

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)

CONFIDENTIALITY ORDER

Members of the Tribunal

Mr. Alexis Mourre, President of the Tribunal

Mr. Henri C. Alvarez, Arbitrator

Prof. John R. Crook, Arbitrator

Secretary of the Tribunal

Mr. Gonzalo Flores

Date: 8 February 2023

Confidentiality Order

DEFINITIONS

1. For the purposes of this Confidentiality Order:

- a. “Disputing Party” means either TC Energy Corporation and TransCanada PipeLines Limited or the Government of the United States of America;
- b. “Confidential Information” means information that is not publicly available and is designated by a Disputing Party as confidential on the grounds that it is:
 - i. Business Confidential Information of a Disputing Party or of a state/provincial or municipal government;
 - ii. Business Confidential Information relating to a third party;
 - iii. information that otherwise may be protected from disclosure under the applicable domestic law of the disputing State party; or
 - iv. information that is deemed to be financial, commercial, scientific, or technical information supplied by third parties that has been treated in a confidential manner by those third parties.
- c. “Business Confidential Information” includes:
 - i. trade secrets;
 - ii. financial, commercial, scientific, or technical information that is treated consistently in a confidential manner by the Disputing Party, state/provincial or municipal government, or third party to which it relates, including but not limited to pricing and cost information; identification of customers, profit, loss and expense information; contracts; marketing and strategic planning documents; market share data; accounting or financial records; proprietary economic models; and other information of commercial value, not otherwise disclosed in the public domain;
 - iii. information, the disclosure of which could result in material financial loss or gain to the Disputing Party, state/provincial or municipal government, or third party to which it relates;
 - iv. information, the disclosure of which could interfere with contractual negotiations or relationships, or other negotiations or relationships of the Disputing Party, state/provincial or municipal government, or third party to which it relates; and
 - v. other communications treated as confidential in furtherance of settlement between the Disputing Parties.

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- d. “Pleading” means the Request for Bifurcation, Claimants’ Observations on the Request, Respondent’s Reply to Claimants’ Observations, Claimants’ Rejoinder to Respondent’s Reply, a Memorial, a Counter-Memorial, a Reply, a Rejoinder, and any other similar brief or written argument filed with the Tribunal.
- e. “Supporting Documentation” means witness statements, expert reports, exhibits, legal authorities, annexes, and any other similar evidentiary documentation.
- f. “Written Submission” means a Pleading and its Supporting Documentation.
- g. “Public Document” means a Written Submission, order, decision, or award that contains no Confidential Information and no redactions of such information.
- h. “Public Version” means the version of a Written Submission, order, decision, or award that has been redacted to remove all Confidential Information.
- i. “Confidential Version” means the version of a Written Submission, order, decision, or award that contains Confidential Information that has not been redacted.

GUIDING PRINCIPLES, OBJECTIVE AND PURPOSE

- 2. The Disputing Parties agree to respect and maintain the confidentiality of information exchanged in this arbitration in accordance with the terms of this Confidentiality Order and, for this purpose, to adopt and maintain appropriate communications modalities and secure data storage systems.
- 3. A Disputing Party may designate Confidential Information contained in any Written Submission, order, decision, or award, and in any other document produced by that Disputing Party to the other Disputing Party. These designations shall be made in accordance with the procedures set out in this Confidentiality Order.

DOCUMENTS EXCHANGED IN DOCUMENT PRODUCTION

- 4. A Disputing Party may designate Confidential Information contained in any document produced by that Disputing Party to the other Disputing Party. These designations shall be made in accordance with the procedures set out in this Confidentiality Order with respect to Written Submissions.

WRITTEN SUBMISSIONS

- 5. This section addresses procedures for the designation of Confidential Information for all Written Submissions.
- 6. For Pleadings, witness statements, and expert reports, information that the United States has designated as Confidential Information shall be surrounded by double brackets highlighted in yellow: **[[...]]**. Information that the Claimants have designated as Confidential Information shall be surrounded by double brackets highlighted in blue: **[[...]]**. For all Supporting Documentation besides a witness statement and an expert report, the Disputing Parties may

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designate the Supporting Documentation, or specific pages thereof, as Confidential Information with the label “Confidential Information, Unauthorized Disclosure Prohibited” on each page containing Confidential Information.

7. A Disputing Party has seven (7) calendar days from the date of the Electronic Platform Filing (as defined in Section 14.2 of Procedural Order No. 1) of a Written Submission to propose the designation of Confidential Information.
8. The Disputing Parties shall use the attached Disputed Designations Schedule (Appendix A) to file any objections and responses to any objections.
9. Designations of Confidential Information and objections shall be made on the following timetable:

Filing Date	Filing Party	Non-Filing Party
+7 calendar days of the Electronic Platform Filing	Proposes designations (or confirms that it has no designations)	
+7 calendar days of the proposed designations		Objects to filing party’s proposed designations Proposes any additional designations (or confirms that it has no designations)
+7 calendar days of the objections	<p>Attempt to agree on final designations or submission of the Disputed Designations Schedule (Appendix A) to the Tribunal. The Tribunal will endeavor to make a decision on Disputed Designations within seven (7) calendar days.</p> <p>If the Tribunal decides that information was not properly designated, or should be designated, the Disputing Party who made the Written Submission shall have the opportunity either to agree to remove the designation or make the designation (as the case may be), or to withdraw the information.</p> <p>In the event that the Disputing Party withdraws the information, it shall have seven (7) calendar days from the date of the Tribunal’s decision to resubmit the document without the information, and the Disputing Parties in receipt of the documents shall thereupon destroy or return the documents, in whatever form, which contained the information or information derived therefrom.</p> <p>If the information is withdrawn, it cannot be relied upon by the opposing Disputing Party or the Tribunal.</p>	

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10. If a Disputing Party does not object to the designation of Confidential Information pursuant to the timetable in paragraph 9, the Disputing Party is deemed to have accepted the designation.
11. Pursuant to Section 14.3 of Procedural Order No. 1, within three weeks of the Electronic Platform Filing, or within seven (7) calendar days of the order of the Tribunal regarding the appropriate designations, whichever is later, the Disputing Party that originally filed the Written Submission shall upload the Public Version of the Written Submission. Pursuant to Section 14.4 of Procedural Order No. 1, within three (3) business days of uploading the Public Version of the Written Submission, the Disputing Parties shall courier the Confidential Version and the Public Version of the Written Submission (excluding Supporting Documentation besides witness statements and expert reports) to the Tribunal and opposing counsel. For greater certainty, ICSID shall publish Public Versions of Written Submissions in accordance with Section 24.1 of Procedural Order No. 1 following the procedures set forth in this section.
12. Each page of a Confidential Version must be labeled, “Confidential Information, Unauthorized Disclosure Prohibited.” Each page of a Public Version must be labeled “Public Version.” Public Documents shall be labeled “Public Document” on the first page of the document.
13. Where whole documents or multiple pages of Confidential Versions have been redacted entirely, such pages need not be reproduced in redacted form in the Public Version. Instead, a summary page stating the number of pages that have been redacted in their entirety will suffice.

ORDERS, DECISIONS AND AWARD

14. The Disputing Parties shall have twenty-one (21) calendar days from the receipt of an order, decision, or award from the Tribunal to designate information as Confidential Information in the order, decision, or award and to exchange such designations. The Disputing Parties shall have an additional fourteen (14) calendar days from the receipt of such designations to raise any objections to the other Disputing Party’s designations. At the conclusion of that period, the Disputing Parties shall have ten (10) calendar days to consolidate their final designations and submit, as appropriate, a final Confidential Version and Public Version of the order, decision, or award.
15. If the Disputing Parties are unable within the ten (10) calendar days identified in paragraph 14 of this Confidentiality Order to agree on any designations of Confidential Information, a Disputing Party may submit the issues to the Tribunal for resolution. The Disputing Parties shall use the attached Disputed Designations Schedule (Appendix A) for filing these objections.

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TREATMENT OF CONFIDENTIAL INFORMATION

16. Until the elapse of any period for a Disputing Party to provide the other Disputing Party with its proposed designations of Confidential Information, or such earlier time should the Disputing Parties communicate in writing that they have no proposed designations, a Written Submission, order, decision, or award shall be deemed to be entirely designated as Confidential Information. Thereafter, until the final designations of Confidential Information have been agreed by the Disputing Parties, or determined by the Tribunal, each Disputing Party's proposed designations of Confidential Information shall be presumed valid.
17. Except with the prior written consent of the Disputing Party that claimed confidentiality with respect to the Confidential Information, and, in the case of materials from state/provincial or municipal governments, or third parties, the owner of such Confidential Information, Confidential Information may be used only in these proceedings and may be disclosed only for such purposes to and among:
 - a. Members of the Tribunal their Assistant, and ICSID officials assigned from time to time, in any capacity, to the administration of this proceeding by the Secretary-General of ICSID;
 - b. counsel to a Disputing Party (and their support staff) and counsel to state/provincial or municipal governments whose involvement in the preparation or conduct of these proceedings is reasonably considered by a Disputing Party to be necessary in connection with preparation of the Disputing Party's case;
 - c. officials or employees of a Disputing Party and of state/provincial or municipal governments to whom disclosure is reasonably considered by the Disputing Party to be necessary in connection with preparation of the Disputing Party's case;
 - d. independent experts or consultants retained or consulted by a Disputing Party or by state/provincial or municipal governments in connection with these proceedings;
 - e. witnesses, who in good faith are reasonably expected by a Disputing Party to offer evidence in these proceedings, but only to the extent that the Confidential Information is material to their expected testimony; and
 - f. court reporters and other hearing support staff.
18. No Disputing Party shall file any confidential material covered by the terms of this Confidentiality Order in any court unless required to do so by that court. In such case, the Disputing Party shall bring this Confidentiality Order to the attention of the court and seek directions concerning the filing of such material in a manner that protects its confidentiality. A Disputing Party shall notify the other Disputing Party and any affected parties prior to requesting such direction from the court.

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19. Inadvertent or improper disclosure of Confidential Information, as set forth in the present Confidentiality Order, does not constitute a waiver of the designation of the information as confidential.
20. All persons receiving Confidential Information shall be bound by this Confidentiality Order. Each Disputing Party shall have the obligation of notifying all persons receiving Confidential Information of the obligations under this Confidentiality Order and to ensure that persons receiving Confidential Information pursuant to paragraphs 17(d) or (e) execute a Confidentiality Undertaking in the form attached as Appendix B before gaining access to any such information. Each Disputing Party shall maintain copies of Confidentiality Undertakings under Appendix B and shall make such copies available to the other Disputing Party upon order of the Tribunal or upon the termination of this arbitration.
21. Notwithstanding any other provision in this Confidentiality Order, any request for documents (other than those made in this arbitration), or for the production of documents under the applicable domestic law of the disputing State party, including documents produced to the United States in these proceedings, shall be wholly governed by the relevant federal, state, or provincial law. For the avoidance of doubt, in response to any request for documents, the Disputing Parties and the Non-Disputing NAFTA Parties shall not disclose the Confidential Version of documents submitted or produced in this arbitration, unless otherwise required by the relevant federal, state, or provincial law.
22. In light of the Note of Interpretation of the NAFTA Free Trade Commission issued July 31, 2001, a Disputing Party shall be free to disclose Public Documents and the Public Version of any Written Submissions, orders, decisions, and the award.
23. Notwithstanding any other provision in this Confidentiality Order, the Disputing Parties may make such disclosure of documents or information as is required by law.
24. In accordance with Articles 1127, 1128 and 1129 of the NAFTA, non-disputing NAFTA Parties may attend the oral hearings, and may have access to orders, the award, and Written Submissions, including those designated as Confidential Information under this Confidentiality Order. Non-disputing NAFTA Parties shall be made aware of this Confidentiality Order and, pursuant to Article 1129 of the NAFTA, shall treat all information received from the Respondent as if they were a Disputing Party, notably in respect of protection of Confidential Information.
25. Nothing in this Confidentiality Order shall be construed to abrogate or support a claim or entitlement with respect to a refusal to disclose any information under or on the basis of:
(a) federal or state law; (b) a privilege; or (c) other grounds for exemption or non-disclosure.
26. The obligations created by this Confidentiality Order shall survive the termination of these proceedings. Within 120 days after (1) the Secretary-General of ICSID has dispatched certified copies of the Award to the parties pursuant to Article 49 of the ICSID Convention; or (2) in the event of an annulment proceeding, following any decision on annulment and following the end of any post-annulment proceedings, each Disputing Party and each non-

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disputing NAFTA Party shall dispose of any documents containing Confidential Information of the other Disputing Party (or the Disputing Parties, as the case may be), unless a Disputing Party asks that the documents be returned to them or to their counsel, which will be done at the expense of the requesting party. Each Disputing Party shall inform the other Disputing Party in writing of the destruction or return of such documents. For the avoidance of doubt, the United States and the non-disputing NAFTA Parties shall comply with the obligations in this paragraph to the extent permitted by their respective domestic laws.

27. In the event that a Disputing Party considers that certain information requires an additional level of confidentiality on the grounds that (i) its disclosure to the other Disputing Party could result in a serious material gain or loss which could potentially prejudice the competitive position of the Disputing Party, state/provincial or municipal government, or third party to whom that information relates, or (ii) the information is highly sensitive Business Confidential Information that belongs or relates to a Disputing Party, state/provincial or municipal government, or third party, the Disputing Party may request that the Tribunal further limit disclosure of such information to specific persons and counsel in these proceedings.
28. The time periods set out in this Confidentiality Order may be amended by agreement of the Disputing Parties, or by order of the Tribunal after hearing the Disputing Parties and taking into account all relevant circumstances.
29. A Disputing Party may apply for an amendment to, or a derogation from, this order if compelling circumstances so require.
30. This Confidentiality Order shall be effective and binding upon the Disputing Parties upon the signature of the Confidentiality Order by the Tribunal.
31. The Tribunal, the Assistant and ICSID personnel are not subject to this order, but acknowledge their inherent duty to ensure the protection of the confidentiality of information exchanged with the Disputing Parties and amongst themselves in this arbitration and, to this effect, shall maintain appropriate communications modalities and secure data storage systems according to their professional practice.

Date: 8 February 2023

For the Tribunal

[Signed]

Mr. Alexis Mourre
Presiding Arbitrator

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Signed by both Disputing Parties in acknowledgement of the obligation to abide by this Confidentiality Order:

For the Government of the United States of
America

Ms. Lisa J. Grosh, Assistant Legal Adviser
Mr. John D. Daley, Deputy Assistant Legal Adviser
Mr. David M. Bigge, Chief of Investment
Arbitration
Ms. Julia H. Brower, Attorney-Adviser
Mr. Nathaniel E. Jedrey, Attorney-Adviser
Ms. Melinda E. Kuritzky, Attorney-Adviser
Ms. Mary T. Muino, Attorney-Adviser
Mr. Alvaro J. Peralta, Attorney-Adviser
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Office of International Claims
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TC Energy Corporation and TransCanada
PipeLines Limited

Mr. James E. Mendenhall
Ms. Jennifer Haworth McCandless
Mr. Eric M. Solovy
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Washington, D.C., USA 20005

APPENDIX A

DISPUTED DESIGNATIONS OF CONFIDENTIAL INFORMATION

No.	Ref. to Designation	Objection to Designation	Tribunal's Decision
CHALLENGES TO [CLAIMANTS'/RESPONDENT'S] CONFIDENTIALITY DESIGNATIONS IN [MEMORIALXX]			
1.			

APPENDIX B

CONFIDENTIALITY UNDERTAKING

TO: The Government of the United States of America (and its legal counsel) and TC Energy Corporation and TransCanada PipeLines Limited (and its legal counsel).

FROM: _____

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between TC Energy Corporation and TransCanada PipeLines Limited and the Government of the United States of America, over which claims for confidentiality have been advanced (“Confidential Information”), I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person who has not signed a Confidentiality Undertaking nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of the Confidentiality Order that has been agreed to by the Disputing Parties, a copy of which is attached to this Undertaking, and agree to be bound by it.
3. I will promptly return or otherwise destroy any Confidential Information received by me to the Disputing Party that provided me with such materials or the information recorded in those materials, at the conclusion of my involvement in these proceedings.
4. I acknowledge and agree that either of the Disputing Parties to this arbitration is entitled to relief to restrain breaches of this Confidentiality Order, to enforce the terms and provisions hereof in addition to any other remedy to which any Disputing Party to this arbitration may be entitled at law or in equity.
5. I agree to submit to the jurisdiction of the courts:
 - a. For residents of Canada in the Provinces of Alberta and/or Ontario; or
 - b. For residents of the United States of America in the District of Columbia; or
 - c. For residents of another jurisdiction, at their choice [check one box]:
 - In the Province of Alberta
 - In the Province of Ontario
 - In the District of Columbia

SIGNED, SEALED AND DELIVERED before a witness this ___ day of _____, 20__.

(Print Name)

(Print Witness Name)

(Signature)

(Witness Signature)

