by C G Fenwick) (Washington DC: Carnegie Institution, 1916) at § 263 **(RG-0003)**.

an arbitration. These Conventions are identified through the definitions to which reference is made in paragraph 6(c) of Annex 14-C as: the 'ICSID Convention' Washington, 1965, and the associated Additional Facility Rules; the New York Convention on Foreign Arbitral Awards, New York, 1958; and the Inter-American Convention on International Commercial Arbitration, Panama, 1975.

**C.13** Paragraph 3 of the Annex provides for the consent under paragraph 1 to expire three years after the termination of NAFTA 1994. Thus this consent continues for three years, the consent being to submission to arbitration of claims alleging breaches of Section A of Chapter 11 of NAFTA. Any such breach presupposes obligations of Section A being binding, which they only were until superseded. There is nothing in paragraph 3 of Annex 14-C to indicate that those obligations had any effect after they were superseded, nor by that very fact of being superseded could they have continuing effect.

**C.14** Paragraph 4 confirms that such expiry of consent does not affect the jurisdiction of a tribunal duly constituted following a claim duly submitted before that expiry. This only confirms the effectiveness of consent and makes no provision for continuation of superseded obligations in the regime for treatment of investments. Paragraph 5 gives similar confirmation of jurisdiction in relation to specified claims submitted while NAFTA 1994 was in force.

## D. Further Interpretative Elements of the General Rule for Interpretation of Treaties

### D.1 Interpretative declarations and unilateral statements

Interpretative declarations and unilateral statements have sometimes been accepted as having an interpretative role. This may be when made by one or more parties in an instrument made in connection with the conclusion of a treaty and accepted by the other parties as an instrument related to the treaty (1969 Vienna Convention, art 31(2)(b)), where made by one party after conclusion of the treaty and enjoying the concurrence of the other parties thus constituting a subsequent agreement (1969 Vienna Convention, art 31(3)(a)), or as confirmation of meaning where constituting part of the preparatory work (1969 Vienna Convention, art 32). In all cases declarations and unilateral statements must be attributable to a state party to a treaty to be relevant.

**D.2** Interpretative declarations may take a defined form.[8] They are commonly found in instruments of international legal significance such as Final Acts of Diplomatic Conferences, in instruments of ratification of a treaty etc. For such statements to form part of the context under Article 31(2)(b) of the 1969 Vienna Convention they must be in an instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted

[8] The International Law Commission's *Guide to Practice on Reservations to Treaties* (Addendum to Report of ILC Sixty-third session (2011), UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1), endorsed by General Assembly Resolution A/RES/68/111 (2013), provides a definition as Guideline 1.2 **(RG-0004)**:
'Definition of interpretative declarations
"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.'

by the other parties as an instrument related to the treaty. However, such declarations do not in themselves have a decisive effect on interpretation unless capable of being held to constitute an estoppel.[9] If taken up by one or more other parties to a treaty they may provide the formulation for an agreement as to interpretation of provisions of a treaty in accordance with Article 31(2)(a) or Article 31(3)(a) of the 1969 Vienna Convention. They may alternatively provide a basis for agreement on the meaning of a treaty through practice in its implementation as envisaged in Article 31(3)(b).

**D.3** No authoritative interpretative declaration or statement has been adduced in the present case.

## D.4 Relevant Rules of International Law

A further interpretative element is constituted by relevant rules of international law applicable in the relations between the parties (1969 Vienna Convention, 31(3)(c)). This requires account to be taken of general principles of international law and of relevant treaties additional to that which is the subject of interpretation, applying in relations between the parties to a dispute. This aspect of interpretation has been conveniently described as 'systemic integration'.[10]

**D.5** Systemic integration is pertinent to interpretation of Annex 14-C because any consent given there relates to arbitration at the International Centre for Settlement of Investment Disputes and because the Annex refers to other treaties relevant to arbitration.

**D.6** Professor Christoph Schreuer, a well-known commentator on arbitration at the International Centre for Settlement of Investment Disputes, has stated:

> 'Like any form of arbitration, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction.'[11]

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[9] As to a purely unilateral statement, the International Court of Justice has indicated: "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court." (Advisory Opinion of the ICJ on the International Status of South West Africa [1950] ICJ Reports 128, at 135–36) **(RG-0005)**

[10] This description has been widely adopted from the following explanation:

> ". . . [a]rticle 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system. As such, they must be 'applied and interpreted against the background of the general principles of international law', and, as Verzijl put it . . . a treaty must be deemed 'to refer to such principles for all questions which it does not itself resolve expressly and in a different way.'"
>
> C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279 at 280 (original emphasis, footnotes omitted) **(RG-0006)**

[11] C Schreuer, 'Consent to Arbitration', Chapter 21 in *The Oxford Handbook of International Investment Law* (Peter Muchlinski et al., eds., 2008) at p. 831. **(RG-0007)**

**D.7** A provision in a treaty giving consent to arbitration of disputes over acts and events which are the subject of rules in that treaty, in another treaty, or in some other body of law, is a provision identifying issues open to arbitration and the law applicable to them, not making that law applicable to the acts and events in issue. Hence, Schreuer has described jurisdiction and applicable law as having 'separate lives'.[12] He makes clear that this distinction applies to temporal aspects of consent:

> 'The question whether acts and events that occurred prior to an expression of consent to arbitration are covered by the latter should be distinguished from the issue of the applicable substantive law. Even if jurisdiction is established under a treaty, this does not mean that the treaty's substantive provisions are necessarily applicable to all aspects of the case. The general rule is that the law applicable to acts and events will normally be the law in force at the time they occurred.'[13]

**D.8** Schreuer has also stated:

> 'In some cases the applicable law is to be found primarily or exclusively outside the treaty establishing jurisdiction. This is particularly evident in situations involving inter-temporal questions. A tribunal's jurisdiction may extend to situations which are outside the treaty's application *ratione temporis*. A treaty may provide for jurisdiction over disputes arising from events that occurred before its entry into force. In such a situation the law in force at the time of the relevant events and not the treaty establishing jurisdiction will have to be applied to the merits of the case.'[14]

**D.9** It is clear from this analysis that a grant for a specified length of time of consent to submission of defined classes of disputes to arbitration does not determine the time during which the legal regime of rules in a treaty applies to acts and events affecting investments which might be the subject of such an arbitration.

## E. Interpretation of the Issues

In the light of the foregoing analysis the following issues can be identified and resolved:

### E.1 What is the consent to which paragraph 3 of Annex 14-C relates?

The paragraph refers expressly to consent under its paragraph 1.

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[12] C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1:1 McGill Journal of Dispute Resolution 1, Part IV, The Separate Lives of Jurisdiction and Applicable Law at p 20 ff. **(RG-0008)**

[13] C Schreuer, 'Consent to Arbitration', *The Oxford Handbook of International Investment Law*, above, at p. 859. **(RG-0007)**

[14] C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration', above, at p.20. **(RG-0008)**

**E.2 What is the nature and effect of the consent in paragraph 1 of Annex 14-C?**

The consent in paragraph 1 is consent by states bound by the Annex for submission of a claim to arbitration. Its effect is established by long-standing arbitral practice and, more particularly, as indicated in paragraph 2 of the Annex. The institution of international arbitration, including investment arbitration, and long-standing arbitral practice have established that consent is an essential element for an arbitral tribunal to be constituted and to have jurisdiction. The present consent also has the specified effect of meeting the requirements of the three treaties relevant to arbitration identified in paragraph 2 of the Annex.

**E.3 How is the extent of consent defined in paragraph 1?**

The extent of the consent is defined: (a) by specifying the material element to which it relates; (b) by reference to the arbitration process to which it relates; (c) by identifying the subject-matter over which claims may be submitted to arbitration; and (d) by a specific exclusion in footnote 21.

The boundaries are set as follows:

> (a) The material element to which the consent relates is a 'legacy investment' as defined in paragraph 6 of the Annex.
>
> (b) The arbitration process is specified as that within Section B of Chapter 11 (Investment) of NAFTA and Annex 14-C.
>
> (c) The subject-matter is identified as being a claim alleging breach of an obligation under Section A of Chapter 11 (Investment) of NAFTA (and other provisions of NAFTA not relevant here). An obligation under Section A of Chapter 11 is one binding on the states parties to that treaty when the acts or events that are the subject of claims in the arbitration occurred.
>
> (d) The exclusion in footnote 21 is one that is specific to a certain class of investor, excepting from consent any legacy claim by an investor that has contractual relations with the putative respondent state such as would make the investor eligible to bring claims under Annex 14-E.

**E.4 What are the relevant time factors consequent upon defining the extent of consent in paragraph 1?**

A 'legacy investment', being an investment established or acquired between 1 January 1994 and the date of termination of NAFTA 1994 and in existence on the date of entry into force of the USMCA, is one which was covered by Section A of Chapter 11 of NAFTA while those provisions were in force.

Obligations under Section A of Chapter 11 were binding until Section A was superseded by the provisions of Chapter 14 of the USMCA which entered into force on 1 July 2020.

An arbitration process duly and validly submitted in accordance with Section B of Chapter 11 of NAFTA, in accordance with general principles of law, sustains the jurisdiction of an arbitral tribunal until the conclusion of an arbitral process. This principle is further evidenced and reaffirmed by the provisions of paragraphs 4 and 5 of Annex 14-C. This time factor relates to the institution and continuance of an arbitration and is thus distinct from the time frame within which is found the subject-matter of the arbitration.

**E.5 What is the significance of these time factors for interpretation of paragraph 3 of Annex 14-C?**

The definition of legacy investment in paragraph 6 is by reference to matters covered by Section A of Chapter 11 of NAFTA as is the reference to the subject matter of a dispute being claims relating to obligations in Section A. Together these facts show that consent is given only for acts or events while those obligations were in force. Those criteria for consent ceased to be met when Section A ceased to be in force. Nowhere is there any exception expressed to Section A being superseded by the regime of Chapter 14 of USMCA.

**F. Conclusion**

**F.1** The terms used in the relevant treaty texts are unambiguous in their ordinary meaning. However, applying the general rule of treaty interpretation requires that the context in which the terms are used and the relevant rules of international law are also given due weight. These rules as they relate to arbitration show clearly that consent to arbitration is an essential element for the constitution and jurisdiction of an arbitral tribunal that is distinct from the law applicable by that tribunal to the subject matter of an arbitration.

**F.2** Thus understood, the consent in paragraph 1 of Annex 14-C to USMCA is for arbitration of claims alleging breach of an obligation under Section A of Chapter 11 of NAFTA. Paragraph 3 of Annex 14-C to USMCA provides for expiry of such consent 3 years after the provisions of Section A of Chapter 11 of NAFTA were superseded. This time factor delimiting such consent makes no change to the point in time at which those provisions of Section A were superseded. Thus the consent in Annex 14-C is consent only to submission to arbitration of claims alleging breach of obligations relating to acts and events taking place before the NAFTA, as the source of those obligations, was superseded on 1 July 2020.

**F.3** My report on interpretation of Annex 14-C relies only on documents within the public domain and there is nothing in the interpretative process to suggest an outcome that leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Hence, no requirement arises to seek to determine the meaning from supplementary means of interpretation.

Richard K Gardiner
09 June 2023
London, U.K.

## *Curriculum Vitae* of R. K. GARDINER

| | | |
|---|---|---|
| NAME: | Richard Kingswell Gardiner | |
| EDUCATION: | Westminster School | 1958 to 1963 |
| | Keble College Oxford | 1964 to 1967 |
| | University College London | 1969 to 1970 |

QUALIFICATIONS:

B.A. Oxford Second Class Honours Law 1967,
(M.A. 1970)

LL.M. London 1970

Subjects:

- Air and Space Law
- Law of International Institutions
- Law of European Institutions
- Industrial and Intellectual Property

Diploma in Air and Space Law
of London Institute of World Affairs, 1970

Barrister, Lincoln's Inn, 1969

LANGUAGES: Good French
Very Limited German

EMPLOYMENT NOW: Honorary Professor, Faculty of Laws UCL

PREVIOUS EMPLOYMENT:

August to September 1965

Intern with Secretariat of European Commission of Human Rights, Strasbourg:

Preparation of Human Rights cases.

1968 to 1969

Lycée Benzerdjeb, Tlemcen, Algeria:

Teaching English (Voluntary Service Overseas).

1970 to 1971

Fletcher School of Law and Diplomacy (administered by Tufts and Harvard Universities):

Assistant Director of Research Programme in Law and Population and Research Associate.

1971 to 1974

Pupil then practising Barrister at 1 Harcourt Buildings, Temple:

Practising in general common law matters, in criminal cases, landlord and tenant, personal injuries and matrimonial work.

1975 to 1986

Assistant Legal Adviser in H.M. Diplomatic Service (Acting Legal Counsellor, 1986),

covering a wide range of legal matters with international aviation as principal subject.

Other subjects: Shipping, International Trade, Economic Relations, Industrial and Intellectual Property, Human Rights, United Nations and other International Organisations, European Community, Nationality and Treaties.

On secondment January 1983 to May 1986 to Law Officers' Department, Attorney General's Chambers, as: Senior Legal Assistant January 1983

Assistant Solicitor September 1983 - May 1986

1986 to 2007 Lecturer, then Senior Lecturer at University College London

1990–2010 Resumed practice (as door tenant) at Chambers 1 Harcourt Buildings, then 5 Bell Yard, 4 Essex Court, and Quadrant Chambers

2011 Ceased practising as a barrister

2007–2009 Teaching fellow UCL

2009– 2021 Visiting Professor at University College London (part-time teaching)

2023 – Honorary Professor at University College London

**Publications**:

1. ***Industrial and Intellectual Property Rights: Their Nature and the Law of the European Communities*** (1972) 88 Law Quarterly Review 507 to 529

2. ***Consumer Interest in Trademark Protection*** (1973) 36 Modern Law Review 300

3. ***Registering a Colourable Invention*** (1974) 124 New Law Journal 191

4. ***United Kingdom Air Services Agreements 1970 to 1980*** (1982) VII Air Law 2-10

5. Review of J.E.S.Fawcett, Outer Space: New Challenges in Law and Policy, [1986] LLoyd's Maritime and Commercial Law Quarterly ("LMCLQ") 404

6. ***Torts in Violation of International Law*** [1988] LMCLQ 10-12

7. ***European Community Instruments on Air Transport*** [1988] LMCLQ 135-138

8. ***Carriage by Air in the US Court of Appeals*** [1988] LMCLQ 151-156.

9. Review of M.N. Taishoff, State Responsibility and the Direct Broadcast Satellite. [1988] International & Comparative Law Quarterly ("ICLQ") 211

10. ***Our Law or Theirs*** [1988] LMCLQ 445-449

11. Review of C.P. Verwer Liability for Damage to Luggage in International Air Transport LMCLQ (1989), 124-5

12. ***Carriage by Air Outside the International Conventions*** [1989] LMCLQ 267-270

13. Review of T.L.Zwaan (Ed) Space Law: Views of the Future [1989] Leiden Journal of International Law 276.

14. ***Air and Space Law: Laying the Track and Leaving the Rails*** in Perestroika and International Law (Ed. Butler, W.E.) (1990), 165-176.

15. Review of K-H.Böckstiegel Space Law - Changes and Expectations at the Turn to Commercial Activities Vol 6 No 1 (1990) Arbitration International 95-99.

16. House of Lords Select Committee on the European Communities. Memorandum in Community Shipping Measures (Session 1989-90, 28th Report, HL Paper 90), 114-117. (London: HMSO).

17. ***Air Law's Fog: The Application of International and English Law*** in (1990) 43 Current Legal Problems 159-184

/18.

18. House of Lords Select Committee on the European Communities. Memorandum on Conduct of the Community's External Aviation Relations (Session 1990-91, 9th Report, HL Paper 39), 99-107. (London: HMSO)

19. ***The Existing International Legal Régime in Airport Access in the 1990s***, Proceedings of Royal Aeronautical Society (1991) 1.1-1.7. (London: Royal Aeronautical Society)

20. Review of P Mendes de Leon, Air Transport Law and Policy in the 1990s Vol 9 No 1 (1993) Arbitration International 116-118

21. Review of C Blackshaw, *Aviation Law and Regulation*, [1993] LMCLQ 586-588

22. ***Independent Advice and the Role of Attorney Generals*** Parliamentary Brief, Vol.2 No.7, 80-81 (1994)

23. ***Treaty Interpretation in English Courts*** (***Antwerp United Diamond v Air Europe***), [1994] LMCLQ 184-189

24. Review of British Year Book of International Law 1992, [1994] LMCLQ 587

25. ***Language and the Law of Patents*** (1994) 47 Current Legal Problems 255-285

26. ***Treaty Interpretation in the English Courts since Fothergill v. Monarch Airlines (1980)***, (1995) 44 ICLQ 620-628.

27. ***Treaties and Foreign Affairs*** Chapter 28 in de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th Ed., 1995 and Supp.)

28. **'Interpreting Treaties in the United Kingdom', Chapter** in *Legislation and the Courts* (Michael Freeman, Ed.) (1997), pp 115-132.

29. ***Incorporating the Convention and Internalising its Principles*** Paper to Edinburgh University Conference on Human Rights, http://www.ed.ac.uk/pgstuff/gardiner/htm

30. Intellectual Property: Recent Developments, (video with others) Legal Network Television Programme 422, April 1997

31. ***Treaties and Treaty Materials: Role, Relevance and Accessibility*** (1997) 46 ICLQ 643 – 662

32. ***Revising the Law of Carriage by Air: Mechanisms in Treaties and Contract*** (1998) 47 ICLQ 278 – 305

33. ***The Warsaw Convention at Threescore Years and Ten*** (1999) XXIV Air & Space Law 114 – 120

34. ***Treaty Relations in the Law of Carriage by Air: Article 55(1) of the Montreal Convention*** [2000] The Aviation Quarterly 245 - 261

35. Review of L. B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* and Fountain Court Chambers (Trevor Philipson QC and others), *Carriage by Air* [2002] LMCLQ 155-158

36. Service Issues for ***Shawcross and Beaumont on Air Law***, April and December, (as one of the editors)

37. ***International Law*** (Pearson/Longman, 2003) ISBN 0-582-36976-2 (Paperback) 504 pages + xlii and index

38. **UN Convention on State Immunity: form and function** (2006) 55 ICLQ 407-409

39. **Treaty Interpretation** (OUP, 2008, and paperback edn 2010) 398 pages + tables and index

40. **'The Vienna Convention Rules on Treaty Interpretation'**, Chapter 19 in D Hollis, *The Oxford Guide to Treaties* (Oxford: OUP, 2012)

41. **Treaty Interpretation** (2nd edn, OUP, 2015, and paperback edn 2017)

42. Review of H Stevens, *The Life and Death of a Treaty: Bermuda 2* (London: Palgrave Macmillan, 2018), (2018) 43 Air & Space L. 645

43. **'Characteristics of the Vienna Convention Rules on Treaty Interpretation'**, Chapter 11 in MJ Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge, CUP, 2018)

44. Review of T Gazinni, *Interpretation of International Investment Treaties* (Oxford and Portland: Hart, 2016), (2018) 19 J. World Investment & Trade 321

45. Review of J Klingler & others (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Leiden: Kluwer, 2019), (2019) 30 Eur. J. Int'l L. 1077

46. **'The Vienna Convention Rules on Treaty Interpretation'**, Chapter 19 in D Hollis, *The Oxford Guide to Treaties* (Oxford: OUP, 2nd Edn, 2020)

47. Evidence to Public Administration and Constitutional Affairs Committee, oral evidence on Scrutiny of Treaties (5 July 2022), transcript and video at: <https://committees.parliament.uk/event/13963/formal-meeting-oral-evidence-session/>

Not yet published but under contract:

1. Chapters on International Air Law and Space Law for new Edition of Oppenheim's International Law (To be published by OUP) – submitted and in editorial process

2. *Treaties*, an 80,000 word book in OUP's Elements of International Law series – publication expected 2023

3. *Treaty Interpretation*, Third edition, see items 39 and 41 above, due 2024–5

# EXHIBIT LIST

| Exhibit No. | Description |
|---|---|
| RG-0001 | Vienna Convention on the Law of Treaties (1969) |
| RG-0002 | Merriam-Webster.com Dictionary online "Supersede." <https://www.merriam-webster.com/dictionary/supersede> accessed 1 Jun. 2023 |
| RG-0003 | E de Vattel, *The Law of Nations*, Book II, Chap XVII, of *The Interpretation on Treaties* (1758 edition, trans by C G Fenwick) (Washington DC: Carnegie Institution, 1916) |
| RG-0004 | The International Law Commission's *Guide to Practice on Reservations to Treaties* (Addendum to Report of ILC Sixty-third session (2011), UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1), endorsed by General Assembly Resolution A/RES/68/111 (2013) |
| RG-0005 | Advisory Opinion of the ICJ on the International Status of South West Africa [1950] ICJ Reports 128 |
| RG-0006 | C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279 |
| RG-0007 | C Schreuer, 'Consent to Arbitration', Chapter 21 in *The Oxford Handbook of International Investment Law* (Peter Muchlinski et al., eds., 2008) |
| RG-0008 | C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1:1 McGill Journal of Dispute Resolution 1, Part IV, The Separate Lives of Jurisdiction and Applicable Law |

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

*TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED*

*v.*

*UNITED STATES OF AMERICA*

(ICSID Case No. ARB/21/63)

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# EXPERT REPORT OF PROFESSOR HERVE ASCENSIO

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Hervé ASCENSIO
Professor of law – Sorbonne Law School
University Paris 1 Panthéon-Sorbonne
12, place du Panthéon
75231 Paris cedex 05
France

June 8, 2023

1. The undersigned, author of the expert report, is a professor at the University Paris 1 Panthéon-Sorbonne (Sorbonne Law School) (France). He teaches public international law, including international economic law and investment arbitration. He is the director of the *Global Business Law and Governance* master's degree, a partnership with the universities of Columbia (New York), City University of Hong Kong and Melbourne. He is the author of numerous publications on international economic law and general public international law, including a commentary on Article 70 of the Vienna Convention on the Law of Treaties on the consequences of the termination of a treaty in an edited collection on the Vienna Convention,[1] and an article on interpretation according to Article 31 of the Vienna Convention in international investment law published in the *ICSID Review*.[2] He co-edits the *Annuaire français de droit international* (French Yearbook of International Law). He has acted as counsel in several cases before the International Court of Justice, as a party's expert on international investment law in a large number of cases before investment arbitration tribunals and before French courts, and as an arbitrator in one ICSID arbitration. He is a member of the OSCE Court of Conciliation and Arbitration, as an alternate arbitrator, and a national expert in the OSCE human dimension mechanism. In January 2022, he taught a special course at The Hague Academy of International Law on "the responsibility of business enterprises in international law". A copy of the expert's *curriculum vitae* is appended at the end of this expert report.

2. In the matter of the arbitration between *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, the Government of the United States of America has requested the author's expertise on the consequences of the termination of the North American Free Trade Agreement (hereinafter "NAFTA"), and the interpretation of the provisions on intertemporal law of the Agreement between the United States, Mexico and Canada (hereinafter "USMCA"), notably its Annex 14-C on "Legacy Investment Claims and Pending Claims". It is the expert's understanding that these issues call into question the jurisdiction of the arbitral tribunal. The expert has no previous relationship with or interest in any of the parties to this arbitration, nor a connection to the matters at issue.

3. To address the legal questions raised in the context of the present case, the expert took note of the case materials available on the ICSID website, including the parties' submissions related to the Respondent's request for bifurcation.[3] He was provided with the claimants' request for arbitration by the Government of the United States of America. For his analysis, he relied on the text of the relevant treaties and on the decisions of international courts and arbitral tribunals publicly available. This expert report represents the expert's true professional assessment of the matters to which it refers based on his experience in the application of international law.

4. As a preliminary point, it is useful to briefly recall the relevant dates for the purposes of analysing the temporal issues covered in this report. As for the investment treaties involved, NAFTA was signed on 17 December 1992 and entered into force on 1st January 1994; it terminated on 1st July 2020, the date of entry into force of the Protocol of 30 November 2018 replacing NAFTA with USMCA. The subject of the dispute is the revocation of a permit to build a pipeline that had been granted on 29 March 2019; the revocation occurred on 20 January 2021, and the claimants filed their request for arbitration before ICSID on 22 November 2021.

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[1] Hervé Ascensio, "Article 70 – Consequences of the termination of a treaty", *in* O. Corten and P. Klein (ed.), *The Vienna Conventions on the Law of Treaties*, Oxford University Press, Oxford, vol. II, pp. 1585-1611 (2011) **(HA-0001)**. The second edition of this collection is forthcoming.

[2] Hervé Ascensio, "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", *ICSID Review – Foreign Investment Law Journal*, vol. 31, n°2, 2016, pp. 366-387 **(HA-0002)**.

[3] <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/63>

The chronology is thus the following one (in bold: dates relating to the investment treaties involved):

**- 1994, 1st January: entry into force of NAFTA**

- 2019, 29 March: Presidential permit to construct the KXL Pipeline[4]

**- 2020, 1st July: termination of NAFTA, entry into force of USMCA**

- 2021, 20 January: revocation of the Presidential permit to construct the KXL Pipeline[5]

- 2021, 22 November: request for arbitration under Annex 14-C of USMCA

5. Such a chronology reveals a problem with the application of treaties over time. This must be approached from two angles, that of the arbitration procedure and that of the substance of the protection offered to the investment.

6. From a procedural standpoint, the claimants' request for arbitration is not based directly on NAFTA Chapter 11, Section B, since it postdates the termination of NAFTA, but indirectly, through a reference to this section in USMCA Annex 14-C. It is worth recalling here that USMCA does not provide a mechanism for the settlement of investor-to-State disputes regarding the treaty relationship between the United States and Canada – whereas it does regarding the treaty relationship between the United States and Mexico. However, its Annex 14-C extends the possibility of invoking the NAFTA arbitration procedure after the termination of NAFTA in respect of two specific categories of dispute known as "legacy investment claims" and "pending claims". Only the first category, that of "legacy investment claims", is at issue in the present case. On reading the parties' written submissions, the expert considers that they are not opposed on this point.[6]

7. From a substantive standpoint, the claimants' request does not allege a breach of USMCA Chapter 14, which protects foreign investment since 1st July 2020, but a breach of NAFTA, because Annex 14-C of USMCA applies to claims alleging such breaches only. The main question of law raised is therefore whether the extension of NAFTA's arbitration mechanism in Annex 14-C relates only to breaches of that treaty that occurred while it was in force, *i.e.*, until 1st July 2020, or whether it also involves an extension of the substantive protection provided by NAFTA for a further three years, *i.e.*, until 1st July 2023. The first part of the alternative corresponds to the position of the respondent and the second to that of the claimants.

8. In the expert's opinion, the answer depends on the application in the present case of a set of rules of public international law, which will be presented in two parts: on the one hand, the legal consequences of the termination of NAFTA, and on the other, the interpretation of Annex 14-C of the USMCA, and more particularly its paragraph 1. The conclusion will be that Annex 14-C does not apply to claims alleging breaches of NAFTA occurring after its termination, and that consequently the jurisdictional objection raised by the respondent should be granted. The reasons are developed below.

* * *

[4] Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13101 (Mar. 29, 2019) **(C-010)**.

[5] Executive Order 13990 of January 20, 2021, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis", 86 Fed. Reg. 7037 (Jan. 25, 2021) ("EO 13990"), at Section 6 **(C-11)**.

[6] See Request for Arbitration, para. 17, 73-74, and Request for Bifurcation, para. 17.

## I. LEGAL CONSEQUENCES OF THE TERMINATION OF NAFTA

*a) Overview*

9. In international law, the consequences of the termination of a treaty are governed by the treaty itself or, in the absence of a provision to this effect, by a suppletive rule codified in article 70 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "VCLT" or "Vienna Convention"). Although a signatory, the United States has not become a party to the Vienna Convention, which is therefore not directly applicable in this case; but it is widely accepted that Article 70 of the Convention is a faithful reflection of customary international law.[7] The rule is as follows:

> *Article 70 – Consequences of the termination of a treaty*
>
> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) releases the parties from any obligation further to perform the treaty;
>
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
>
> 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

10. A reading of the NAFTA, particularly its final provisions, shows that the NAFTA parties have provided almost no detail about the effects of the termination of the treaty. The only clarification appears in Article 2205, when it states that in the event of withdrawal of a party, the treaty continues to apply in the relations between the remaining parties, which is perfectly in line with Article 70(2) VCLT.[8] That said, NAFTA Article 2205 is in no way at issue in the present case. The United States, Mexico and Canada did not decide to terminate NAFTA by withdrawing altogether from the treaty, and thus ending all bilateral relationships between them. They rather negotiated a new treaty, the 2018 Protocol, to govern their future relationships. The 2018 Protocol did not limit itself to modifying NAFTA, but replaced it entirely with a new treaty, USMCA. Hence the termination of NAFTA, as mentioned several times in Annex 14-C.[9]

11. In the silence of the treaty, the customary rule as codified in Article 70(1) VCLT must apply. But where, as here, a treaty has been terminated by reason of a new treaty between the same parties, it is conceivable that the new treaty contains provisions which organise the effects of the termination in a different, or more precise, way than does Article 70(1) VCLT. This is apparent from a reading of the 2018 Protocol. It states that "[u]pon [its] entry into force, the USMCA … shall supersede the NAFTA, without prejudice to those provisions set forth in the

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[7] See International Law Commission, Second Report of Sir Gerald Fitzmaurice, A/CN.4/107, *YILC*, 1957, vol. II, at p. 67 **(HA-0003)**; *Case between New Zealand and France, RIAA*, 30 April 1990, vol. XX, p 251, para. 75 **(HA-0004)**. In legal literature, see S. Wittich, "Article 70 – Consequences of the Termination of a Treaty", *in* O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer Verlag, Berlin Heidelberg, 2nd ed., 2018, p. 1299 **(HA-0005)**; H. Ascensio, *op. cit*. note 1, p. 1590-1591 **(HA-0001)**.

[8] The provision follows the logic of the law of treaties of deconstructing a multilateral treaty into bilateral relations in order to resolve this type of question of law.

[9] USMCA, Annex 14-C, para. 3 ("A Party's consent under paragraph 1 shall expire three years after termination of NAFTA 1994"), para. 5 ("… the Tribunal's jurisdiction … is not affected by the termination of NAFTA 1994"), para. 6 ("'legacy investment' means an investment … established or acquired between January 1, 1994, and the date of termination of NAFTA 1994 …").

USMCA that refer to provisions of the NAFTA".[10] Actually, the "without prejudice" clause still amounts to applying the USMCA; but it suggests that the new treaty has included specific provisions that rely in some way on provisions previously contained in the NAFTA. A careful reading of the new treaty is therefore necessary to determine whether the termination of NAFTA has consequences different from those which, in principle, would result from customary law with respect to the case at hand.

12. However, the Protocol makes no reference to a "transition period". The term "provisions", indicates only limited, *ad hoc* borrowings from NAFTA that will be analysed further below (n°19-25). These selective referrals are in no way comparable, for instance, to the "transition period" and the transitional legal regime established in the context of Brexit, in Part IV of the 2019 Agreement on the withdrawal of the United Kingdom from EU, and applicable from its entry into force until 31 December 2020. According to its Article 127, as a matter of principle, "Union law shall be applicable to and in the United Kingdom during the transition period", which makes it perfectly clear that the previous treaty and all secondary legislation remain applicable on a transitional basis.[11] This is the kind of language that would be expected if the drafters of the Protocol had intended to keep a substantial part of NAFTA in force. On reading the Protocol, no such wording is to be found.

13. The legal situation is also very different from that encountered by several investment tribunals faced with the termination of an investment treaty that included a so-called "survival clause" or "sunset clause".[12] In the presence of such a clause, the treaty continues to produce both procedural and substantive effects in favour of the protection of foreign investments for the period indicated. But this is not the case with NAFTA, lacking such provision. As the arbitral tribunal in this case noted in its Procedural Order No. 2, "[t]he Respondent relies … on the undisputed fact that NAFTA does not contain a sunset clause".[13]

14. The circumstances of the present case are closer to those of the famous *Ambatielos* case brought before the International Court of Justice in 1951. In this case, the Court discussed an 1886 treaty which, like NAFTA, was terminated by another treaty concluded between the same parties in 1926. The 1926 treaty was accompanied by a Declaration that provided consent to arbitration for claims arising from the 1886 treaty. Without this declaration, the treaty of 1926 would have "wipe[d] out the Treaty of 1886 and all its provisions, including its remedial provisions, and any claims based thereon".[14] It was then clear that the 1926 declaration, when addressing "claims … based on the provisions of the of Anglo-Greek Commercial Treaty of 1886",[15] referred to claims pre-dating the 1926 treaty. In *Ambatielos*, Greece relied on the provisions of the 1886 treaty, but it did not assert its claim until 1939. The claims were permitted in part because the alleged breach occurred in 1922-1923, before the 1886 treaty was terminated, and the 1926 Declaration permitted the assertion of such claims after the termination of the 1886 treaty.[16] Annex 14-C works in much the same fashion.

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[10] Protocol, para. 1.

[11] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 17 October 2019, *OJEU*, 12/11/2019, C 384 I/1, articles 126 and ff **(HA-0006)**.

[12] See, for instance, Stockholm Chamber of Commerce (SCC) No. 088/2004 Partial Award, *Eastern Sugar BV v Czech Republic*, of 27 March 2007, para. 173-177 **(HA-0007)**.

[13] *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2, 13 April 2023, para. 23.

[14] ICJ, *Ambatielos case (jurisdiction)*, judgment of 1st July 1952, *ICJ Reports 1952*, p. 28 ff, at 43 **(HA-0008)**.

[15] *Ibid.*, at 36.

[16] For the facts, see *The Ambatielos Claim (Greece v. United Kingdom)*, award of 6 March 1956, *RIAA*, vol. XII, p. 83 ff, at 91-94 **(HA-0009)**.

15. In its Procedural Order No. 2, the Arbitral Tribunal stressed the novelty in investment arbitration of the legal issue raised by Annex 14-C of USMCA concerning the consequences of the termination of NAFTA.[17] To answer this question, it is proposed here to begin by reasoning as if NAFTA had ended without any new treaty specifying the effects of its termination, which amounts to applying the customary rule of Article 70 VCLT alone. This will make it possible, at a second stage and by comparison, to seek what different effects may be due to the provisions of the USMCA referring to NAFTA.

*b) Consequences of termination under customary law and under USMCA*

16. Article 70(1) contains two subparagraphs, the first of which provides that treaty obligations cease to apply when the treaty ends, while the second provides for the maintenance of rights, obligations and legal situations created previously. It must be deduced from this that the customary rule provides for different effects depending on the nature of the rights, obligations, or legal situations. If they were instantaneous and have been performed, such as the payment of a sum of money provided for in the treaty, they remain valid and continue to produce legal effects. If they are continuous, then the date of termination of the treaty marks a caesura: the State obligation continues for the party that had to be performed before the end of the treaty; but this obligation ceases for the party after the end of the treaty. In investment treaties, substantive obligations provide a continuous, ongoing, protection for investments. In the event of termination of the treaty, protection therefore ceases on the date of termination of the treaty.

17. The consequences of the customary rule on litigation must also be specified. Firstly, it is accepted that a dispute which arose when the treaty was in force and on the basis of that treaty creates a legal situation which continues despite the termination of the treaty.[18] Another question is whether and until when a dispute settlement mechanism provided for by the terminated treaty can still be used. In this respect, international law recognises a transitional effect for dispute settlement clauses contained in a terminated treaty. According to a constant jurisprudence of the International Court of Justice, jurisdiction of the Court persists, and proceedings can continue, if the dispute is referred to the court before the date of termination of the treaty. After that date, the dispute cannot be validly referred to the court even if the claims relate to events pre-dating termination. The relevant date, here, is the date of the filing of the application.[19] If we apply this principle of the transitional effect of dispute settlement clauses to the arbitration clauses of a terminated investment treaty, it follows that, according to customary international law, the arbitral tribunal whose jurisdiction is based on that treaty retains jurisdiction, and that the arbitration may continue, provided that the request for arbitration was filed before its termination.

18. If customary law alone were to apply in the present case, it would have to be concluded that a dispute arising after the termination of NAFTA could not create any legal situation capable

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[17] *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2, 13 April 2023, para. 26.

[18] See the Dissenting Opinion of Lord McNair *in* ICJ, *Ambatielos (Preliminary Objection)*, Judgment of 1 July 1952, *ICJ Reports 1952*, p. 63 **(HA-0010)**. The idea was then taken up by the ICJ: *Northern Cameroons* case, Judgment of 2 December 1963, *ICJ Reports 1963*, at 34-35 **(HA-0011)**. See also *Case between New Zealand and France*, award of 30 April 1990, *RIAA*, vol. XX, at 266, para. 106 **(HA-0004)**.

[19] ICJ, *Northern Cameroons* case, Judgment of 2 December 1963, *ICJ Reports 1963*, at 35 **(HA-0011)**; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, *ICJ Reports 2016*, at 115, para. 31 **(HA-0012)**; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 13 February 2019, *ICJ Report 2019*, at 21-22, para. 30 **(HA-0013)**; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 3 February 2021, *ICJ Reports 2021*, at 19, para. 24 **(HA-0014)**.

of having legal effects under NAFTA. Furthermore, as the request for arbitration arose after 1st July 2020, the investment arbitration provisions of NAFTA would not be available. It is now possible to look at the provisions of USMCA to see to what extent its provisions modify the effects normally expected, under customary international law, of the termination of a treaty.

19. Firstly, it is necessary to establish whether USMCA contains transitional provisions in its general parts, including the final clauses. We note that one general clause appears in Article 34.1 entitled "Transitional Provision from NAFTA 1994". The areas concerned are the following ones: works of the NAFTA Commission and NAFTA subsidiary bodies; membership of the Committee under NAFTA Article 2022; NAFTA Chapter 19; NAFTA Chapter 5 inasmuch as it applies to arrangements to grant claims for preferential tariff treatment. The list makes no reference to the NAFTA provisions offering substantial protection to foreign investment and whose breach could lead to arbitration between foreign investors and States (Section A of Chapter 11, Article 1503(2), and Article 1502(3)); nor does it mention the procedural protection offered by Chapter 11, Section B.

20. Secondly, there is a provision in Chapter 14 dealing with the relationship between USMCA and NAFTA specifically in the field of investment and applicable to the whole chapter. This is Article 14.2, paragraph 3, according to which:

> "For greater certainty, 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 Agreement."

21. Annex 14-C is therefore an exception to a general rule laid down by the treaty, and this general rule echoes Article 70(1) VCLT, but seen in mirror image from the new treaty. Hence the fact that, under USMCA, as a matter of principle, obligations do not relate to acts or events that took place prior to its entry into force, or to situations that had ceased by that date. By way of exception, Annex 14-C deals with such acts, facts or situations. The language of Article 14.2 supports the conclusion that the temporal scope of Annex 14-C is thus events that occurred *before* the entry into force of USMCA.

22. Annex 14-C of USMCA is the only text modifying the consequences of the termination of NAFTA in relation to investment. Moreover, its status as an exception suggests that the modification is narrow and should be explicit. It should also be noted that this instrument, according to its title, covers two categories of "claims", "legacy investment claims" and "pending claims", meaning that the exception deals with litigation – "claims" – rather than with substantive protection of investments. It also presupposes that the dispute pre-existed the date of termination of NAFTA, consistent with Article 14.2, paragraph 3, which is in line with Article 70(1) VCLT because only pre-existing disputes can continue to exist under NAFTA.

23. Consequently, this expert could not interpret Annex 14-C as implementing a "transition period", as it is presented by the claimants.[20] There is no provision in Annex 14-C and no provision in the whole of Chapter 14 to indicate any "transition" of the NAFTA's substantive obligations. When a period of three years is mentioned in Annex 14-C, paragraph 3, it is not a question of creating a "transition period" covering substance as well as procedure, but of setting a time limit on the extension of consent to arbitration beyond the end date of NAFTA.[21]

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[20] *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/21/63, Claimants' Observations on Respondent's Request for Bifurcation of Preliminary Objections, 10 February 2023 ["Claimants' Observations"], para. 20.

[21] USMCA, Annex 14-C, para. 3: "A Party's consent under paragraph 1shall expire three years after the termination of NAFTA 1994".

Moreover, the two categories of claims covered by the Annex do not imply that the substantive provisions of NAFTA would remain applicable after 1st July 2020.

24. The second category of claims, "pending claims", is not at stake in the present case. But it is worth emphasising that the category refers to arbitration cases that were initiated while NAFTA was still in force. The fact that "the Tribunal's jurisdiction with respect to such claims is not affected by the termination of NAFTA 1994" thus coincides entirely with the transitory effect of the dispute settlement clause under customary law.[22] The provision therefore merely clarifies, without changing, the usual consequences of the termination of a treaty on ongoing proceedings, and was drafted "for greater certainty" only.[23] There are examples of subsequent treaties modifying the treatment of pending claims,[24] but this is not the path chosen in USMCA.

25. The first category, that of "legacy investment claims", refers to another dispute configuration, where arbitration may be initiated after the end of the NAFTA, up to the end of a three-year period. This departs from customary law, because the arbitration procedure provided for under NAFTA is normally no longer available. But this does not correspond to the circumstances of the present case either. Based on the analysis of what USMCA specifies or modifies in comparison to Article 70(1) VCLT, based on the very title of Annex 14-C, and just like in the *Ambatielos* case, everything suggests that only consent to arbitration and the arbitral procedure are extended, without this in any way affecting the substance of the obligations or the moment of the breach. Disputes may still be arbitrated if they arose when NAFTA was in force, although the request for arbitration postdates its termination. This is confirmed by an analysis of the annex itself, particularly its paragraph 1.

## II. INTERPRETATION OF ANNEX 14-C OF USMCA

26. According to the claimants, Annex 14-C of USMCA would make it possible to initiate arbitration proceedings under Section B of Chapter 11 of the NAFTA for a breach of the NAFTA substantive provisions due to an act occurring *after* the termination of the treaty.

27. It should be remembered here that treaties must be interpreted in accordance with the customary rules codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. While article 32 deals with the "supplementary" means of interpretation and article 33 with possible differences among the different authentic language versions, the "general rule" of article 31 contains the main methodological elements necessary for interpretation. Its first paragraph provides that "a treaty shall be interpreted in good faith and in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose".

28. Under Annex 14-C, disputes relating to the NAFTA may continue to be arbitrated in accordance with Chapter 11, Section B, of the treaty if the request was filed before 1st July 2020 ("pending claims"). Disputes relating to a "breach of an obligation" under NAFTA for which the request could not be filed in time may still be referred to arbitration under Annex 14-C ("legacy investment claims"), for three years after the USMCA's entry into force. The meaning of the term "breach of an obligation" under Annex 14-C, paragraph 1, is therefore important, because it determines the category of claims called "legacy investment claims". A breach must

[22] USMCA, Annex 14-C, para. 5.
[23] *Ibid*.
[24] See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, *OJEU*, 29/05/2020, L 169/1, articles 8 to 10 **(HA-0015)**.

relate to a legal rule in force; if not, there would be no obligation and, consequently, no breach. Since the substantive provisions of the NAFTA have ceased to be in force on 1st July 2020, there can be no "breach" of a substantive NAFTA obligation related to foreign investments after that date, unless the USMCA extends such substantive obligations. As this expert sees no language in Annex 14-C or otherwise extending the substantive obligations of NAFTA Chapter 11, Section A, the "breach of an obligation" necessarily refers to a breach of NAFTA predating its termination.

29. The above analysis of Article 34.1 and Chapter 14 of USMCA shows that the contextual interpretation confirms the interpretation according to the ordinary meaning of the terms. However, in support of their interpretation, the claimants rely on two additional contextual elements, namely footnote 20, which cites the chapters of NAFTA possibly involved in a legacy investment claim, and footnote 21, which refers to another USMCA Annex, Annex 14-E. In the expert's opinion, neither of these notes alters the ordinary meaning of the terms of Annex 14-C, paragraph 1, as explained above. Footnote 20 contains no indication as to the application of paragraph 1 over time. It merely recalls, "for greater certainty", which chapters of NAFTA may be invoked in a legacy investment claim, *i.e*., according to our understanding, which provisions may have been violated when the treaty was still in force. And as for footnote 21, claimants read into it proof that legacy investment claims could relate to events occurring before as well as after 1st July 2020, since the note aims at avoiding parallel proceedings under Annex 14-E which concerns disputes under the USMCA, *i.e.,* occurring after 1st July 2020. Even following this *a contrario* interpretation instead of another for discussion purposes, this could at most be an inconsistency affecting the note itself and not the sentence constituting paragraph 1 of Annex 14-C, the meaning of which is clear.

30. Lastly, the interpretation of Annex 14-C supported in this report is consistent with the object and purpose of the treaty. As stated clearly in the title of the 2018 Protocol, and in the preamble of USMCA which is an annex to it, USMCA is intended to replace NAFTA. If the claimants' interpretation were to be followed, it would mean that, during a period of three years after the entry into force of USMCA, the NAFTA chapter relating to investment would not be replaced by the USMCA, but would continue to apply as it stands, in terms of both substance and dispute settlement. This would also result in a three-year overlap with the substantive provisions of USMCA Chapter 14 for investments existing at the time of the entry into force of the Protocol. This would create confusion, in contradiction to the idea of establishing a "clear, transparent, and predictable legal and commercial framework" for investment and of promoting "transparency, good governance and the rule of law", as it appears in the preamble of USMCA.

## III. CONCLUSIONS

31. On the basis of the terms of the NAFTA and the Protocol, the expert concludes that the NAFTA terminated on the date on which the USMCA entered into force, *i.e*., 1st July 2020, and that its provisions relating to the substantive protection of foreign investments ceased to apply on that date, in accordance with Article 70 VCLT.

32. Secondly, the analysis of USMCA shows that there is no transition period provided for in it, but that some specific provisions make reference to certain NAFTA provisions in order to extend their effect over time. Under Chapter 14 of USMCA, only Annex 14-C contains provisions of this type. They allow the NAFTA investor-to-State arbitration procedure to continue to be used to resolve the category of disputes named "legacy investment claims". But there is no provision for the substantive obligations of NAFTA to be extended.

33. It follows from these two sets of conclusions that Annex 14-C of USMCA, which contains the State's consent to arbitration, relates to violations of NAFTA that occurred when this treaty was in force. It does not cover an alleged breach of the NAFTA due to events that took place after it terminated, *i.e.*, after 1st July 2020, as in the present case.

Respectfully submitted,

Hervé Ascensio

Paris, France

**Hervé ASCENSIO**
Professor at the University Paris 1, Panthéon-Sorbonne (Sorbonne Law School)

Born on 15 December 1970, in Montbéliard (France)
Chevalier in the French National Order of Merit

Université Paris 1 Panthéon-Sorbonne
IREDIES – Campus Port-Royal
37, bd de Port-Royal
75013 Paris – France
✉ : herve.ascensio@univ-paris1.fr
☎ : +33 (0)1 87 02 50 34

## Qualifications:

"Agrégation" in Public Law (2000); Doctorate in Law (1997, "L'autorité de chose decidée en droit international public"); master degrees in General Theory and Philosophy of Law (Paris X-Nanterre, 1996) and Law of International and European Economic Relations (Paris X-Nanterre, 1992); degree of the Institute of Political Studies of Paris ("SciencesPo" – 1991).

## Academic Function:

*Since 2005*: professor of law at the University Paris 1 Panthéon-Sorbonne (Sorbonne Law School); courses on general international law, international economic law, international investment arbitration, litigation before international courts, international criminal and humanitarian law.

*Academic duties*: director of the master's degree in Global Business Law and Governance; member of the Academic Council; president of the Disciplinary Section of the university.

*Previously*: professor of law at the Universities of Aix-Marseille III (2003-2005) and Paris 13 (2000-2003); associate professor at the University of Paris X-Nanterre (1998-2000); research assistant and teacher at the University of Paris X-Nanterre (1992-2000).

## Other professional experience:

*Consultancy, Legal Expertise, Arbitration*: counsel of the French Government in four cases before the International Court of Justice; expert for a party before investment arbitral tribunals (cases involving Laos, Egypt, …), and before French courts on questions of public international law; arbitrator in one ICSID case (ARB/18/16); member of the Court of Conciliation and Arbitration within the OSCE (as alternate arbitrator, 2013-2019 and 2019-2025); listed as national expert in the OSCE human dimension ("Moscow mechanism") (2020-2023).

*Scientific, editorial and assessment activities*: co-editor of the *Annuaire français de droit international* (French Yearbook of International Law, since 2022); member of the editorial committees of the *Journal of World Investment and Trade*, the *Manchester Journal of International Economic Law*, the *Asia Pacific Law Review*; elected member of the French National Council of Universities (2019-2023); member of the French Society for International Law (former Secretary General, 2004-2008), the American Society of International Law, the International Law Association, the Société de Législation comparée.

*Courses or lectures abroad (in French or English)*: The Hague Academy of International Law (special course, winter session 2022, on "Responsibility of Business Enterprises in International Law"; director of studies in French 2010); Pontificia Universidad Javeriana (Bogotá, 2022); QueenMary University of London (2019, 2020); University of Vienna (2019); City University of Hong Kong (2019, 2012-2016); University of Buenos Aires (2018); Cornell University (Ithaca, USA, 2015); *etc*.

**Selected Publications:**

***i/ Books:***

- *Droit international économique*, PUF, Paris, 2nd ed., 2020, xviii-379 p. [*International Economic Law* (handbook)] ;
- *Les principes communs de la procédure administrative : Essai d'identification*, P. Gonod & H. Ascensio (dir.)[eds.], Mare & Martin, 2019, 242 p. [*Common Principles of Administrative Procedure: Search for an Identification*]
- *Dictionnaire des idées reçues en droit international*, H. Ascensio, P. Bodeau-Livinec, M. Forteau, F. Latty, J.-M. Sorel, M. Ubéda-Saillard (dir.)[eds.], Pedone, Paris, 2017, 606 p. [*Dictionnary of Received Ideas on International Law*, book in honour to Prof. Alain Pellet]
- *Le pouvoir normatif de l'OCDE*, SFDI/OCDE, H. Ascensio, N. Bonucci (dir.)[eds.], Pedone, Paris, 2014, 148 p. [*The Normative Power of the Organization for Economic Co-operation and Development*]
- *Droit international pénal – 2ème édition révisée*, H. Ascensio, E. Decaux, A. Pellet (dir.)[eds.], Pedone, Paris, 2012, 1280 p. [*Treatise on International Criminal Law*]

***ii/ Articles:***

- "The International Settlement of Disputes under the (Draft) CAI", *The Journal of World Investment and Trade*, Vol. 23, 2022, Issue 4, pp. 651-674;
- "Introduction : une année de droit international marquée par la crise sanitaire", *AFDI 2020*, 2021, pp. 3-18 [introduction to the special part of the French Yearbook of International Law dedicated to the covid19 crisis in international law];
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- Commentaire sous CA Paris, *Venezuela c. Sté Rusoro Mining Limited*, 29 janvier 2019, *JDI*, 2020, n°1, 4 [case comment: annulment proceedings against an investment award before the Appeals Court of Paris];
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- "Les activités normatives des entreprises multinationales", *in* Société française pour le droit international, *L'entreprise multinationale et le droit international*, Pedone, Paris, 2017, pp. 265-278 ["Normative Activities of Multinational Corporations"];
- "La conduite de la procédure dans l'arbitrage d'investissement et les droits de l'homme: intérêt et limites d'une comparaison", *in* Walid Ben Hamida et Frédérique Coulée (dir.), *Convergences et contradictions du droit des investissements et des droits de l'homme : une approche contentieuse*, Pedone, Paris, 2017, pp. 105-118 ["Conduct of the Procedure in Investment Arbitration and Human Rights: Interest and Limits of a Comparison"];
- "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", *ICSID Review – Foreign Investment Law Journal*, vol. 31, n°2, 2016, pp. 366-387;
- "Le droit non-écrit dans la jurisprudence des tribunaux d'investissement", *in* Paolo PALCHETTI (a cura di), *L'incidenza del diritto non scritto sul diritto internazionale ed europeo*, Editoriale

Scientifica, Milano, 2016, pp. 115-130 ["Non-Written Law in the Jurisprudence of Investment Tribunals"];

- "Abuse of Process in International Investment Arbitration", *Chinese Journal of International Law*, vol. 13 (4), 2014, 763-785;
- "Le règlement des différends entre organisations internationales et personnes privées", *in* E. Lagrange et J.-M. Sorel (dir.), *Traité de droit des organisations internationales*, LGDJ, Paris, 2013, 1121-1145 ["The Settlement of Disputes Between International Organizations and Private Parties" in a treatise on the law of international organizations];
- "Relations extérieures", *in* M. Troper et D. Chagnollaud (dir.), *Traité international de droit constitutionnel*, vol. II, *Distribution des pouvoirs*, Dalloz, Paris, 2012, pp. 659-704 [Chapter on "External Relations" in a treatise on constitutional law];
- "Le Pacte mondial et l'apparition d'une responsabilité internationale des entreprises", *in* L. Boisson de Chazournes et E. Mazuyer (dir.), *Le Pacte mondial, dix ans après – The Global Compact, Ten Years After*, Bruylant, Bruxelles, 2011, pp. 167-184 ["The Global Compact and the Emergence of International Liability for Corporations"];
- "Article 70 – Consequences of the termination of a treaty", *in* O. Corten and P. Klein (ed.), *The Vienna Conventions on the Law of Treaties*, Oxford University Press, Oxford, 2011, vol. II, pp. 1585-1611 (2nd ed. forthcoming, 2023);
- "Rapport introductif", *in* H. Gherari et Y. Kerbrat (dir.), *L'entreprise dans la société internationale*, Pedone, Paris, 2010, pp. 13-41 ["Introductory Report" on the Role of Corporations in Global Legal Perspective].

***iii/ Reports***

- *Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020*, report under the OSCE Moscow mechanism, by prof. H. Ascensio as sole rapporteur, 18 April 2023, 53 p., published at <https://www.osce.org/odihr/543240>
- *Extraterritoriality as an instrument: Contribution to the work of the UN Secretary's Representative on human rights and transnational corporations and other businesses*, by prof. H. Ascensio, December 2010, 17 p. (commissioned by the French Ministry of Foreign Affairs), available at <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/business-and-human-rights/article/the-united-nations-guiding>

# LIST OF EXHIBITS

| Exhibit No. | Description |
|---|---|
| HA-0001 | Hervé Ascensio, "Article 70 – Consequences of the termination of a treaty", *in* O. Corten and P. Klein (ed.), *The Vienna Conventions on the Law of Treaties*, Oxford University Press, Oxford, 2011, vol. II (2011) |
| HA-0002 | Hervé Ascensio, "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", *ICSID Review – Foreign Investment Law Journal*, vol. 31, n°2, 2016 |
| HA-0003 | International Law Commission, Second Report of Sir Gerald Fitzmaurice, A/CN.4/107, *YILC*, 1957, vol. II |
| HA-0004 | *Case between New Zealand and France, RIAA*, 30 April 1990, vol. XX |
| HA-0005 | S. Wittich, "Article 70 – Consequences of the Termination of a Treaty", *in* O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer Verlag, Berlin Heidelberg, 2nd ed., 2018 |
| HA-0006 | Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 17 October 2019, OJEU, 12/11/2019, C 384 I/1 |
| HA-0007 | Stockholm Chamber of Commerce (SCC) No. 088/2004 Partial Award, *Eastern Sugar BV v Czech Republic*, of 27 March 2007 |
| HA-0008 | ICJ, *Ambatielos case (jurisdiction)*, judgment of 1st July 1952, *ICJ Reports 1952* |
| HA-0009 | *The Ambatielos Claim (Greece v. United Kingdom)*, award of 6 March 1956, *RIAA*, vol. XII |
| HA-0010 | Dissenting Opinion of Lord McNair *in* ICJ, *Ambatielos (Preliminary Objection)*, Judgment of 1 July 1952, *ICJ Reports 1952* |
| HA-0011 | ICJ, *Northern Cameroons* case, Judgment of 2 December 1963, *ICJ Reports 1963* |
| HA-0012 | *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, *ICJ Reports 2016* |
| HA-0013 | *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 13 February 2019, *ICJ Report 2019* |
| HA-0014 | *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 3 February 2021, *ICJ Reports 2021* |
| HA-0015 | Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, *OJEU*, 29/05/2020, L 169/1 |