

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT
DISPUTES**

TC Energy Corporation and TransCanada Pipelines Limited

v.

United States of America

(ICSID Case No. ARB/21/63)

PROCEDURAL ORDER NO. 4

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

Assistant to the Tribunal

Ms. Valentine Chessa

DATE: 11 December 2023

I. Procedural Background

1. On 6 November 2023, the Arbitral Tribunal issued a Procedural Order n°3 on production of documents (“PO3”). Pursuant to PO3 and the Procedural Calendar, the Respondent was ordered to produce documents by 27 November 2023.
2. On 27 November 2023, the United Mexican States (“Mexico”) addressed a letter to the Arbitral Tribunal in which it requested that the Tribunal reconsider its decision ordering the Respondent to produce documents exchanged between the governments of the United States, Mexico and Canada in connection with the negotiation history of Chapter 14 of the USMCA. Mexico’s request was based on the USMCA Parties’ Agreement on Confidentiality that preserves confidentiality of such documents until 1 July 2024. Alternatively, Mexico requested that the Tribunal ensure that the confidential information in the documents is protected from further disclosure.
3. On 28 November 2023, the Arbitral Tribunal invited the parties to submit their comments, which the parties did on 1st December 2023.
4. On 4 December 2023, the Arbitral Tribunal decided not to reconsider its decision contained in PO3 and specified that the “agreed measures are sufficient to address the Respondent’s and Mexico’s concerns as to the confidentiality of the *travaux préparatoires* for the seven months during which the Agreement on Confidentiality will remain in force.”
5. On 1st December 2023, the Claimants also submitted Objections to Respondent’s Deficient Document Production accompanied by Exhibits C-141 and C-142 as well as CL-198 to CL-200 (“Objections”).
6. On 4 December 2023, the Tribunal invited the Respondent to submit any comments to the Objections. These comments were submitted on 6 December 2023 with Exhibits RL-65 to RL- 78. On 8 December 2023, the Claimants replied and submitted Exhibits CL-201 to CL-207.

II. The Parties’ Positions

A. Claimants

7. The Respondent submitted, in response to PO3, a privilege log¹ listing a total of 1,630 documents in respect of which Respondent asserts deliberative process privilege for 1,629 documents and attorney-client privilege for more than half of the documents. The Claimants object to the privilege log.
8. The Claimants first submit that PO3 does not permit the Respondent to withhold documents based on deliberative process privilege. Instead, the Tribunal required Respondent to establish compelling reasons of national security or public policy that would justify the protection of documents, which Respondent failed to do.
9. Second, as to attorney-client privilege, the Claimants submit that the applicable standard is the protection of “confidential communications from clients to their attorneys made for the purpose of securing legal advice or services” as well as “communications from attorneys to their clients if the communications rest on confidential information obtained from the client”². However, the Respondent has not provided any justification that the documents involved the provision of legal advice by the Respondent’s attorneys acting in that capacity. The Claimants note, in confirmation

¹ Exhibit C-141.

² Exhibit C-141.

of the Respondent's overbroad interpretation of the privilege, that some of the documents designated by the Respondent as privileged were disclosed based on the Freedom of Information Act (FOIA).

B. The Respondent

10. The Respondent confirms, as to the alleged attorney-client privilege, that all withheld documents involved communications to or from attorneys on the "inherently legal matters surrounding a treaty negotiation" and produces in support a list of the involved attorneys with the identification of the capacity in which they acted.
11. As to the deliberative privilege, the Respondent alleges that it is available to U.S. government agencies in civil litigation in the United States and under the FOIA, and that it derives from important public policy considerations, as required in PO3. Namely, the privilege "protects from disclosure documents generated during an agency's deliberations about a policy, as opposed to documents that embody or explain a policy that the agency adopts" and should be protected to ensure the integrity of the deliberative process.³
12. The Respondent relies in particular, in that respect, on decisions made by the *Glamis Gold*⁴ and *Apotex*⁵ tribunals as well as on two sets of rules of procedure governing disputes established in accordance with the USMCA. On the latter point, the Claimants respond that these two sets of USMCA rules do not apply to investor-state dispute settlement.
13. Based on the foregoing, documents subject to the deliberative process privilege should be protected from disclosure under both Article 9.2(b) and 9.2(f) of the IBA Rules.
14. Finally, the Respondent submits that the fact that some of the withheld documents were erroneously produced by USTR in response to Claimants' FOIA request does not affect their privileged nature. However, these documents having been erroneously disclosed, and they will be removed from the privilege log.

III. Order

15. The Tribunal will first address the parties' arguments on attorney-client privilege (a), and then deliberative process privilege (b).
 - a) Attorney-client privilege:
16. The Tribunal first notes that there does not seem to be any difference between the parties as to the applicable standard. The Claimants submit in this respect, by relying on Respondent's letter dated 27 December 2023 quoting *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.*, that the applicable standard is the protection of "confidential communications from clients to their attorneys made for the purpose of securing legal advice or services" as well as "communications from attorneys to their clients if the communications rest on confidential information obtained from the client."⁶ The Respondent does not object to that contention. As a consequence, the parties agree that documents involving the provision of legal advice by attorneys acting in that capacity are privileged, whether the legal advice relates to the arbitration or to the treaty

³ RL-068; RL-077.

⁴ *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, ¶ 36 (Nov. 17, 2005) (RL-069).

⁵ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs ¶¶ 14, 59 (July 5, 2013) (RL-071).

⁶ Exhibit C-141.

negotiation process itself.

17. The Claimants however submit that the privilege log does not provide evidence that the withheld documents related to legal advice provided by attorneys acting in that capacity. As to the latter point, the Respondent provided a list of the individuals involved with the indication of their respective positions, which seems to be responsive to Claimants' objection. As to the subject-matter of the documents, however, the Claimants rightly note that the privilege log does not allow to assess whether the documents should be protected.
18. The Tribunal decides that all documents withheld on the basis of the attorney-client privilege shall be reviewed by a privilege master, whose draft terms of reference are attached. The parties shall agree on and propose a privilege master within **72** hours from issuance of this order. If they are unable to do so within that time limit, the Arbitral Tribunal shall propose a person to serve as privilege master.
 - b) Deliberative process privilege:
 19. The Tribunal first notes that the two sets of rules of procedure governing disputes established in accordance with the USMCA on which the Respondent relies effectively establish that deliberative process may be a basis to assert privilege in the context of the USMCA. Therefore, the Tribunal accepts that documents generated during a governmental agency's policy deliberations can be protected, including in investor-state proceedings. The Tribunal however considers that whether protection should be afforded should be assessed by balancing the legitimate interest of the other party to access certain information and that of the government to protect the integrity of the deliberative process. That balancing exercise must therefore assess whether the invocation of the privilege responds to compelling public policy considerations, in accordance with the Tribunal's decision at § 4 of PO3 and with Article 9(2)(f) of the IBA Rules.
 20. Balancing the parties' respective interests to assess whether the invocation of deliberative process privilege is warranted, is consistent with the decision made by the *Glamis Gold* and the *Apotex* tribunals. In *Glamis Gold*, the Tribunal noted, by reference to a Federal Trade Commission decision, that "[a] litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact finding override the government's interest in non-disclosure."⁷ As to the *Apotex* tribunal, it assessed the matter by reference to Article 9(2)(f) of the IBA Rules, which applies to political or institutional sensitivity considerations.⁸
 21. These considerations, however, do not appear to be such as to outweigh the legitimate interest of the Claimants to have access to the USMCA *travaux préparatoires*. The Tribunal notes that deliberative privilege has been asserted very broadly to apply to 1,629 of the 1,630 documents on the privilege log. In addition, these documents mainly date back to 2017 and 2018 and do not go to current policy debates. From a general perspective, because deliberative privilege is aimed at protecting the deliberative process, it does not apply with the same force once that process is over, as in the present case. In the present case, the Tribunal does not find that the Respondent explained to its satisfaction why documents pertaining to the deliberative process should be privileged years after the deliberative process was concluded. Rather, the Respondent seems to invoke the privilege in the abstract, not out of the sensitivity of specific documents.
 22. Based on the foregoing, the Tribunal rejects the Respondent's invocation of deliberative privilege and orders the production of all documents in the privilege log in respect of which attorney-client privilege is not invoked. As to the documents in respect of which attorney-client privilege is invoked, they will be reviewed by a privilege master as explained above.

⁷ RL-072.

⁸ RL-071.

23. Based on the foregoing, the Arbitral Tribunal:

- a. Orders the production within three (3) working days of all documents in the privilege log in respect of which attorney-client privilege is not invoked;
- b. Orders that documents in respect of which attorney-client privilege is invoked shall be reviewed by a privilege master before any decision of the Arbitral Tribunal in respect of their disclosure to the Claimants;
- c. Orders that unless the parties agree on the privilege master within 72 hours from issuance of this order, the privilege master will be proposed by the Arbitral Tribunal, and then appointed after considering possible objections of the parties based on proper disclosures made by the privilege master;
- d. Attaches for the parties' comments within three (3) working days a draft of the privilege master's terms of reference.

On behalf of the Tribunal,

[Signed]

Mr. Alexis Mourre
Presiding Arbitrator

Encl.:

- Draft Privilege Master's Terms of Reference
- Draft Non-Disclosure Undertaking

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[DRAFT]

PRIVILEGE MASTER'S TERMS OF REFERENCE

[DATE]

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I. SUMMARY OF THE PROCEDURE

1. The present dispute arose between the parties following President Biden's revocation, in January 2021, of the Claimants' 2019 permit to construct, connect, operate, and maintain the cross-border segment of the KXL Pipeline. The Request for Arbitration was filed on 22 November 2021. On 13 April 2023, the Arbitral Tribunal issued Procedural Order n°2, pursuant to which the proceedings were bifurcated in two phases (jurisdiction and merits).
2. In the present phase of the proceedings, the parties disagree on whether the Respondent was bound by the substantive obligations of the North America Free Trade Agreement ("NAFTA") at the time of the revocation. The United States-Mexico-Canada Agreement that replaced NAFTA on 1 July 2020 ("USMCA") contains an Annex 14-C ("Annex 14-C"), the interpretation of which is disputed. The Claimants argue that Annex 14-C provides that, for a transition period of three years after the date on which USMCA replaced NAFTA, claimants holding legacy investments may bring claims alleging a breach of Section A of Chapter 11 of NAFTA using the procedures set forth in Section B of Chapter 11 of NAFTA. The Respondent, to the contrary, submits that Annex 14-C only allows the submission of claims based on breaches occurred while NAFTA was in force.
3. On 11 September 2023, the Claimants submitted a request for document production. In Procedural Order n°3, the Arbitral Tribunal ordered the production of certain categories of documents identified in the Stern Schedule exchanged between the parties. On 1st December 2023, the Claimants submitted Objections to Respondent's Deficient Document Production accompanied by Exhibits C-141 (privilege log) as well as C-142 and CL-198 to CL-200. On 4 December 2023, the Tribunal invited the Respondent to submit comments on said Objections, which the Respondent did on 6 December 2023, with Exhibits RL-65 to RL-78.

On 8 December 2023, Claimants replied to Respondent's response and submitted Exhibits CL-201 to CL-207.

4. On 11 December 2023, the Arbitral Tribunal issued Procedural Order n°4 ("PO4"), deciding to appoint a Privilege Master to assess whether documents argued to be subject to the attorney-client privilege should be protected from disclosure.

II. TERMS OF REFERENCE

5. The Privilege Master shall review each of the documents for which Respondent claims attorney-client privilege in the privilege log (C-141) and determine which of them are protected by attorney-client privilege. The applicable standard is that described in paragraph 16 of the Tribunal's PO4, namely the protection of "confidential communications from clients to their attorneys made for the purpose of securing legal advice or services" as well as "communications from attorneys to their clients if the communications rest on confidential information obtained from the client".
6. Attachments to privileged documents are not automatically covered by the privilege pertaining to the accompanying document but have to be individually assessed to determine whether privilege attaches to them.
7. The Privilege Master shall review the documents in dispute on an *ex parte* basis.
8. The Privilege Master may, if necessary, seek additional explanations from the Respondent in respect of one or more of the documents in dispute on an *ex parte* basis.
9. The Privilege Master will be provided by the Secretary of the Arbitral Tribunal with the following documents:
 - The Arbitral Tribunal's Procedural Orders n° 1 to 4;
 - The parties' submissions.
10. The Respondent shall, within **48** hours of the appointment of the Privilege Master, provide her/him, on an *ex parte* basis, with a copy of each of the documents allegedly covered by the attorney-client privilege.
11. The allegedly privileged documents shall not be disclosed to the other Party and the Arbitral Tribunal unless their production is ordered by the Arbitral Tribunal in light of the report of the Privilege Master.
12. The decisions of the Privilege Master shall be communicated to the Arbitral Tribunal and the parties in the form of a report no later than **10** business days from appointment.

III. CONFIDENTIALITY

13. All documents and information provided to the Privilege Master in the context of its mandate shall be treated by the Master as strictly confidential and shall not be disclosed by him to

any person or entity unless upon the order of the Arbitral Tribunal. The Privilege Master shall not make any use of any such documents or of the information contained therein, during and after the completion of her/his mandate.

14. The Privilege Master shall, upon completion of his mandate, destroy all documents which she/he will have received, gathered or collected in relation to his mandate, together with any and all copies thereof.
15. The Arbitral Tribunal will cause the Privilege Master to execute the attached Non-Disclosure Undertaking.

IV. PRIVILEGE MASTER'S FEES AND EXPENSES

16. The Privilege Master shall be remunerated at the rate of US\$ 500 per hour, for all time spent in connection with her/his mandate as described herein at Section III. Travel time, if any, shall be charged at 50% of this rate. The parties may not, unless they agree otherwise, engage in discussions with the Privilege Master concerning her/his remuneration.
17. The Privilege Master shall be reimbursed for all disbursements and charges reasonably incurred in connection with her/his mandate as defined herein, including but not limited to travel expenses, telephone, delivery, printing, and other expenses.
18. The Privilege Master will address invoices to the Secretary of the Tribunal, who shall forward them to the Tribunal and the parties. Upon approval by the Tribunal, the Privilege Master shall be paid from the advances held by ICSID in relation to this Arbitration.
19. The fees and expenses of the Privilege Master shall be considered by the Arbitral Tribunal in its final award.

V. COMMUNICATIONS

20. Other than as provided in paragraphs 7-10 above, the parties shall not engage into any oral or written *ex parte* communications with the Privilege Master.

VI. SIGNATURE OF THE TERMS OF REFERENCE

21. These Terms of Reference may be signed in counterparts, collectively forming one composite signed document.

The Privilege Master

Date: _____

For the Claimant

Date: _____

For the Respondent

Date: _____

Mr. Henri Alvarez
Arbitrator

Date: _____

Mr. John Crook
Arbitrator

Date: _____

Mr. Alexis Mourre
Presiding Arbitrator

Date: _____

Non-Disclosure Statement

In the ICSID Case No. ARB/21/63 between

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I, [XX], domiciled at [XX] hereby declare and undertake that:

- I will maintain all documents and information disclosed to me for the fulfilment of my mandate as Privilege Master (whether privileged or not) as strictly confidential;
- I shall not disclose to any person or entity, within or outside my professional office, and shall not make any use of, any such documents, or of the information, facts, particulars, data or documents whatsoever contained therein;
- I shall, upon completion of my mandate, destroy all documents that I will have received, gathered or collected in relation to the same, together with any and all copies thereof, if any.

The present undertaking shall be maintained after completion of my mandate.

XX

Place and Date: