

**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)**

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**PROCEDURAL ORDER NO. 3**

***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

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DATE: 6 November 2023

## I. Procedural Background

1. In accordance with Procedural Order No. 1 and the Procedural Timetable:

<i>Parties to Confer Regarding Need for Document Production</i>	<i>Claimants &amp; Respondent</i>	<i>7 from Counter-Memorial on Preliminary Objection(s)</i>	<i>18 August 2023</i>
<i>Requests for Production of Documents (Stern Schedule), if any</i>	<i>Claimants &amp; Respondent</i>	<i>23</i>	<i>11 September 2023</i>
<i>Responses/Objections to Document Requests</i>	<i>Claimants &amp; Respondent</i>	<i>30</i>	<i>11 October 2023</i>
<i>Reply to Objections to Document Requests/ Requests to the Tribunal/Voluntary Production</i>	<i>Claimants &amp; Respondent</i>	<i>15</i>	<i>26 October 2023</i>
<i>Tribunal's Decisions on Document Production</i>	<i>Tribunal</i>	<i>Approx. 15</i>	<i>10 November 2023</i>
<i>Production of Remaining Documents</i>	<i>Claimants &amp; Respondent</i>	<i>15</i>	<i>27 November 2023</i>

## II. Applicable Rules

2. The applicable rules to the document production phase in these proceedings are provided in section 16 of Procedural Order No. 1.
3. In accordance with paragraph 16.2 of Procedural Order No. 1, the Arbitral Tribunal and the parties may “use as a guideline in the document production process Articles 3 and 9 of the IBA Rules on the Taking of Evidence (2020)”.

## III. Order

4. The Arbitral Tribunal's decisions on the Claimants' requests for document production are set out in Annex A to the present procedural order.
5. Where the Respondent has represented that documents either do not exist or are not in its possession, custody, or control, the Tribunal expects that it has exercised due diligence in checking its records.
6. Any determination as to the relevance and materiality of requests to produce is made on a preliminary and *prima facie* basis, without any prejudice of the Arbitral Tribunal's final decision as to the evidentiary value of the documents.
7. The documents produced by the Respondent pursuant to the decisions set out in Annex A shall be communicated directly to the Claimants without copying the Arbitral Tribunal. The documents so produced shall not be part of the evidentiary record unless and until

either party produces them in accordance with Section 17 of Procedural Order No. 1.

8. All ordered documents shall be produced by 27 November 2013.

On behalf of the Tribunal,

[Signed]

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Mr. Alexis Mourre  
Presiding Arbitrator

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

**Claimants’ Replies to U.S. Responses and Objections to Claimants’ Document Production Requests**

**Table of Contents**

Request No. 1	USMCA Negotiating History.....	1
Request No. 1.a	Negotiating History Related to Chapter 14 of USMCA.....	1
Request No. 1.b	Negotiating History Related to Article 14.2(1), (3), and (4) of USMCA.....	11
Request No. 1.c	Negotiating History Related to Paragraph 1 of Annex 14-C.....	13
Request No. 1.d	Negotiating History Related to Footnote 20 of Annex 14-C.....	15
Request No. 1.e	Negotiating History Related to Footnote 21 of Annex 14-C.....	17
Request No. 1.f	Negotiating History Related to the Meaning of Legacy Investment.....	19
Request No. 1.g	Negotiating History Related to the Length of the Transition Period in Annex 14-C.....	21
Request No. 1.h	Negotiating History Otherwise Related to Grandfathering of the NAFTA Chapter 11 Obligations.....	23
Request No. 1.i	Negotiating History Related to USMCA Protocol.....	25
Request No. 1.j	Negotiating History Related to Article 34.1 of USMCA.....	27
Request No. 2	U.S. Negotiating Position.....	29
Request No. 2.a	U.S. Negotiating Position Related to Chapter 14.....	29
Request No. 2.b	U.S. Negotiating Position Regarding Article 14.2(1), (3), and (4) of USMCA.....	36
Request No. 2.c	U.S. Negotiating Position Related to Paragraph 1 of Annex 14-C.....	38
Request No. 2.d	U.S. Negotiating Position Related to Footnote 20 of Annex 14-C.....	40
Request No. 2.e	U.S. Negotiating Position Related to Footnote 21 of Annex 14-C.....	42
Request No. 2.f	U.S. Negotiating Position Related to the Meaning of Legacy Investment.....	44
Request No. 2.g	U.S. Negotiating Position Related to the Length of the Transition Period in Annex 14-C.....	46
Request No. 2.h	U.S. Negotiating Position Otherwise Related to Grandfathering of the NAFTA Chapter 11 Obligations.....	48
Request No. 2.i	U.S. Negotiating Position Related to the USMCA Protocol.....	50
Request No. 2.j	U.S. Negotiating Position Related to Article 34.1 of USMCA.....	52
Request No. 3	Other Documents Related to USMCA.....	54

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

---

Request No. 3.a	Other Documents Related to Chapter 14.....	54
Request No. 3.b	Other Documents Related to Article 14.2(1), 14.2(3), and 14.2(4) of USMCA .....	58
Request No. 3.c	Other Documents Related to Paragraph 1 of Annex 14-C .....	61
Request No. 3.d	Other Documents Related to Footnote 20 of Annex 14-C .....	64
Request No. 3.e	Other Documents Related to Footnote 21 of Annex 14-C .....	67
Request No. 3.f	Other Documents Related to Meaning of Legacy Investment.....	70
Request No. 3.g	Other Documents Related to Length of Transition Period .....	73
Request No. 3.h	Other Documents Otherwise Related to the Grandfathering of the NAFTA Chapter 11 Obligations .....	76
Request No. 3.i	Other Documents Related to USMCA Protocol.....	79
Request No. 3.j	Other Documents Related to Article 34.1 of USMCA .....	82
Request No. 4	Communications between and among the USMCA Parties after USMCA’s Entry into Force .....	85
Request No. 5	Documents Discussing Keystone XL in Connection with NAFTA Renegotiation/USMCA Negotiation.....	89
Request No. 6	Documents Discussing Ability of Investors to Submit Claims Arising from Measures Taken during Transition Period.....	93
Request No. 7	Documents Discussing Ability of Investors to Submit Claims Against Mexican Energy Measures Taken during Transition Period..	96
Request No. 8	Documents Related to Rep. Jodey C. Arrington’s Letter to Ambassador Katherine Tai.....	98
Request No. 9	Documents Related to the Decision to Settle ICSID Case No. ARB/16/21.....	100

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 1 USMCA Negotiating History**

**Request No. 1.a Negotiating History Related to Chapter 14 of USMCA**

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
A. Documents or category of documents requested (requesting party)	All documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties or that otherwise pertain to positions considered or taken by any of them, in connection with the negotiation of <b>the investment chapter of USMCA, including Chapter 14 of USMCA</b> (including previous iterations of that chapter and its provisions).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations in the North American Free Trade Agreement (“NAFTA”) to measures taken in relation to legacy investments during the three-year period after the termination of NAFTA (the “transition period”). <i>See</i> Respondent’s Memorial on its Preliminary Objection (“Respondent’s Memorial”) at Sections I-III. This objection implicates multiple provisions in Chapter 14 of USMCA. <i>See</i> Claimants’ Counter-Memorial on Respondent’s Preliminary Objection (“Claimants’ Counter-Memorial”) at Sections I, II, IV-VII, and IX; Respondent’s Memorial at Section II.A.1-2. The requested documents relate to the intended meaning and/or the USMCA Parties’ understandings of the provisions of Chapter 14 and are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.a. Article 3.3(a)(ii) of the IBA Rules provides that “[a] Request to Produce shall contain . . . a description in sufficient detail (including subject matter) of a <i>narrow and specific</i> requested category of Documents that are reasonably believed to exist.” <sup>1</sup> The category of documents sought by Request No. 1.a is neither narrow nor specific. The request seeks “[a]ll documents” that <i>any</i> agency, official, or employee of <i>any</i> of the three USMCA Parties “prepared, proposed, or exchanged . . . or that otherwise pertain to positions considered or taken by any of them” in connection with the specified topics. <sup>2</sup> Request No. 1.a is overbroad and should be rejected on that basis

<sup>1</sup> IBA Rules on the Taking of Evidence in International Arbitration, Art. 3.3(a)(ii) (2020) (“IBA Rules”) (emphasis added). Procedural Order No. 1 specifies in paragraph 16.2 that “[i]f the parties agree to conduct a documents production process, . . . [t]he Tribunal and the parties may in such case use as a guideline in the document production process Articles 3 and 9 of the IBA Rules on the Taking of Evidence (2020).”

<sup>2</sup> The United States understands Request No. 1 to be limited to documents exchanged between the USMCA Parties during negotiations. If Request No. 1 was instead

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
	<p>alone.</p> <p>In addition, Claimants have not established that the requested documents are relevant to the U.S. preliminary objection or material to its outcome.<sup>3</sup> Article 32 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”) provides that “[r]ecourse <i>may</i> be had” to supplementary means of interpretation such as the preparatory work of the treaty “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.”<sup>4</sup> As explained in the U.S. Memorial, the application of Article 31 of the Vienna Convention to Annex 14-C unambiguously establishes that it does not extend the NAFTA’s substantive investment obligations beyond the NAFTA’s termination. Moreover, there is nothing manifestly absurd or unreasonable about this choice of the USMCA Parties.<sup>5</sup> Accordingly, Claimants have not shown that there is a need for the United States to produce the requested documents or for the Tribunal to consider them.</p> <p>In any event, as Claimants are aware,<sup>6</sup> the Agreement on Confidentiality signed by the USMCA Parties at the outset of USMCA negotiations requires that the United States hold in confidence “negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations” for four years after the USMCA’s entry into force, i.e., until July 1, 2024.<sup>7</sup> The United States is therefore barred from disclosing material subject to the Agreement on Confidentiality to Claimants at this time, and is withholding responsive documents pursuant to Article 9.2(b) and (f) of the IBA Rules.</p> <p>Subject to the above objections to the breadth of the request and the relevance and materiality of the requested</p>

intended to encompass documents that were prepared by the United States but were neither shared with the other USMCA Parties nor contain information regarding the Parties’ negotiations, the United States would also object to the production of such documents for the reasons discussed in the responses and objections to Request No. 2. Likewise, if Request No. 1 was intended to encompass documents prepared by Canada or Mexico during the USMCA negotiations but not shared with the United States, the United States objects on the basis that those documents are not in its possession, custody, or control.

<sup>3</sup> IBA Rules, Art. 3.3(b). *See also* Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, at 11 (Jan. 2021) (“Under Article 3.3(b), the content of the requested document needs to be both ‘relevant to the case’ and ‘material to its outcome.’”).

<sup>4</sup> Vienna Convention on the Law of Treaties, Art. 32 (**RL-016**) (emphasis added).

<sup>5</sup> Expert Report of Professor Richard Gardiner (“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* U.S. Memorial on Its Preliminary Objection ¶ 65 n.69 (citing sources).

<sup>6</sup> Claimants’ Counter-Memorial ¶ 22 n.25.

<sup>7</sup> Agreement on Confidentiality at 1 (**R-0015**).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
	<p>documents, the United States is willing:</p> <ul style="list-style-type: none"> <li>• to produce responsive documents in the possession, custody, or control of the Office of the United States Trade Representative (“USTR”), the lead U.S. agency in negotiations of the USMCA, that are exempt from the Agreement on Confidentiality because they contain information regarding the U.S. position in negotiations and do not contain “any reference to positions of other parties or agreed text.”<sup>8</sup></li> <li>• to produce responsive documents in USTR’s possession, custody, or control that are subject to the Agreement on Confidentiality after July 1, 2024.</li> </ul>
D. Response to objections and request for resolution (requesting party)	<p><i>First</i>, Claimants’ request is narrow and specific. The request plainly seeks the preparatory work for USMCA Chapter 14. Respondent complains that the request extends beyond documents in the possession of USTR; however, the U.S. Government has structured itself to require coordination of U.S. negotiating positions across a wide range of government agencies, as explained in Claimants’ cover letter. Therefore, it is reasonable to request materials that are in the possession or custody of agencies other than USTR.</p> <p><i>Second</i>, Respondent seeks to withhold the requested documents on grounds that they are supplementary means of interpretation. However, the interpretation of the disputed provisions in Chapter 14 of USMCA are clearly in dispute, and Article 32 of the Vienna Convention expressly recognizes preparatory work as a supplementary means of interpretation.<sup>9</sup> It is not for the United States to decide that supplementary means of interpretation are not relevant, nor should the question of whether supplementary means of interpretation are appropriate be resolved in the context of document production. Respondent’s objection does not relate to the relevance of the documents but to the evidentiary weight that should be afforded to those documents. The documents that Claimants have requested are clearly relevant, and it will be for the Tribunal to assess the weight of such evidence at the time that it rules on the preliminary objection.</p> <p>Furthermore, Claimants’ requests are relevant regardless of whether the text of the disputed provisions appears to be clear on its face. As Respondent’s own expert, Richard Gardiner, has stated, “[r]ecourse to preparatory work is <u>always</u> permissible under the Vienna rules to ‘confirm’ the meaning reached by application of the general rule in article 31.”<sup>10</sup> If the text is ambiguous or if the interpretation under Article 31 of the VCLT leads to a result that is manifestly absurd</p>

<sup>8</sup> Exhibit R-15, Agreement on Confidentiality at p. 1.

<sup>9</sup> See Exhibit RL-16, Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series*, vol. 1155, at Art. 32.

<sup>10</sup> Exhibit CL-163, Richard Gardiner, *Treaty Interpretation* (2015) (excerpts) (“Gardiner, *Treaty Interpretation*”), at p. 354 (emphasis added).



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
	<p>and unreasonable, then Article 32 of the VCLT clearly allows resort to supplementary means of interpretation.</p> <p><i>Third</i>, Respondent should not be permitted to hide behind the Agreement on Confidentiality to avoid disclosing the requested documents. The parties agreed to the Confidentiality Order in this arbitration precisely so that confidential information exchanged in the context of this proceeding would maintain its confidentiality. Claimants agree to treat the negotiating history as Confidential Information under the Confidentiality Order. Furthermore, forcing Claimants to wait until July 1, 2024 to access the full negotiating history with respect to the disputed USMCA provisions would undermine Claimants’ ability to fully present their case and create an unacceptable inequality between the parties. Respondent obviously has full access to the requested documents, and Claimants have no ability to access the materials.</p> <p>In any case, the Agreement on Confidentiality was designed to “allow[] the negotiating parties to develop their negotiating positions, communicate internally and with each other, and engage with their public as they consider appropriate in developing and communicating their own positions.”<sup>11</sup> These circumstances no longer apply, as USMCA entered into force on July 1, 2020—over two and a half years ago. Moreover, the very fact that the Agreement on Confidentiality ceases to have effect after only four years demonstrates that the confidentiality interests at stake under it are limited in nature and do not pertain to matters of fundamental national interest, <i>e.g.</i>, such as national security.</p> <p><i>Fourth</i>, Respondent has failed to show that Article 9.2(b) or 9.2(f) of the IBA Rules excuse it from producing the full negotiating history. Respondent’s basis for invoking either provision is not clear. To the extent that Respondent invokes Article 9.2(b) of the IBA Rules on the basis that the Agreement on Confidentiality creates a “legal impediment,” that impediment can be removed, if the Tribunal deems it necessary, by supplementing the Confidentiality Order with reasonable additional provisions specifically to protect the confidentiality of the full negotiating history. To the extent that Respondent invokes the deliberative process privilege and/or political sensitivity under Article 9.2(f) of the IBA Rules, Respondent cannot withhold documents from disclosure merely by uttering the words “political sensitivity.” Even when a document may show a government’s deliberative process, or even when there is some political sensitivity involved, tribunals have required disclosure if the documents are important to the claimant’s case are not otherwise available.<sup>12</sup></p>

<sup>11</sup> Exhibit R-15, Agreement on Confidentiality at p. 2.

<sup>12</sup> See Exhibit CL-195, *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Procedural Order No. 13, July 11, 2012 (“*Clayton v. Canada*, Procedural Order No. 13”), at paras. 22, 26 (“[I]n view of an evolving *jurisprudence constante* by prior NAFTA tribunals, that any refusal to produce documents based on their political or institutional sensitivity requires a balancing process, weighing, on the one hand, the compelling nature of the requested party’s asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party’s case. . . . with

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
	<p>NAFTA tribunals have required the party invoking Article 9.2(f) to: (i) describe the content of the document, (ii) explain the basis for non-disclosure, (iii) analyze the competing interests by “weighing, on the one hand, the compelling nature of the requested party’s asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party’s case,” and (iv) provide its analysis and conclusion.<sup>13</sup> NAFTA tribunals have also required the aforementioned exercise to be performed by senior attorneys familiar with the facts of the dispute.<sup>14</sup> To the extent that Respondent invokes the deliberative process privilege under Article 9.2(b) of the IBA Rules, Respondent must show that the requested documents are subject to that privilege within the scope of Article 9.2(b). Respondent has failed to satisfy its burden under either Article 9.2(b) or 9.2(f).</p> <p><b><i>Clarification and Agreed Limitation of Claimants’ Request:</i></b></p> <p>Respondent has raised the question of whether Claimants seek documents prepared by the Canadian or Mexican governments that were not shared with the U.S. Government. To clarify, Claimants do not seek such documents through this document production exercise.</p> <p>Respondent has also raised the question of whether Claimants seek internal U.S. Government documents that were not shared with the other USMCA Parties. To clarify, Request 1.a does not pertain to documents that were prepared by the United States Government but were not shared with the other USMCA Parties. However, internal United States Government documents that were not shared with the other USMCA Parties <u>are</u> the subject of other document production requests.</p>

respect to claims of sensitivity of government deliberations, the Tribunal has generally found the following considerations to be of particular importance: - The Investors’ interest in production of the requested document to advance the Investors’ case . . . - Disclosure or availability of non-privileged sources with related content . . .” (emphasis added); Exhibit CL-196, *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Requests for Production of Documents and Challenges to Assertions of Privilege of Apr. 21, 2006, at para. 14 (“[A]lthough the Tribunal recognizes the assertion of and interests in the deliberative process privilege, it finds the statement of Claimant’s need, particularly given the apparent absence of other documents or other means of proof available to the Claimant, to be sufficiently great to override those interests. Therefore, the Tribunal requests Respondent to produce the ten documents at issue . . .”) (emphasis added); *id.* at para. 48 (“Balancing these interests, the Tribunal holds that there must be a sufficient enough showing of need to ensure that the governmental process is protected. The Tribunal has not found a sufficient statement of need in the arguments presented at this point . . .”).

<sup>13</sup> Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at paras. 22, 24-28. See also Exhibit CL-192, *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Parties’ Requests for Production of Documents Withheld on Grounds of Privilege, Nov. 17, 2005 (“*Glamis Gold v. U.S.*, Decision on Parties’ Requests for Withheld Documents”), at para. 38.

<sup>14</sup> See Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at para. 24; Exhibit CL-192, *Glamis Gold v. U.S.*, Decision on Parties’ Requests for Withheld Documents at para. 37.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
	<p>Furthermore, in the spirit of cooperation, Claimants are willing to limit the scope of this request in the following way:</p> <ul style="list-style-type: none"> <li>• Production may be limited to documents that are in the possession, custody, or control of USTR (which led the USMCA negotiations); the U.S. State Department (the “State Department”) (which co-leads, or at a minimum plays a key role, in the negotiations of investment chapters in free trade agreements, like USMCA, and obviously plays a central role in investor-state dispute settlement matters);<sup>15</sup> and the National Archives and Record Administration (the “National Archives”) (which maintains certain records of U.S. Government agencies),<sup>16</sup> to the extent that documents in the National Archives originated from USTR or the State Department.</li> </ul> <p><b><i>Requests for the Tribunal:</i></b></p> <ul style="list-style-type: none"> <li>• Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023 (<i>i.e.</i>, the date fixed in the Procedural Calendar for the production of remaining documents following the Tribunal’s decisions on document production).</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to the disputed USMCA provisions (<i>i.e.</i>, the provisions identified in Request No. 1.b to Request No. 1.j) by November 27, 2023. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s</li> </ul>

<sup>15</sup> Exhibit C-133, U.S. Department of State “Negotiating Investment Agreements,” available at <https://2009-2017.state.gov/e/eb/ifa/oi/agreements/index.htm> (archived Jan. 20, 2017).

<sup>16</sup> See Exhibit C-134, 36 C.F.R. § 1235.10.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
	consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to the disputed USMCA provisions.
E. Decision of the Tribunal	<p>The request is for the production of all documents, including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material, discussion documents, preparatory works, reports, minutes, draft documents, emails, and other electronic or non-electronic materials that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees), prepared, proposed, or exchanged with one or more of the other USMCA Parties or that otherwise pertain to positions considered or taken by any of them, in connection with the negotiation of the investment chapter of USMCA, including Chapter 14 of USMCA (including previous iterations of that chapter and its provisions).</p> <p>The reformulated request refers to: “documents that are in the possession, custody, or control of USTR (which led the USMCA negotiations); the U.S. State Department (the “State Department”) (which co-leads, or at a minimum plays a key role, in the negotiations of investment chapters in free trade agreements, like USMCA, and obviously plays a central role in investor-state dispute settlement matters);<sup>17</sup> and the National Archives and Record Administration (the “National Archives”) (which maintains certain records of U.S. Government agencies),<sup>18</sup> to the extent that documents in the National Archives originated from USTR or the State Department.”</p> <p>The Respondent instead proposes to produce responsive documents (i) “in the possession, custody, or control of the Office of the United States Trade Representative (“USTR”), the lead U.S. agency in negotiations of the USMCA, that are exempt from the Agreement on Confidentiality because they contain information regarding the U.S. position in negotiations and do not contain “any reference to positions of other parties or agreed text.”<sup>19</sup>” and (ii) documents “in USTR’s possession, custody, or control that are subject to the Agreement on Confidentiality after July 1, 2024”.</p> <p>The Respondent’s objection is threefold: (i) the request lacks specificity and is overbroad, (ii) lack of relevance, and</p>

<sup>17</sup> Exhibit C-133, U.S. Department of State “Negotiating Investment Agreements,” available at <https://2009-2017.state.gov/e/eb/afd/oia/agreements/index.htm> (archived Jan. 20, 2017).

<sup>18</sup> See Exhibit C-134, 36 C.F.R. § 1235.10.

<sup>19</sup> Exhibit R-15, Agreement on Confidentiality at p. 1.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
	<p>(iii) confidentiality based on the Agreement on Confidentiality signed by the Negotiating Parties<sup>20</sup>.</p> <p>Concerning the alleged overbroad nature of the request and its lack of specificity, the Arbitral Tribunal notes, first of all, that the Parties’ disagreement as to the entities holding the documents sought is now limited to whether these entities should include the State Department and the National Archives to the extent that documents originate from USTR or the State Department. The Tribunal considers that including the State Department and the National Archives to the extent mentioned above does not make the request overbroad or unspecific. The Tribunal notes in this respect that the Respondent is not alleging that production of the documents sought would be unduly burdensome, which leads the Tribunal to understand that these documents are readily available. The Tribunal also notes that, in its submission of 26 October 2023, the Claimants have identified the relevant time frame of its requests from 20 January 2017 to date. Based on the foregoing, the Tribunal does not consider that the request is overbroad or lacks specificity.</p> <p>Concerning the alleged lack of relevance of the documents, the Arbitral Tribunal is not at this point expressing any view as to whether USMCA Chapter 14 is ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. Nor is the Arbitral Tribunal expressing any view, at this point, on the final relevance of the <i>travaux préparatoires</i> in interpreting USMCA Chapter 14. The relevance of a document sought in the context of a request to produce has in effect to be assessed on a <i>prima facie</i> basis considering the parties’ allegations. It is therefore sufficient at this document production stage to note that the Claimants do submit that Chapter 14 deserves to be interpreted by resorting to the <i>travaux préparatoires</i>. Whether that is the case or not is a question that needs not to be discussed at this point and will be decided in the Tribunal’s decision on jurisdiction. The Tribunal therefore considers that the Claimants’ submission concerning the need to interpret Chapter 14 by using the <i>travaux préparatoires</i> satisfies the requirement that the documents sought are <i>prima facie</i> relevant and material.</p> <p>Concerning the alleged confidential nature of the documents sought, the objection is based both on the Agreement on Confidentiality concluded by the Negotiating Parties and the alleged privileged nature of the documents sought.</p> <p>As to the Agreement on Confidentiality, the Arbitral Tribunal notes that its text is clear in that negotiating texts, proposals of each Governments, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations shall be held in confidence by the recipients and may therefore only be provided to Government’s officials or persons outside Government participating in that Government’s domestic consultation process and having the need to review the documents or be advised of the information contained therein. It is undisputed that the documents sought fall into the category of confidential documents identified in the</p>

<sup>20</sup> Exhibit R-15, Agreement on Confidentiality.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
	<p>Agreement on Confidentiality and that neither the Claimants nor the Arbitral Tribunal’s members qualify as individuals allowed to have access to the same. The Tribunal, however, does not consider that the Agreement on Confidentiality prevents it from ordering production of the documents sought.</p> <p>First, the Arbitral Tribunal considers that the agreed Confidentiality Order issued on 8 February 2023 by the Arbitral Tribunal in this case is precisely meant to ensure that information that is otherwise confidential, such as information covered by the Agreement on Confidentiality, can be produced subject to the protective measures identified therein, in particular at §§ 16-26. The Tribunal further notes that § 27 of the Confidentiality Order provides that any party may request that the Tribunal further limit disclosure of information to specific persons and counsel in these proceedings. The Arbitral Tribunal considers that any concerns deriving from the Respondent’s obligations towards Canada and Mexico pursuant to the Agreement on Confidentiality can be addressed by adopting appropriate protective measures such as, but not limited to, those identified in the Confidentiality Order, such as redactions of especially sensitive information, limiting the number of authorized representatives allowed to review the documents, and subjecting their review to signature of an NDA by each of them. While no such request has been made so far, the Tribunal will consider any such request to that effect once this order to produce will have been dispatched but already instructs the parties to consult and agree on appropriate protective measures insofar as necessary.</p> <p>Second, the Arbitral Tribunal is mindful of the fact that the Agreement on Confidentiality provides that the Negotiating Parties’ obligation expires four years after the last round of negotiations and that it is undisputed that this date is 1<sup>st</sup> July 2024. It is therefore undisputed that, past such date, the documents sought will no longer be confidential, which gives the Tribunal comfort that disclosure of the same only some months before the expiry date and subject to the agreed protective measures is not such as to cause any prejudice to the Respondent.</p> <p>Concerning the reference made by the Respondent to privilege, the Tribunal notes that the Respondent refers to both Article 9.2(b) and 9.2(f) of the IBA Rules.</p> <p>Article 9.2(b) refers to attorney-client privilege or the protection of documents containing legal advice in respect of the case. The Claimants, however, state that they do not seek documents that are protected by attorney-client privilege or the work-product doctrine. As a consequence, the Respondent may withhold responsive documents falling under these categories. In so doing, the Respondent bears the burden of proving its objection and, to that effect, will produce a privilege log identifying (i) the date, authors and recipients of the document, (ii) a summary of its nature and content, and (iii) the legal basis adduced for the objection. The Tribunal will then adopt directions to resolve the matter after having heard the other party.</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.a – Negotiating History Related to Chapter 14 of USMCA
	<p>Concerning Article 9.2(f), it refers to grounds of political or institutional sensitivity. The Arbitral Tribunal considers however that these are precisely the grounds that have led the Negotiating Parties to sign the Agreement on Confidentiality, so that the matter is disposed of as specified above. The Tribunal accepts, however, that documents that may affect national security may be withheld for compelling public policy reasons, and the provisions above concerning the privilege log will apply equally.</p> <p>Based on the foregoing, the Tribunal orders the production, under the conditions specified above, of responsive documents in the possession, custody, or control of the USTR, the State Department and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) exchanged between the United States Government, the Mexican Government or the Canadian Government relating to the negotiation of the investment chapter of USMCA, including Chapter 14, of USMCA.</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 1.b Negotiating History Related to Article 14.2(1), (3), and (4) of USMCA**

Document Request No.	Request No. 1.b – Negotiating History Related to Article 14.2(1), (3), and (4) of USMCA
A. Documents or category of documents requested (requesting party)	To the extent not covered by Request No. 1.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties, or that otherwise pertain to positions considered or taken by any of them, in connection with the negotiation of USMCA regarding <b>Article 14.2(1), (3), and (4) of USMCA</b> (including previous iterations of those provisions).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Respondent’s preliminary objection hinges on the temporal scope of Annex 14-C. Article 14.2(1) addresses the scope of measures to which Chapter 14 applies. Article 14.2(3) of USMCA addresses the temporal scope of Annex 14-C. <i>See</i> Claimants’ Counter-Memorial at para. 27 and footnotes 28-29. Article 14.2(4) confirms that Annex 14-C is one of three annexes under which investors may submit claims to arbitration under Chapter 14. Thus, documents concerning the positions and/or understanding of the USMCA Parties regarding Article 14.2(1), (3), and (4) are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.b for the same reasons stated above with respect to Request No. 1.a. Subject to those objections, the United States is willing to produce responsive documents in USTR’s possession, custody, or control consistent with the terms of the Agreement on Confidentiality, as specified in Request No. 1.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection to Request No. 1.b for the same reasons that they oppose Respondent’s objection to Request No. 1.a. The clarifications and limitations Claimants specified in their response to Respondent’s objection to Request No. 1.a also apply here.  <b><i>Requests for the Tribunal:</i></b>



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.b – Negotiating History Related to Article 14.2(1), (3), and (4) of USMCA
	<ul style="list-style-type: none"> <li>• Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023 (<i>i.e.</i>, the date fixed in the Procedural Calendar for the production of remaining documents following the Tribunal’s decisions on document production).</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada or Mexico and (ii) “agreed text” with respect to Article 14.2(1), (3), and (4) of USMCA (<i>i.e.</i>, the provisions identified in Request No. 1.b) by November 27, 2023. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to Article 14.2(1), (3), and (4) of USMCA.</li> </ul>
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 1.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 1.c Negotiating History Related to Paragraph 1 of Annex 14-C**

Document Request No.	Request No. 1.c – Negotiating History Related to Paragraph 1 of Annex 14-C
A. Documents or category of documents requested (requesting party)	To the extent not covered by Request No. 1.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties, or that otherwise pertain to positions considered or taken by any of them, in connection with the negotiation of <b>paragraph 1 of Annex 14-C of USMCA</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Claimants have shown that, through paragraph 1 of Annex 14-C, the USMCA Parties chose to apply NAFTA’s substantive investment obligations to measures taken in relation to legacy investments during the transition period. <i>See</i> Claimants’ Counter-Memorial at paras. 36-37. Documents concerning the positions and/or understanding of the USMCA Parties regarding paragraph 1 are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.c for the same reasons stated above with respect to Request No. 1.a. Subject to those objections, the United States is willing to produce responsive documents in USTR’s possession, custody, or control consistent with the terms of the Agreement on Confidentiality, as specified in Request No. 1.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection to Request No. 1.c for the same reasons that they oppose Respondent’s objection to Request No. 1.a. The clarifications and limitations Claimants specified in their response to Respondent’s objection to Request No. 1.a also apply here.  <b><i>Requests for the Tribunal:</i></b> <ul style="list-style-type: none"> <li>Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or</li> </ul>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.c – Negotiating History Related to Paragraph 1 of Annex 14-C
	<p>control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023.</p> <ul style="list-style-type: none"> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada or Mexico and (ii) “agreed text” with respect to paragraph 1 of Annex 14-C of USMCA by November 27, 2023. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to paragraph 1 of Annex 14-C of USMCA.</li> </ul>
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 1.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 1.d Negotiating History Related to Footnote 20 of Annex 14-C**

Document Request No.	Request No. 1.d – Negotiating History Related to Footnote 20 of Annex 14-C
A. Documents or category of documents requested (requesting party)	To the extent not covered by Request No. 1.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties), or that otherwise pertain to positions considered or taken by any of them, in connection with the negotiation of USMCA regarding <b>Footnote 20 of Annex 14-C of USMCA</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. As Claimants observed in their Counter-Memorial, Footnote 20 of Annex 14-C confirms that the obligations contained in Section A of NAFTA Chapter 11 apply to claims submitted under paragraph 1 of Annex 14-C in connection with measures taken during the transition period. <i>See</i> Claimants’ Counter-Memorial at para. 38. Claimants and Respondent disagree as to the meaning of this provision. <i>See</i> Respondent’s Memorial at paras. 48-49. Thus, documents concerning the positions and/or understanding of the USMCA Parties regarding Footnote 20 are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.d for the same reasons stated above with respect to Request No. 1.a. Subject to those objections, the United States is willing to produce responsive documents in USTR’s possession, custody, or control consistent with the terms of the Agreement on Confidentiality, as specified in Request No. 1.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection to Request No. 1.d for the same reasons that they oppose Respondent’s objection to Request No. 1.a. The clarifications and limitations Claimants specified in their response to Respondent’s objection to Request No. 1.a also apply here.  <b><i>Requests for the Tribunal:</i></b>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.d – Negotiating History Related to Footnote 20 of Annex 14-C
	<ul style="list-style-type: none"> <li>• Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023.</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada or Mexico and (ii) “agreed text” with respect to Footnote 20 of Annex 14-C of USMCA by November 27, 2023. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to Footnote 20 of Annex 14-C of USMCA.</li> </ul>
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 1.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 1.e Negotiating History Related to Footnote 21 of Annex 14-C**

Document Request No.	Request No. 1.e – Negotiating History Related to Footnote 21 of Annex 14-C
A. Documents or category of documents requested (requesting party)	To the extent not covered by Request No. 1.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties), or that otherwise pertain to positions considered or taken by any of them, in connection with the negotiation of USMCA regarding <b>Footnote 21 of Annex 14-C of USMCA</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	As Claimants have shown, Footnote 21 carves out from Annex 14-C claims that are eligible for submission to arbitration under Annex 14-E, and that carveout makes sense only if Annex 14-C, like Annex 14-E, applies to measures taken after USMCA’s entry into force. <i>See</i> Claimants’ Counter-Memorial at Section V.A. Claimants and Respondent disagree as to the significance of this provision. <i>See</i> Respondent’s Memorial at paras. 50-57. Thus, documents concerning the positions and/or understanding of the USMCA Parties regarding Footnote 21 are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.e for the same reasons stated above with respect to Request No. 1.a. Subject to those objections, the United States is willing to produce responsive documents in USTR’s possession, custody, or control consistent with the terms of the Agreement on Confidentiality, as specified in Request No. 1.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection to Request No. 1.e for the same reasons that they oppose Respondent’s objection to Request No. 1.a. The clarifications and limitations Claimants specified in their response to Respondent’s objection to Request No. 1.a also apply here.  <b>Requests for the Tribunal:</b> <ul style="list-style-type: none"> <li>Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA</li> </ul>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.e – Negotiating History Related to Footnote 21 of Annex 14-C
	<p>negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023.</p> <ul style="list-style-type: none"> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada or Mexico and (ii) “agreed text” with respect to Footnote 21 of Annex 14-C of USMCA by November 27, 2023. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to Footnote 21 of Annex 14-C of USMCA.</li> </ul>
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 1.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 1.f Negotiating History Related to the Meaning of Legacy Investment**

Document Request No.	Request No. 1.f – Negotiating History Related to the Meaning of Legacy Investment
A. Documents or category of documents requested (requesting party)	To the extent not covered by Request No. 1.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties, or that otherwise pertain to positions considered or taken by them, in connection with the negotiation of USMCA regarding <b>paragraph 6(1) of Annex 14-C</b> (defining “legacy investment”) (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	As Claimants have observed, Annex 14-C provides that an investment is a legacy investment only if it (1) existed when NAFTA was in force and (2) remained in existence when USMCA entered into force. <i>See</i> Claimants’ Counter-Memorial at paras. 86-87. Claimants have further explained that this second requirement shows that Annex 14-C applies to measures taken after USMCA’s entry into force. <i>See</i> Claimants’ Counter-Memorial at paras. 86-87. Claimants and Respondent disagree as to the significance of this provision. <i>See</i> Respondent’s Memorial at paras. 27-29. Thus, documents concerning the positions and/or understanding of the USMCA Parties regarding paragraph 6(1) are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.f for the same reasons stated above with respect to Request No. 1.a. Subject to those objections, the United States is willing to produce responsive documents in USTR’s possession, custody, or control consistent with the terms of the Agreement on Confidentiality, as specified in Request No. 1.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection to Request No. 1.f for the same reasons that they oppose Respondent’s objection to Request No. 1.a. The clarifications and limitations Claimants specified in their response to Respondent’s objection to Request No. 1.a also apply here.  <b>Requests for the Tribunal:</b> <ul style="list-style-type: none"> <li>Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or</li> </ul>



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.f – Negotiating History Related to the Meaning of Legacy Investment
	<p>control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023.</p> <ul style="list-style-type: none"> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada or Mexico and (ii) “agreed text” with respect to paragraph 6(1) of Annex 14-C of USMCA by November 27, 2023. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect paragraph 6(1) of Annex 14-C of USMCA.</li> </ul>
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 1.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

***Request No. 1.g Negotiating History Related to the Length of the Transition Period in Annex 14-C***

Document Request No.	Request No. 1.g – Negotiating History Related to the Length of the Transition Period in Annex 14-C
A. Documents or category of documents requested (requesting party)	To the extent not covered by Request No. 1.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties), or that otherwise pertain to positions taken by them, in connection with the negotiation of USMCA regarding <b>the length of the transition period, including but not limited to its relationship, <i>vel non</i>, to NAFTA Chapter 11’s limitations period, or paragraph 3 of Annex 14-C</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	Respondent asserts that the length of the transition period (contained in paragraph 3 of Annex 14-C) was designed to align with the limitations period under NAFTA Chapter 11. <i>See</i> Respondent’s Memorial at paras. 67-71. According to Respondent, this alleged correspondence confirms its argument that Annex 14-C does not apply to measures taken during the transition period. <i>See id.</i> Claimants have disputed that the USMCA Parties designed the transition period to align with NAFTA Chapter 11’s limitations period. <i>See</i> Claimants’ Counter-Memorial at paras. 100-05. Documents concerning the positions and/or understanding of the USMCA Parties regarding the length of the transition period are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.g for the same reasons stated above with respect to Request No. 1.a. Subject to those objections, the United States is willing to produce responsive documents in USTR’s possession, custody, or control consistent with the terms of the Agreement on Confidentiality, as specified in Request No. 1.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection to Request No. 1.g for the same reasons that they oppose Respondent’s objection to Request No. 1.a. The clarifications and limitations Claimants specified in their response to Respondent’s objection to Request No. 1.a also apply here.  <b><i>Requests for the Tribunal:</i></b>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.g – Negotiating History Related to the Length of the Transition Period in Annex 14-C
	<ul style="list-style-type: none"> <li>• Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023.</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada or Mexico and (ii) “agreed text” with respect to the length of the transition period, including but not limited to its relationship, <i>vel non</i>, to NAFTA Chapter 11’s limitations period, or paragraph 3 of Annex 14-C of USMCA, by November 27, 2023. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to the length of the transition period in paragraph 3 of Annex 14-C of USCMA.</li> </ul>
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 1.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

***Request No. 1.h Negotiating History Otherwise Related to Grandfathering of the NAFTA Chapter 11 Obligations***

Document Request No.	Request No. 1.h – Negotiating History Otherwise Related to Grandfathering of the NAFTA Chapter 11 Obligations
A. Documents or category of documents requested (requesting party)	To the extent not covered by Request No. 1.a to Request No. 1.g, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties, or that otherwise pertain to positions considered or taken by any of them, in connection with the negotiation of USMCA regarding <b>grandfathering, continuation, or otherwise carrying forward obligations contained in NAFTA Chapter 11</b> following the entry into force of USMCA.
B. Relevance and materiality, including references to submissions (requesting party)	Respondent recognizes that USMCA carried forward certain NAFTA obligations but asserts that USMCA did not preserve NAFTA’s substantive investment obligations with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 59. Claimants have asserted that, through Annex 14-C, the USMCA Parties preserved NAFTA’s substantive investment obligations with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Claimants’ Counter-Memorial at Sections II, IV-VII, IX. Thus, documents concerning the positions and/or understanding of the USMCA Parties regarding the grandfathering, continuation, or preservation of obligations contained in NAFTA Chapter 11 after the entry into force of USMCA are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.h for the same reasons stated above with respect to Request No. 1.a. Subject to those objections, the United States is willing to produce responsive documents in USTR’s possession, custody, or control consistent with the terms of the Agreement on Confidentiality, as specified in Request No. 1.a.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.h – Negotiating History Otherwise Related to Grandfathering of the NAFTA Chapter 11 Obligations
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection to Request No. 1.h for the same reasons that they oppose Respondent’s objection to Request No. 1.a. The clarifications and limitations Claimants specified in their response to Respondent’s objection to Request No. 1.a also apply here.</p> <p><b>Requests for the Tribunal:</b></p> <ul style="list-style-type: none"> <li>• Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023.</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada or Mexico and (ii) “agreed text” with respect to grandfathering, continuation, or otherwise carrying forward obligations contained in NAFTA Chapter 11 by November 27, 2023. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to grandfathering, continuation, or otherwise carrying forward obligations contained in NAFTA Chapter 11.</li> </ul>
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 1.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 1.i Negotiating History Related to USMCA Protocol**

Document Request No.	Request No. 1.i – Negotiating History Related to USMCA Protocol
A. Documents or category of documents requested (requesting party)	All documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties), or that otherwise pertain to positions considered or taken by any of them, in connection with the negotiation of USMCA regarding <b>the Protocol Replacing NAFTA with USMCA</b> (the “USMCA Protocol”).
B. Relevance and materiality, including references to submissions (requesting party)	The USMCA Protocol provides that, “[u]pon 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.” Respondent contends that the USMCA Protocol shows that the Section A obligations do not apply to claims arising from measures taken during the transition period with respect to legacy investments. <i>See</i> Respondent’s Memorial at paras. 36-38. Claimants have shown that the clause “without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA” gives effect to the NAFTA obligations that are incorporated by reference into USMCA, including the NAFTA Chapter 11 obligations incorporated into paragraph 1 of Annex 14-C. <i>See</i> Claimants’ Counter-Memorial at paras. 81-84. Thus, documents concerning the positions and/or understanding of the USMCA Parties regarding the USMCA Protocol are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.i for the same reasons stated above with respect to Request No. 1.a. Subject to those objections, the United States is willing to produce responsive documents in USTR’s possession, custody, or control consistent with the terms of the Agreement on Confidentiality, as specified in Request No. 1.a.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.i – Negotiating History Related to USMCA Protocol
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection to Request No. 1.i for the same reasons that they oppose Respondent’s objection to Request No. 1.a. The clarifications and limitations Claimants specified in their response to Respondent’s objection to Request No. 1.a also apply here. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to the USMCA Protocol.</p> <p><b><i>Requests for the Tribunal:</i></b></p> <ul style="list-style-type: none"> <li>• Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023.</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada or Mexico and (ii) “agreed text” with respect to the USMCA Protocol by November 27, 2023.</li> </ul>
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 1.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 1.j Negotiating History Related to Article 34.1 of USMCA**

Document Request No.	Request No. 1.j – Negotiating History Related to Article 34.1 of USMCA
A. Documents or category of documents requested (requesting party)	All documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements, presentations, or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) that the United States Government, the Mexican Government, or the Canadian Government (including any of their agencies, officials, or employees) prepared, proposed, or exchanged with one or more of the other USMCA Parties, or that otherwise pertain to positions considered or taken by any of them, in connection with the negotiation of USMCA regarding <b>Article 34.1 of USMCA</b> , and any previous iterations of that provision.
B. Relevance and materiality, including references to submissions (requesting party)	Respondent asserts that, because Article 34.1 does not refer to the continued application of the NAFTA Chapter 11 obligations, those obligations do not apply to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 59. Claimants have shown that this assertion misconstrues the meaning of, and draws incorrect inferences from, Article 34.1. <i>See</i> Claimants’ Counter-Memorial at paras. 90-94. Documents concerning the positions and/or understanding of the USMCA Parties regarding Article 34.1 are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 1.j for the same reasons stated above with respect to Request No. 1.a. Subject to those objections, the United States is willing to produce responsive documents in USTR’s possession, custody, or control consistent with the terms of the Agreement on Confidentiality, as specified in Request No. 1.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection to Request No. 1.j for the same reasons that they oppose Respondent’s objection to Request No. 1.a. The clarifications and limitations Claimants specified in their response to Respondent’s objection to Request No. 1.a also apply here.  <b><i>Requests for the Tribunal:</i></b> <ul style="list-style-type: none"> <li>Respondent has indicated that it is willing to produce responsive documents in the possession, custody, or control of USTR that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA</li> </ul>



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 1.j – Negotiating History Related to Article 34.1 of USMCA
	<p>negotiation and do not contain “any reference to positions of other parties or agreed text.” To the extent that Respondent does not voluntarily produce these documents by October 26, Claimants request that the Tribunal order Respondent to produce them by November 27, 2023.</p> <ul style="list-style-type: none"> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that contain information regarding the U.S. position in the NAFTA renegotiation/USMCA negotiation and do not contain “any reference to positions of other parties or agreed text.”</li> <li>• Claimants request that the Tribunal order Respondent to produce responsive documents regarding (i) the positions of Canada or Mexico and (ii) “agreed text” with respect to Article 34.1 of USMCA by November 27, 2023. Alternatively, Claimants request that the Tribunal order Respondent to immediately seek, in good faith, to obtain Canada’s and Mexico’s consent to produce responsive documents regarding (i) the positions of Canada and Mexico and (ii) “agreed text” with respect to Article 34.1 of USMCA.</li> </ul>
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 1.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2 U.S. Negotiating Position**

**Request No. 2.a U.S. Negotiating Position Related to Chapter 14**

Document Request No.	Request No. 2.a – U.S. Negotiating Position Related to Chapter 14
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the United States Government’s negotiating position and/or understandings during the negotiation of USMCA regarding all provisions included in <b>the investment chapter of USMCA, including Chapter 14 of USMCA</b> (including previous iterations of that chapter and its provisions).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations in NAFTA to measures taken in relation to legacy investments during transition period. <i>See</i> Respondent’s Memorial at Sections I-III. This objection implicates multiple provisions in Chapter 14 of USMCA. <i>See</i> Claimants’ Counter-Memorial at Sections I, II, IV-VII, and IX; Respondent’s Memorial at Section II.A.1-2. Documents concerning the U.S. negotiating position and/or understandings regarding the intended meaning of the provisions of Chapter 14 are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.a. Claimants have not established that the requested documents are relevant to the U.S. preliminary objection or material to its outcome. <sup>21</sup> Article 32 of the Vienna Convention provides that “[r]ecourse <i>may</i> be had” to supplementary means of interpretation such as the preparatory work of the treaty “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.” <sup>22</sup> As explained in the U.S. Memorial, the application of Article 31 of the Vienna Convention to Annex 14-C unambiguously establishes that it does not extend the NAFTA’s substantive investment obligations beyond the NAFTA’s termination. Moreover, there is nothing manifestly absurd or unreasonable about this choice of the USMCA Parties. <sup>23</sup> Accordingly, Claimants have not shown that there is a need for the United States to produce the requested

<sup>21</sup> IBA Rules, Art. 3.3(b). *See also* Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, at 11 (Jan. 2021) (“Under Article 3.3(b), the content of the requested document needs to be both ‘relevant to the case’ and ‘material to its outcome.’”).

<sup>22</sup> Vienna Convention on the Law of Treaties, Art. 32 (**RL-016**) (emphasis added).

<sup>23</sup> 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

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

documents or for the Tribunal to consider them.

Even if Claimants had established that recourse to the preparatory work of the treaty would be appropriate, their request is overbroad in that it seeks internal U.S. documents that were not shared with the other USMCA Parties and reflect solely U.S. positions and understandings. As the tribunal in *Methanex v. United States* explained in rejecting Methanex’s request for internal U.S. documents prepared during negotiation of the NAFTA: “It was . . . for Methanex to demonstrate not only that it was appropriate to depart from the text of the NAFTA provisions and to conduct an investigation ab initio of the supposed intentions of the NAFTA Parties, but also that such intentions could reliably be established from documents which had never been seen or discussed between the three NAFTA Parties. It failed to do so.”<sup>24</sup> The tribunal in *Canfor v. United States* reached a similar conclusion, explaining: “The Tribunal . . . considers that the internal materials of an individual NAFTA Party established solely for that Party and not communicated to the other Parties during the negotiations of the Agreement do not reflect the common intention of the NAFTA Parties in drafting, adopting, or rejecting a particular provision.”<sup>25</sup>

Humphrey Waldo likewise observed in his Third Report on the Law of Treaties:

Today, it is generally recognized that some caution is needed in the use of *travaux préparatoires* as a means of interpretation. They are not, except in the case mentioned [i.e., “an agreed statement or understanding as to the meaning of a provision prior to the conclusion of the treaty”], an authentic means of interpretation. They are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties.<sup>26</sup>

In addition, Claimants’ request is also overbroad and inconsistent with Article 3.3(a)(ii) of the IBA Rules insofar as it seeks documents prepared not only by USTR, the lead U.S. agency in negotiations of the USMCA, but also documents prepared by other U.S. government agencies. Documents prepared by other U.S. government agencies that influenced the U.S. position in negotiations, if any, would necessarily have been communicated to USTR and would therefore be in USTR’s possession, custody, or control. Moreover, the request seeks internal documents related to the development of

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 U.S. Memorial on Its Preliminary Objection ¶ 65 n.69 (citing sources).

<sup>24</sup> *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part II, Chapter H, ¶ 25 (Aug. 3, 2005) (RL-065).

<sup>25</sup> *Canfor Corp. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 5, ¶ 19 (May 28, 2004) (RL-066).

<sup>26</sup> Humphrey Waldo, Third Report on the Law of Treaties 58 (¶ 21), U.N. Doc. A/CN.4/167 (1964) (RL-050) (emphasis in original).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

	<p>the U.S. position in the USMCA negotiations, which are likely to be subject to the deliberative process privilege and/or the attorney-client privilege.<sup>27</sup></p>
<p>D. Response to objections and request for resolution (requesting party)</p>	<p><i>First</i>, Respondent seeks to withhold the requested documents on grounds that they are supplementary means of interpretation. However, the interpretation of the disputed provisions in Chapter 14 of USMCA is clearly in dispute, and Article 32 of the Vienna Convention expressly recognizes preparatory work as a supplementary means of interpretation.<sup>28</sup> It is not for the United States to decide that supplementary means of interpretation are not relevant, nor should the question of whether supplementary means of interpretation are appropriate be resolved in the context of document production.</p> <p>Respondent’s objection does not relate to the relevance of the documents but to the evidentiary weight that should be afforded to those documents. The very quotation that Respondent relies upon from the Third Report on the Law of Treaties states that the <i>travaux préparatoires</i> <u>are</u> “evidence to be weighed against any other relevant evidence of the intentions of the parties . . . .”<sup>29</sup> The weight of the evidence must be assessed at the time the Tribunal decides the preliminary objection, not in the context of document production. The documents that Claimants have requested are clearly relevant, and it will be for the Tribunal to assess the weight of such evidence at the time that it rules on the preliminary objection.</p> <p>Furthermore, Claimants’ requests are relevant regardless of whether the text of the disputed provisions appears to be clear on its face. As Respondent’s own expert, Richard Gardiner, has stated, “[r]ecourse to preparatory work is <u>always</u> permissible under the Vienna rules to ‘confirm’ the meaning reached by the general rule in article 31.”<sup>30</sup> If the text is ambiguous or if the interpretation under Article 31 of the VCLT leads to a result that is manifestly absurd and unreasonable, then Article 32 of the VCLT clearly allows resort to supplementary means of interpretation.</p> <p><i>Second</i>, Respondent is wrong in asserting that internal documents are irrelevant if they are not shared with the other negotiating parties. As Mr. Gardiner states, “[t]he supplementary means of interpretation indicated in the Vienna rules are not an exclusive list.”<sup>31</sup> Mr. Gardiner explicitly acknowledges that internal documents may be relevant, observing</p>

<sup>27</sup> IBA Rules, Art. 9.2(b) and (f).

<sup>28</sup> See Exhibit RL-16, Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series*, vol. 1155, at Art. 32.

<sup>29</sup> Exhibit RL-50, *Humphrey Waldock*, Third Report on the Law of Treaties, U.N. Doc. A/CN.4/167 (1964), at para. 21.

<sup>30</sup> Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 354 (emphasis added).

<sup>31</sup> Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 409.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

that the “ICJ did admit and consider material of unilateral origin in the *Oil Platforms* case.”<sup>32</sup> In fact, in the *Oil Platforms* case, the United States itself offered its own unilateral statements as evidence regarding the interpretation of the treaty at issue.<sup>33</sup> Similarly, in his treatise on the VCLT, Mark Villiger (a former Judge of the European Court of Human Rights) explains that supplementary means of interpretation include “documents not strictly qualifying as *travaux préparatoires* . . . e.g., a State’s internal documents upon preparation of a treaty unknown to other States at the time . . . .”<sup>34</sup>

Respondent notes that the *Methanex v. United States* tribunal rejected a request for documents related to the negotiation of NAFTA Article 1105.<sup>35</sup> In rejecting that request, the tribunal emphasized that Article 1105 had already been the subject of a binding interpretation issued by the NAFTA Free Trade Commission and interpreted by a number of tribunals.<sup>36</sup> In a context where the issues in dispute had effectively already been decided, the value of supplementary means of interpretation diminished.<sup>37</sup> By contrast, in this case, whether Annex 14-C allows claims arising from measures taken during the transition period is an issue of first impression—a fact the Tribunal explicitly acknowledged in Procedural Order No. 2.<sup>38</sup>

*Third*, Respondent objects to disclosing any documents beyond those in the possession of USTR. By statute, USTR works closely with agencies across the U.S. Government to develop U.S. negotiating positions and to implement free trade agreements.<sup>39</sup> Therefore, it is reasonable for Claimants to request documents prepared by any U.S. Government

<sup>32</sup> See Exhibit CL-163, Gardiner, *Treaty Interpretation* at p. 120 (footnote omitted). In the *Oil Platforms Case*, the International Court of Justice relied on message transmitted from the U.S. Secretary of State to the U.S. Senate that explained the meaning of a particular treaty provision—a document of undoubtedly unilateral character—as a supplementary means of interpretation. See Exhibit CL-189, *Oil Platforms (Iran v. United States)*, Judgment on Preliminary Objection, 1996 I.C.J. (Dec. 12), at para. 29.

<sup>33</sup> Exhibit CL-190, *Oil Platforms (Iran v. United States)*, Preliminary Objection Submitted by the United States of America, Dec. 16, 1993, at paras. 3.22, 3.25.

<sup>34</sup> See Exhibit CL-164, Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) (excerpts), at p. 445. See also Exhibit CL-197, *HICEE B.V. v. Slovak Republic*, PCA Case No. 2009-11, Final Award, May 23, 2011, at para. 136 (“[T]he category of supplementary materials that a tribunal is authorized to have recourse to, 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 leaves the meaning ambiguous or obscure, is, on the terms of the Convention, not closed.”). On that basis, the *HICEE* tribunal admitted a unilateral statement from the Dutch Government on the interpretation of treaty at issue as “valid supplementary material which the Tribunal may, and in the circumstances must, take into account in dealing with the question before it.” *Id.*

<sup>35</sup> See Exhibit RL-65, *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Aug. 3, 2005, Part II, Chapter H, 25, at paras. 23-25.

<sup>36</sup> See Exhibit RL-65, *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Aug. 3, 2005, Part II, Chapter H, 25, at para. 24.

<sup>37</sup> See Exhibit RL-65, *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Aug. 3, 2005, Part II, Chapter H, 25, at para. 24.

<sup>38</sup> See Procedural Order No. 2 at para. 27.

<sup>39</sup> As stated in USTR’s 2022 Trade Policy Agenda and 2021 Annual Report, USTR “has primary responsibility, with the advice of the interagency trade policy organization, for developing and coordinating the implementation of U.S. trade policy, including . . . to the extent they are related to trade, direct investment matters.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

	<p>agency that relate to the USMCA’s investment chapter. Claimants seek documents that reflect the U.S. Government’s express understanding of what had been negotiated.</p> <p>The meaning of earlier statements from U.S. Government officials and the positions that the U.S. Government took during and immediately after the negotiation of USMCA is clearly in dispute. As the record shows, U.S. Government agencies, officials, and employees communicated their understanding of USMCA’s investment chapter and the disputed USMCA provisions to a diverse range of stakeholders inside and outside the U.S. Government.<sup>40</sup> Respondent has taken issue with Claimants’ understanding of those communications.<sup>41</sup> Furthermore, Claimants seek statements by U.S. Government agencies, officials, and employees partly to demonstrate that Respondent has advanced a bad faith interpretation that fundamentally contradicts its <u>own</u> earlier interpretation of Annex 14-C.<sup>42</sup> The documents that Claimants have requested are directly relevant to those issues.</p> <p><i>Fourth</i>, Respondent itself has argued in this arbitration that unilateral statements by USMCA Parties and their officials constitute supplementary means of interpretation. For example, in Section II.B.3 of its Memorial, Respondent explicitly argues that unilateral, public statements made by Deputy Prime Minister Chrystia Freeland and former Representative Robert Lighthizer constitute supplementary means of interpretation that support its (flawed) interpretation of Annex 14-C.<sup>43</sup></p> <p><i>Finally</i>, to the extent that Respondent objects to disclosing documents on grounds of attorney-client privilege or because</p>
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Under the Trade Expansion Act of 1962, the U.S. Congress established an interagency trade policy mechanism to assist with the implementation of these responsibilities. This organization . . . consists of tiers of committees that constitute the principal mechanism for advising USTR as it develops and coordinates U.S. Government positions on international trade and trade-related investment issues.” Exhibit C-132, United States Trade Representative, 2022 Trade Policy Agenda & 2021 Annual Report, Mar. 2022 (excerpts), at p. 179. These committees include “21 voting member agencies . . . [including] USTR, the U.S. Departments of Commerce, Agriculture, State, Treasury, Labor, Justice, Defense, Interior, Transportation, Energy, Health and Human Services, and Homeland Security; the Environmental Protection Agency; the Office of Management and Budget; the Council of Economic Advisers; the Council on Environmental Quality; the U.S. Agency for International Development; the Small Business Administration; the National Economic Council; and the National Security Council. The U.S. International Trade Commission is a nonvoting member . . . . USTR may invite representatives of other agencies to attend meetings depending on the specific issues discussed.” *Id.*

<sup>40</sup> See, e.g., Exhibit C-118, Email Exchange between Michael Tracton and Lauren Mandell, “RE: OECD Week Item,” Oct. 19, 2018, at p. 1 of attachment “Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings” (USTR and State Department officials discussing talking points regarding the USMCA’s investment chapter for OECD Investment Committee meetings); Exhibit C-119, Email from Karin Kizer to Lauren Mandell, “Background for Brussels Conference (11.16.18),” Nov. 17, 2018 (USTR and State Department officials discussing talking points regarding USMCA’s investment chapter for UNCITRAL Working Group III meetings).

<sup>41</sup> See The United States of America’s Memorial on Its Preliminary Objection, June 12, 2023 (“Respondent’s Memorial on Preliminary Objection”), at para. 85 (“Claimants are, in many cases, wrong about the implications to be drawn from the statements that they have identified.”).

<sup>42</sup> For this reason, Respondent’s reliance on *Canfor v. United States* is inapposite. In that case, the tribunal rejected the claimant’s attempt to introduce unilateral statements made by the United States on the basis that those documents did not reflect the common intent of the parties. See RL-66, *Canfor Corp. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 5, May 28, 2004, at para. 19.

<sup>43</sup> See Respondent’s Memorial on Preliminary Objection at paras. 88-91.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

	<p>the documents relate to the U.S. Government’s deliberative process, Respondent has failed to carry its burden for the same reasons discussed in response to earlier objections above. Instead, Respondent simply asserts that the documents are “likely” to be privileged, and it has apparently made no effort to confirm whether the documents are actually privileged. Furthermore, even when a document may show a government’s deliberative process, tribunals have required disclosure if the documents are important to the claimant’s case and are not otherwise available.<sup>44</sup></p> <p><b>Clarification and Agreed Limitation of Claimants’ Request:</b></p> <p>As noted, in the spirit of cooperation, Claimants are willing to limit the scope of their request to documents that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department).</p> <p><b>Request for the Tribunal:</b></p> <p>Claimants request that the Tribunal order Respondent to produce all documents described in Request No. 2.a, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023.</p>
<p>E. Decision of the Tribunal</p>	<p>The Arbitral Tribunal notes that Request 2.a refers to the same category of documents as Request 1.a, with the difference that it applies to internal U.S. documents while Request 1.a refers to documents exchanged between the Negotiating Parties.</p> <p>The Respondent first objects to this request that these documents lack relevance because, in this case, there is no basis to refer to the <i>travaux préparatoires</i> in order to interpret Chapter 14. That objection is rejected for the same reasons as for</p>

<sup>44</sup> Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at paras. 22, 26 (“[I]n view of an evolving *jurisprudence constante* by prior NAFTA tribunals, that any refusal to produce documents based on their political or institutional sensitivity requires a balancing process, weighing, on the one hand, the compelling nature of the requested party’s asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party’s case. . . . with respect to claims of sensitivity of government deliberations, the Tribunal has generally found the following considerations to be of particular importance: - The Investors’ interest in production of the requested document to advance the Investors’ case . . . - Disclosure or availability of non-privileged sources with related content . . . .” (emphasis added); Exhibit CL-196, *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Requests for Production of Documents and Challenges to Assertions of Privilege of Apr. 21, 2006, at para. 14 (“[A]lthough the Tribunal recognizes the assertion of and interests in the deliberative process privilege, it finds the statement of Claimant’s need, particularly given the apparent absence of other documents or other means of proof available to the Claimant, to be sufficiently great to override those interests. Therefore, the Tribunal requests Respondent to produce the ten documents at issue . . . .”) (emphasis added); *id.* at para. 48 (“Balancing these interests, the Tribunal holds that there must be a sufficient enough showing of need to ensure that the governmental process is protected. The Tribunal has not found a sufficient statement of need in the arguments presented at this point . . . .”).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Request 1.a.

The Respondent also submits that internal U.S. documents that were not shared with the other USMCA Parties reflects solely the U.S position and understandings. However, the Arbitral Tribunal is not expressing at this point any view as to the final relevance and evidentiary value of internal documents to interpret Chapter 14 in the hypothesis in which the *travaux préparatoires* would be relevant for so doing. It suffices to note, at this stage, that there is no definition in international law of what the *travaux préparatoires* should include and therefore no reason to exclude as a matter of principle that internal documents may be *prima facie* relevant.

The Respondent further submits that the request is overbroad as it is not limited to documents in the custody, possession, or control of the USTR but also of any other U.S. agency. The Claimants have however narrowed down their request by reference, as for Request 1.a, to the USTR, the State Department and the National Archives, and the Arbitral Tribunal is satisfied that, as reframed, the request is not overbroad.

Finally, the Respondent objects to the request on the basis that the documents sought are likely to be subject to “deliberative process privilege and/or the attorney-client privilege”. This objection is rejected for the same reasons as for Request 1.a and subject to the same *caveat* concerning the Respondent’s right to retain documents protected under the attorney-client or work-product privilege or documents which disclosure would be inconsistent with compelling reasons of national security or public policy, in which case a privilege log shall be established as indicated above.

Based on the foregoing, the Arbitral Tribunal orders the production, under the conditions specified above, of internal U.S. responsive documents in the possession, custody, or control of the USTR, the State Department and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) generated from 20 January 2017 to present, reflecting or discussing the Respondent’s position in the negotiation of the investment chapter of USMCA, including Chapter 14 of USMCA.



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2.b U.S. Negotiating Position Regarding Article 14.2(1), (3), and (4) of USMCA**

Document Request No.	Request No. 2.b – U.S. Negotiating Position Regarding Article 14.2(1), (3), and (4) of USMCA
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.a, Request No. 1.b, or Request No. 2.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the United States Government’s negotiating position and/or understandings during the negotiation of USMCA regarding <b>Article 14.2(1), (3), and (4) of USMCA</b> (including previous iterations of those provisions).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Respondent’s preliminary objection hinges on the temporal scope of Annex 14-C. Article 14.2(1) addresses the scope of measures to which Chapter 14 applies. Article 14.2(3) of USMCA addresses the temporal scope of Annex 14-C. <i>See</i> Claimants’ Counter-Memorial at para. 27 and footnotes 28-29. Article 14.2(4) confirms that Annex 14-C is one of three annexes under which investors may submit claims to arbitration under Chapter 14. Thus, documents concerning the U.S. negotiating position and/or understandings regarding Article 14.2(1), (3), and (4) are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.b for the same reasons stated above with respect to Request No. 2.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection for the same reasons as described in Request No. 2.a.  <b><i>Request for the Tribunal:</i></b>  Claimants request that the Tribunal order Respondent to produce all documents described in this Request No. 2.b, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 2.b – U.S. Negotiating Position Regarding Article 14.2(1), (3), and (4) of USMCA
	Department) by November 27, 2023.
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 2.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2.c U.S. Negotiating Position Related to Paragraph 1 of Annex 14-C**

Document Request No.	Request No. 2.c – U.S. Negotiating Position Related to Paragraph 1 of Annex 14-C
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.a, Request No. 1.c, or Request No. 2.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the U.S. Government’s negotiating position and/or understandings during the negotiation of USMCA regarding <b>paragraph 1 of Annex 14-C of USMCA</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Claimants have shown that, through paragraph 1 of Annex 14-C, the USMCA Parties chose to apply NAFTA’s substantive investment obligations to measures taken in relation to legacy investments during the transition period. <i>See</i> Claimants’ Counter-Memorial at paras. 36-37. Documents concerning the U.S. negotiating position and/or understandings regarding paragraph 1 of Annex 14-C are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.c for the same reasons stated above with respect to Request No. 2.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection for the same reasons as described in Request No. 2.a. <b><i>Request for the Tribunal:</i></b> Claimants request that the Tribunal order Respondent to produce all documents described in this Request No. 2.c, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 2.c – U.S. Negotiating Position Related to Paragraph 1 of Annex 14-C
	Department) by November 27, 2023.
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 2.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2.d U.S. Negotiating Position Related to Footnote 20 of Annex 14-C**

Document Request No.	Request No. 2.d – U.S. Negotiating Position Related to Footnote 20 of Annex 14-C
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.a, Request No. 1.d, or Request No. 2.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the United States Government’s negotiating position during the negotiation of USMCA regarding <b>Footnote 20 of Annex 14-C of USMCA</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. As Claimants observed in their Counter-Memorial, Footnote 20 of Annex 14-C confirms that the obligations contained in Section A of NAFTA Chapter 11 apply to claims submitted under paragraph 1 of Annex 14-C in connection with measures taken during the transition period. Documents concerning the U.S. negotiating position and/or understandings regarding Footnote 20 of Annex 14-C are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.d for the same reasons stated above with respect to Request No. 2.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection for the same reasons as described in Request No. 2.a. <b>Request for the Tribunal:</b> Claimants request that the Tribunal order Respondent to produce all documents described in this Request No. 2.d, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 2.d – U.S. Negotiating Position Related to Footnote 20 of Annex 14-C
	Department) by November 27, 2023.
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 2.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2.e U.S. Negotiating Position Related to Footnote 21 of Annex 14-C**

Document Request No.	Request No. 2.e – U.S. Negotiating Position Related to Footnote 21 of Annex 14-C
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.a, Request No. 1.e, or Request No. 2.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the United States Government’s negotiating position during the negotiation of USMCA regarding <b>Footnote 21 of Annex 14-C of USMCA</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. As Claimants have shown, Footnote 21 carves out from Annex 14-C claims that are eligible for submission to arbitration under Annex 14-E, and that carveout makes sense only if Annex 14-C, like Annex 14-E, applies to measures taken after USMCA’s entry into force. <i>See</i> Claimants’ Counter-Memorial at Section V.A. Claimants and Respondent disagree as to the significance of this provision. <i>See</i> Respondent’s Memorial at paras. 50-57. Thus, documents concerning the U.S. negotiating position and/or understandings regarding Footnote 21 are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.e for the same reasons stated above with respect to Request No. 2.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection for the same reasons as described in Request No. 2.a.  <b><i>Request for the Tribunal:</i></b>  Claimants request that the Tribunal order Respondent to produce all documents described in this Request No. 2.e, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 2.e – U.S. Negotiating Position Related to Footnote 21 of Annex 14-C
	Department) by November 27, 2023.
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 2.a and no decision is therefore made.



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2.f U.S. Negotiating Position Related to the Meaning of Legacy Investment**

Document Request No.	Request No. 2.f – U.S. Negotiating Position Related to the Meaning of Legacy Investment
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.a, Request No. 1.f, or Request No. 2.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the United States Government’s negotiating position during the negotiation of USMCA regarding <b>paragraph 6(1) of Annex 14-C</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. As Claimants have observed, Annex 14-C provides that an investment is a legacy investment only if it (1) existed when NAFTA was in force and (2) remained in existence when USMCA entered into force. <i>See</i> Claimants’ Counter-Memorial at paras. 86-87. Claimants have further explained that this second requirement shows that Annex 14-C applies to measures taken after USMCA’s entry into force. <i>See</i> Claimants’ Counter-Memorial at paras. 86-87. Claimants and Respondent disagree as to the significance of this provision. <i>See</i> Respondent’s Memorial at paras. 27-29. Thus, documents concerning the U.S. negotiating position and/or understandings regarding paragraph 6(1) of Annex 14-C are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.f for the same reasons stated above with respect to Request No. 2.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection for the same reasons as described in Request No. 2.a.  <b><i>Request for the Tribunal:</i></b>  Claimants request that the Tribunal order Respondent to produce all documents described in this Request No. 2.f, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 2.f – U.S. Negotiating Position Related to the Meaning of Legacy Investment
	National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023.
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 2.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2.g U.S. Negotiating Position Related to the Length of the Transition Period in Annex 14-C**

Document Request No.	Request No. 2.g – U.S. Negotiating Position Related to the Length of the Transition Period in Annex 14-C
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.a, Request No. 1.g, or Request No. 2.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the United States Government’s negotiating position during the negotiation and/or understandings of USMCA regarding the <b>length of the transition period, including but not limited to its relationship, <i>vel non</i>, to NAFTA Chapter 11’s limitations period, or paragraph 3 of Annex 14-C</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	Respondent asserts that the length of the transition period (contained in paragraph 3 of Annex 14-C) was designed to align with the limitations period under NAFTA Chapter 11. <i>See</i> Respondent’s Memorial at paras. 67-71. According to Respondent, this alleged correspondence confirms its argument that Annex 14-C does not apply to measures taken during the transition period. <i>See id.</i> Claimants have disputed that the USMCA Parties designed the transition period to align with Chapter 11’s limitations period. <i>See</i> Claimants’ Counter-Memorial at paras. 100-05. Documents concerning the U.S. negotiating position and/or understandings regarding the length of the transition period are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.g for the same reasons stated above with respect to Request No. 2.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection for the same reasons as described in Request No. 2.a.  <b><i>Request for the Tribunal:</i></b>  Claimants request that the Tribunal order Respondent to produce all documents described in this Request No. 2.g, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 2.g – U.S. Negotiating Position Related to the Length of the Transition Period in Annex 14-C
	Department) by November 27, 2023.
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 2.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2.h U.S. Negotiating Position Otherwise Related to Grandfathering of the NAFTA Chapter 11 Obligations**

Document Request No.	Request No. 2.h – U.S. Negotiating Position Otherwise Related to Grandfathering of the NAFTA Chapter 11 Obligations
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.a, Request No. 1.h, or Request No. 2.a, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the United States Government’s negotiating position and/or understandings during the negotiation of USMCA regarding <b>grandfathering, continuation, or otherwise carrying forward obligations contained in NAFTA Chapter 11</b> following the entry into force of USMCA.
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Respondent recognizes that USMCA carried forward certain NAFTA obligations, but asserts that USMCA did not preserve NAFTA’s substantive investment obligations with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 59. Claimants have asserted that, through Annex 14-C, the USMCA Parties preserved NAFTA’s substantive investment obligations with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Claimants’ Counter-Memorial at Sections II, IV-VII, IX. Documents concerning the U.S. negotiating position and/or understandings regarding grandfathering, continuation, or otherwise carrying forward obligations contained in NAFTA Chapter 11 following the entry into force of USMCA are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.h for the same reasons stated above with respect to Request No. 2.
D. Response to objections and request for	Claimants oppose Respondent’s objection for the same reasons as described in Request No. 2.a.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 2.h – U.S. Negotiating Position Otherwise Related to Grandfathering of the NAFTA Chapter 11 Obligations
resolution (requesting party)	<p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce all documents described in this Request No. 2.h, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023.</p>
E. Decision of the Tribunal	<p>The Arbitral Tribunal considers that the documents sought under this request are included in Request 2.a and no decision is therefore made.</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2.i U.S. Negotiating Position Related to the USMCA Protocol**

Document Request No.	Request No. 2.i – U.S. Negotiating Position Related to the USMCA Protocol
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.i, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the United States Government’s negotiating position and/or understandings during the negotiation of USMCA regarding the <b>USMCA Protocol</b> .
B. Relevance and materiality, including references to submissions (requesting party)	The USMCA Protocol provides that, “[u]pon 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.” Respondent contends that the USMCA Protocol shows that the Section A obligations do not apply to claims arising from measures taken during the transition period with respect to legacy investments. <i>See</i> Respondent’s Memorial at paras. 36-38. Claimants have shown that the clause “without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA” gives effect to the NAFTA obligations that are incorporated by reference into USMCA, including the NAFTA Chapter 11 obligations incorporated into paragraph 1 of Annex 14-C. <i>See</i> Claimants’ Counter-Memorial at paras. 81-84. Thus, documents concerning the U.S. negotiating position and/or understandings regarding the USMCA Protocol are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.i for the same reasons stated above with respect to Request No. 2.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection for the same reasons as described in Request No. 2.a.  <b><i>Request for the Tribunal:</i></b>  Claimants request that the Tribunal order Respondent to produce all documents described in this Request No. 2.i, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 2.i – U.S. Negotiating Position Related to the USMCA Protocol
	National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023.
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 2.a and no decision is therefore made.



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 2.j U.S. Negotiating Position Related to Article 34.1 of USMCA**

Document Request No.	Request No. 2.j – U.S. Negotiating Position Related to Article 34.1 of USMCA
A. Documents or category of documents requested (requesting party)	To the extent not produced under Request No. 1.j, all documents (including, but not limited to, negotiating documents, proposals, or positions; explanatory statements or other explanatory material; discussion documents; preparatory works; reports; minutes; draft documents; emails; and other electronic or non-electronic materials) codifying, reflecting, discussing, or explaining the United States Government’s negotiating position and/or understandings during the negotiation of USMCA regarding <b>Article 34.1 of USMCA</b> (including previous iterations of that provision).
B. Relevance and materiality, including references to submissions (requesting party)	Respondent asserts that, because Article 34.1 does not refer to the continued application of the NAFTA Chapter 11 obligations, those obligations do not apply to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 59. Claimants have shown that this assertion misconstrues the meaning of, and draws incorrect inferences from, Article 34.1. <i>See</i> Claimants’ Counter-Memorial at paras. 90-94. Documents concerning the U.S. negotiating position and/or understandings regarding Article 34.1 are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 2.j for the same reasons stated above with respect to Request No. 2.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection for the same reasons as described in Request No. 2.a. <b><i>Request for the Tribunal:</i></b> Claimants request that the Tribunal order Respondent to produce all documents described in this Request No. 2.j, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 2.j – U.S. Negotiating Position Related to Article 34.1 of USMCA
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 2.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 3 Other Documents Related to USMCA**

**Request No. 3.a Other Documents Related to Chapter 14**

Document Request No.	Request No. 3.a – Other Documents Related to Chapter 14
A. Documents or category of documents requested (requesting party)	<p>All documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other documents) used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>any or all provisions included in the investment chapter of USMCA, including Chapter 14 of USMCA</b> (and any previous iterations of that chapter and its provisions).</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.a – Other Documents Related to Chapter 14
B. Relevance and materiality, including references to submissions (requesting party)	<p>The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at Sections I-III. This objection implicates multiple provisions in Chapter 14 of USMCA. <i>See</i> Claimants’ Counter-Memorial at Sections I, II, IV-VII, and IX; Respondent’s Memorial at Section II.A.1-2. The requested documents relate to the intended meaning and the U.S. Government’s understanding of the provisions of Chapter 14 and are therefore relevant and material to resolving Respondent’s preliminary objection.</p>
C. Objections to document request (objecting party)	<p>The United States objects to Request No. 3.a. Article 3.3(a)(ii) of the IBA Rules provides that “[a] Request to Produce shall contain . . . a description in sufficient detail (including subject matter) of a <i>narrow and specific</i> requested category of Documents that are reasonably believed to exist.”<sup>45</sup></p> <p>The category of documents sought by Request No. 3.a is neither narrow nor specific. It seeks communications between <i>any</i> employee of <i>any</i> U.S. government agency (again ignoring that USTR was the lead U.S. agency in negotiations of and outreach regarding the USMCA) with <i>any</i> other party occurring at <i>any</i> time relating to the specified subjects. Moreover, the request seeks internal documents prepared in connection with discussions, presentations, testimony, or communications regarding the U.S. position in the USMCA negotiations, which are likely to be subject to the deliberative process privilege and/or the attorney-client privilege.<sup>46</sup> Request No. 3.a is overbroad and should be rejected on that basis alone.</p> <p>In any event, for the reasons discussed in the responses and objections to Request No. 2, (i) Claimants have not established that the requested documents, assuming <i>arguendo</i> that any could constitute supplementary means of interpretation under Article 32 of the Vienna Convention, are relevant to the U.S. preliminary objection or material to its outcome; and (ii) even if Claimants had established that recourse to the preparatory work of the treaty would be appropriate, their request is overbroad in that it seeks internal U.S. documents that were neither shared with the other USMCA Parties nor contain information regarding the Parties’ negotiations.</p>

<sup>45</sup> IBA Rules, Art. 3.3(a)(ii) (emphasis added).

<sup>46</sup> IBA Rules, Art. 9.2(b) and (f).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.a – Other Documents Related to Chapter 14
D. Response to objections and request for resolution (requesting party)	<p>Claimants’ document production request is narrowly tailored. As with Request No. 2.a, through this request, Claimants seek documents that show the U.S. Government’s understanding of Annex 14-C and related USMCA provisions. As Respondent has acknowledged, multiple U.S. Government agencies were involved in negotiating USMCA. Documents produced by those agencies, as well as their officials and employees, may have expressed U.S. Government understandings of USCMA’s investment chapter. As the record shows, the U.S. Government communicated its understanding of the applicable USMCA provisions to a diverse range of stakeholders inside and outside the U.S. Government.<sup>47</sup> Thus, Claimants’ request for documents that U.S. Government agencies, officials, and employees used to brief a range of stakeholders on their understanding of USMCA’s investment chapter and the disputed USMCA provisions is an appropriately tailored request. As with Request No. 2.a, in the spirit of cooperation, Claimants are willing to modify the scope of their request to documents that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department).</p> <p>Again, for the reasons explained in response to Respondent’s objections to Request No. 2.a, Respondent is wrong that Claimants have not established that the documents are relevant or material to Respondent’s preliminary objection. As Claimants have shown, unilateral statements by treaty parties constitute supplementary means of interpretation under Article 32 of the Vienna Convention. Thus, Claimants are entitled to rely on documents used or prepared by U.S. Government agencies, officials, and employees expressing an understanding of Annex 14-C and related provisions to confirm Claimants’ interpretation Annex 14-C. Further, Claimants seek the requested documents to support their argument that Respondent has fabricated a bad faith, <i>post hoc</i> interpretation of Annex 14-C for the purpose of this arbitration that contradicts the U.S. Government’s earlier, expressed understanding of Annex 14-C.</p> <p>To the extent that Respondent objects to disclosing documents on grounds of the attorney-client privilege or because the documents relate to the U.S. Government’s deliberative process, Respondent has failed to carry its burden for the same reasons discussed in response to earlier objections above. Instead, Respondent simply asserts that the documents are “likely” to be privileged, and it has apparently made no effort to confirm whether the documents are actually privileged. Furthermore, even when a document may show a government’s deliberative process, tribunals have</p>

<sup>47</sup> See, e.g., Exhibit C-118, Email Exchange between Michael Tracton and Lauren Mandell, “RE: OECD Week Item,” Oct. 19, 2018, at p. 1 of attachment “Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings” (p. 2 PDF) (containing talking points for OECD Investment Committee Meetings regarding USMCA’s investment chapter); Exhibit C-119, Email from Karin Kizer to Lauren Mandell, “Background for Brussels Conference (11.16.18),” Nov. 17, 2018, at p. 2 of attachment (p. 3 PDF) (containing discussion points regarding USMCA’s investment chapter for UNCITRAL Working Group III meetings).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.a– Other Documents Related to Chapter 14
	<p>required disclosure if the documents are important to the claimant’s case and are not otherwise available.<sup>48</sup></p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.a, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023.<sup>49</sup></p>
E. Decision of the Tribunal	<p>The Arbitral Tribunal considers that the relevance of request 3.a, which relates to documents established in connection with any exchange or communication with a broad range of public and private entities, has not been established to its satisfaction. However, the Tribunal orders, insofar as these documents are not covered by the orders made in respect of Requests 1.a and 2.a, the production of any correspondence or documents exchanged from 20 January 2017 to present between the USTR, the State Department, the US Department of Commerce and/or the Executive Office of the President reflecting the Respondent’s position in the negotiation of the investment Chapter of USMCA, including Chapter 14 of USMCA. The same provisions as provided above shall apply with respect of any allegation of privilege.</p>

<sup>48</sup> See Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at paras. 22, 26 (“[I]n view of an evolving *jurisprudence constante* by prior NAFTA tribunals, that any refusal to produce documents based on their political or institutional sensitivity requires a balancing process, weighing, on the one hand, the compelling nature of the requested party’s asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party’s case. . . . with respect to claims of sensitivity of government deliberations, the Tribunal has generally found the following considerations to be of particular importance: - The Investors’ interest in production of the requested document to advance the Investors’ case . . . - Disclosure or availability of non-privileged sources with related content . . . .” (emphasis added); Exhibit CL-196, *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Requests for Production of Documents and Challenges to Assertions of Privilege of Apr. 21, 2006, at para. 14 (“[A]lthough the Tribunal recognizes the assertion of and interests in the deliberative process privilege, it finds the statement of Claimant’s need, particularly given the apparent absence of other documents or other means of proof available to the Claimant, to be sufficiently great to override those interests. Therefore, the Tribunal requests Respondent to produce the ten documents at issue . . . .”) (emphasis added); *id.* at para. 48 (“Balancing these interests, the Tribunal holds that there must be a sufficient enough showing of need to ensure that the governmental process is protected. The Tribunal has not found a sufficient statement of need in the arguments presented at this point . . . .”).

<sup>49</sup> See Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” *available at* <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 3.b Other Documents Related to Article 14.2(1), 14.2(3), and 14.2(4) of USMCA**

Document Request No.	Request No. 3.b – Other Documents Related to Article 14.2(1), 14.2(3), and 14.2(4) of USMCA
A. Documents or category of documents requested (requesting party)	<p>To the extent not covered by Request No. 3.a, all documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other materials) used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>Article 14.2(1), (3), and (4) of USMCA</b> (including previous iterations of those provisions).</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.b – Other Documents Related to Article 14.2(1), 14.2(3), and 14.2(4) of USMCA
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Respondent’s preliminary objection hinges on the temporal scope of Annex 14-C. Article 14.2(1) addresses the scope of measures to which Chapter 14 applies. Article 14.2(3) of USMCA addresses the temporal scope of Annex 14-C. <i>See</i> Claimants’ Counter-Memorial at para. 27 and footnotes 28-29. Article 14.2(4) confirms that Annex 14-C is one of three annexes under which investors may submit claims to arbitration under Chapter 14. Thus, the requested documents regarding Article 14.2(1), (3), and (4) are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 3.b for the same reasons stated above with respect to Request No. 3.a.
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection for the reasons explained in response to Respondent’s objection to Request No. 3.a.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.b, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023..<sup>50</sup></p>

<sup>50</sup> *See* Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” *available at* <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.b – Other Documents Related to Article 14.2(1), 14.2(3), and 14.2(4) of USMCA
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 3.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 3.c Other Documents Related to Paragraph 1 of Annex 14-C**

Document Request No.	Request No. 3.c – Other Documents Related to Paragraph 1 of Annex 14-C
A. Documents or category of documents requested (requesting party)	<p>To the extent not covered by Request No. 3.a, all documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other materials) used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>Paragraph 1 of Annex 14-C</b> (including previous iterations of that provision).</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.c – Other Documents Related to Paragraph 1 of Annex 14-C
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Claimants have shown that, through paragraph 1 of Annex 14-C, the USMCA Parties chose to apply NAFTA’s substantive investment obligations to measures taken in relation to legacy investments during the transition period. <i>See</i> Claimants’ Counter-Memorial at paras. 36-37. The requested documents are likely to reflect the intended meaning and/or the U.S. Government’s understanding of paragraph 1 of Annex 14-C and are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 3.c for the same reasons stated above with respect to Request No. 3.a.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection for the reasons explained in response to Respondent’s objection to Request No. 3.a.  <b><i>Request for the Tribunal:</i></b>  Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.c that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023. <sup>51</sup>

<sup>51</sup> *See* Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” *available at* <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.c – Other Documents Related to Paragraph 1 of Annex 14-C
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 3.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 3.d Other Documents Related to Footnote 20 of Annex 14-C**

Document Request No.	Request No. 3.d – Other Documents Related to Footnote 20 of Annex 14-C
A. Documents or category of documents requested (requesting party)	<p>To the extent not covered by Request No. 3.a, all documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other materials) or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>Footnote 20 of Annex 14-C</b> (including previous iterations of that provision).</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.d – Other Documents Related to Footnote 20 of Annex 14-C
B. Relevance and materiality, including references to submissions (requesting party)	<p>The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. As Claimants observed in their Counter-Memorial, Footnote 20 of Annex 14-C confirms that the obligations contained in Section A of NAFTA Chapter 11 apply to claims submitted under paragraph 1 of Annex 14-C in connection with measures taken during the transition period. <i>See</i> Claimants’ Counter-Memorial at para. 38. Claimants and Respondent disagree as to the meaning of this provision. <i>See</i> Respondent’s Memorial at paras. 48-49. The requested documents are likely to reflect the intended meaning and/or the U.S. Government’s understanding of Footnote 20 are therefore relevant and material to resolving Respondent’s preliminary objection.</p>
C. Objections to document request (objecting party)	<p>The United States objects to Request No. 3.d for the same reasons stated above with respect to Request No. 3.a.</p>
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection for the reasons explained in response to Respondent’s objection to Request No. 3.a.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.d that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023.<sup>52</sup></p>

<sup>52</sup> *See* Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” *available at* <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.d – Other Documents Related to Footnote 20 of Annex 14-C
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 3.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 3.e Other Documents Related to Footnote 21 of Annex 14-C**

Document Request No.	Request No. 3.e – Other Documents Related to Footnote 21 of Annex 14-C
A. Documents or category of documents requested (requesting party)	<p>To the extent not covered by Request No. 3.a, all documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other materials) or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications with:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>Footnote 21 of Annex 14-C</b> (including previous iterations of that provision).</p>



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.e – Other Documents Related to Footnote 21 of Annex 14-C
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. As Claimants have shown, Footnote 21 carves out from Annex 14-C claims that are eligible for submission to arbitration under Annex 14-E, and that carveout makes sense only if Annex 14-C, like Annex 14-E, applies to measures taken after USMCA’s entry into force. <i>See</i> Claimants’ Counter-Memorial at Section V.A. Claimants and Respondent disagree as to the significance of this provision. <i>See</i> Respondent’s Memorial at paras. 50-57. The requested documents are likely to reflect the intended meaning and/or the U.S. Government’s understanding of Footnote 21 and are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 3.e for the same reasons stated above with respect to Request No. 3.a.
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection for the reasons explained in response to Respondent’s objection to Request No. 3.a.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.e, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023.<sup>53</sup></p>

<sup>53</sup> *See* Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” available at <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.e – Other Documents Related to Footnote 21 of Annex 14-C
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 3.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 3.f Other Documents Related to Meaning of Legacy Investment**

Document Request No.	Request No. 3.f – Other Documents Related to Meaning of Legacy Investment
A. Documents or category of documents requested (requesting party)	<p>To the extent not covered by Request No. 3.a, all documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other materials) used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications with:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>paragraph 6(1) of Annex 14-C</b>, including previous iterations of that provision.</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.f – Other Documents Related to Meaning of Legacy Investment
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. As Claimants have observed, Annex 14-C provides that an investment is a legacy investment only if it (1) existed when NAFTA was in force and (2) remained in existence when USMCA entered into force. <i>See</i> Claimants’ Counter-Memorial at paras. 86-87. Claimants have further explained that this second requirement shows that Annex 14-C applies to measures taken after USMCA’s entry into force. <i>See</i> Claimants’ Counter-Memorial at paras. 86-87. Claimants and Respondent disagree as to the significance of this provision. <i>See</i> Respondent’s Memorial at paras. 27-29. Thus, the requested documents regarding paragraph 6(1) are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 3.f for the same reasons stated above with respect to Request No. 3.a.
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection for the reasons explained in response to Respondent’s objection to Request No. 3.a.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.f, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023.<sup>54</sup></p>

<sup>54</sup> *See* Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” available at <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.f – Other Documents Related to Meaning of Legacy Investment
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 3.a and no decision is therefore made.

TC Energy Corporation and TransCanada Pipelines Limited v. United States of America  
(ICSID Case No. ARB/21/63)

**Request No. 3.g Other Documents Related to Length of Transition Period**

Document Request No.	Request No. 3.g – Other Documents Related to Length of Transition Period
A. Documents or category of documents requested (requesting party)	<p>To the extent not covered by Request No. 3.a, all documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other materials) used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>the length of the transition period, including but not limited to its relationship, <i>vel non</i>, to NAFTA Chapter 11’s limitations period, or paragraph 3 of Annex 14-C</b> (including previous iterations of that provision).</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.g – Other Documents Related to Length of Transition Period
B. Relevance and materiality, including references to submissions (requesting party)	Respondent asserts that the length of the transition period (contained in paragraph 3 of Annex 14-C) was designed to align with the limitations period under NAFTA Chapter 11. <i>See</i> Respondent’s Memorial at paras. 67-69. According to Respondent, this alleged correspondence confirms its argument that Annex 14-C does not apply to measures taken during the transition period. <i>See id.</i> Claimants have disputed that the USMCA Parties designed the transition period to align with NAFTA Chapter 11’s limitations period. <i>See</i> Claimants’ Counter-Memorial at paras. 100-05. The requested documents are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 3.g for the same reasons stated above with respect to Request No. 3.a.
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection for the reasons explained in response to Respondent’s objection to Request No. 3.a.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.g, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023.<sup>55</sup></p>

<sup>55</sup> *See* Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” available at <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.g – Other Documents Related to Length of Transition Period
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 3.a and no decision is therefore made.



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 3.h Other Documents Otherwise Related to the Grandfathering of the NAFTA Chapter 11 Obligations**

Document Request No.	Request No. 3.h – Other Documents Otherwise Related to the Grandfathering of the NAFTA Chapter 11 Obligations
A. Documents or category of documents requested (requesting party)	<p>To the extent not covered by Request No. 3.a to Request No. 3.g, all documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other materials) used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>the grandfathering of NAFTA Chapter 11’s obligations after USMCA’s entry into force.</b></p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.h – Other Documents Otherwise Related to the Grandfathering of the NAFTA Chapter 11 Obligations
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that USMCA does not extend the substantive investment obligations of NAFTA to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Respondent recognizes that USMCA carried forward certain NAFTA obligations, but asserts that USMCA did not preserve NAFTA’s substantive investment obligations with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 59. Claimants have asserted that, through Annex 14-C, the USMCA Parties preserved NAFTA’s substantive investment obligations with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Claimants’ Counter-Memorial at Sections II, IV-VII, IX. Thus, the requested documents are relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 3.h for the same reasons stated above with respect to Request No. 3.a.
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection for the reasons explained in response to Respondent’s objection to Request No. 3.a.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.h, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023.<sup>56</sup></p>

<sup>56</sup> *See* Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” *available at* <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.h – Other Documents Otherwise Related to the Grandfathering of the NAFTA Chapter 11 Obligations
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 3.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 3.i Other Documents Related to USMCA Protocol**

Document Request No.	Request No. 3.i – Other Documents Related to USMCA Protocol
A. Documents or category of documents requested (requesting party)	<p>All documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other materials) used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>the USMCA Protocol</b>.</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.i – Other Documents Related to USMCA Protocol
B. Relevance and materiality, including references to submissions (requesting party)	The USMCA Protocol provides that, “[u]pon 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.” Respondent contends that the USMCA Protocol shows that the Section A obligations do not apply to claims arising from measures taken during the transition period with respect to legacy investments. <i>See</i> Respondent’s Memorial at paras. 36-38. Claimants have shown that the clause “without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA” gives effect to the NAFTA obligations that are incorporated by reference into USMCA, including the NAFTA Chapter 11 obligations incorporated into paragraph 1 of Annex 14-C. <i>See</i> Claimants’ Counter-Memorial at paras. 81-84. Thus, the requested documents are relevant and material to Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 3.i for the same reasons stated above with respect to Request No. 3.a.
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection for the reasons explained in response to Respondent’s objection to Request No. 3.a.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.i, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023.<sup>57</sup></p>

<sup>57</sup> *See* Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” available at <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.i – Other Documents Related to USMCA Protocol
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 3.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 3.j Other Documents Related to Article 34.1 of USMCA**

Document Request No.	Request No. 3.j – Other Documents Related to Article 34.1 of USMCA
A. Documents or category of documents requested (requesting party)	<p>All documents (including, but not limited to, talking points, briefing materials, testimony, reports, written responses to questions, notes, correspondence (whether by email, letter, or any other medium), or other materials) used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government in connection with any discussion with, presentation to, testimony before, or communications:</p> <ul style="list-style-type: none"> <li>a. within, between, or among U.S. Government agencies or the Executive Office of the President;</li> <li>b. to or with trade associations or unions, and officials or members thereof;</li> <li>c. to or with advisory committees, including the Advisory Committee for Trade Policy Negotiations, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade and Environment Policy Advisory Committee, the Intergovernmental Policy Advisory Committee, the Industry Trade Advisory Committees, the President’s Export Council, or other advisory committees;</li> <li>d. to or with Members of Congress, congressional committees, or congressional staff;</li> <li>e. to or with state or municipal level governments;</li> <li>f. to or with the U.S. International Trade Commission;</li> <li>g. to or with the U.S. Congressional Research Service;</li> <li>h. to or with foreign governments or international organizations; or</li> <li>i. to or with other parties</li> </ul> <p>regarding <b>Article 34.1 of USMCA</b> (including any previous iterations of that provision).</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.j – Other Documents Related to Article 34.1 of USMCA
B. Relevance and materiality, including references to submissions (requesting party)	Respondent asserts that, because Article 34.1 does not refer to the continued application of the NAFTA Chapter 11 obligations, those obligations do not apply to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 59. Claimants have shown that this assertion misconstrues the meaning of, and draws incorrect inferences from, Article 34.1. <i>See</i> Claimants’ Counter-Memorial at paras. 90-94. The requested documents are therefore relevant and material to resolving Respondent’s preliminary objection.
C. Objections to document request (objecting party)	The United States objects to Request No. 3.j for the same reasons stated above with respect to Request No. 3.a.
D. Response to objections and request for resolution (requesting party)	<p>Claimants oppose Respondent’s objection for the reasons explained in response to Respondent’s objection to Request No. 3.a.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 3.j, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023. Claimants further clarify that, with respect to part (c) of this request (advisory committees), they request that the Tribunal also order production of responsive documents from January 20, 2017 to the present in the possession, custody, or control of the U.S. Department of Commerce that relate to the Industry Trade Advisory Committees, which the Department of Commerce co-manages with USTR, by November 27, 2023.<sup>58</sup></p>

<sup>58</sup> *See* Exhibit C-139, U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Center,” *available at* <https://www.trade.gov/industry-trade-advisory-center> (last accessed Oct. 26, 2023).



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 3.j – Other Documents Related to Article 34.1 of USMCA
E. Decision of the Tribunal	The Arbitral Tribunal considers that the documents sought under this request are included in Request 3.a and no decision is therefore made.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

***Request No. 4 Communications between and among the USMCA Parties after USMCA’s Entry into Force***

<b>Document Request No.</b>	Request No. 4 – Communications between and among the USMCA Parties after USMCA’s Entry into Force
<b>A. Documents or category of documents requested (requesting party)</b>	Any documents or other communications exchanged between or among the USMCA Parties after USMCA’s entry into force regarding Article 14.2 of USMCA, Annex 14-C, or the USMCA Protocol.
<b>B. Relevance and materiality, including references to submissions (requesting party)</b>	In its Memorial, Respondent asserts that one of Mexico’s jurisdictional objections in Mexico’s Counter-Memorial on the Ancillary Claim in <i>Legacy Vulcan v. Mexico</i> (ICSID Case No. ARB/19/1) shows that Mexico shares Respondent’s interpretation of Annex 14-C’s temporal scope. Respondent’s Memorial at para. 89. Claimants have noted that it does not appear that Mexico raised this jurisdictional objection until filing its Counter-Memorial in December 2022, at approximately the same time that Respondent raised its preliminary objection in this proceeding. Claimants’ Counter-Memorial at para. 117. Given this timing, Claimants explained that it is reasonable to assume that Mexico’s jurisdictional objection resulted from Respondent proactively seeking to coordinate positions across this arbitration and the <i>Legacy Vulcan</i> arbitration with Mexico. <i>See</i> Claimants’ Counter-Memorial at para. 117. Communications between and among the USMCA Parties about Article 14.2 of USMCA, Annex 14-C, and the USMCA Protocol after USMCA’s entry into force are therefore relevant and material to Respondent’s preliminary objection.
<b>C. Objections to document request (objecting party)</b>	<p>The United States objects to Request No. 4. Claimants have not established that the requested documents are relevant to the U.S. preliminary objection or material to its outcome.<sup>59</sup> Claimants do not even attempt to explain how the requested documents could be relevant to the interpretation of Annex 14-C under Articles 31 and 32 of the Vienna Convention. Among other things, consultations occurring after the USMCA’s entry into force would not constitute preparatory work of the treaty or circumstances of its conclusion under Article 32.</p> <p>Each of the USMCA Parties makes its own determinations on matters of treaty interpretation in accordance with its own internal procedures. The positions that they express in litigation, arbitration, and otherwise are the result of these procedures. The United States does not have access to the documents maintained by Mexico</p>

<sup>59</sup> IBA Rules, Art. 3.3(b). *See also* Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, at 11 (Jan. 2021) (“Under Article 3.3(b), the content of the requested document needs to be both ‘relevant to the case’ and ‘material to its outcome.’”).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

	<p>regarding how it decided to assert its objection in <i>Legacy Vulcan</i> or submit its non-disputing Party submission in this case. In any event, while the positions that the parties ultimately decide to take on the interpretation of their treaty after its entry into force may be relevant, Claimants have not explained the relevance under the Vienna Convention of preliminary discussions, whether internal or between the treaty parties, in advance of such a decision.</p> <p>The United States also objects to Request No. 4 on the ground that any information provided by Mexican or Canadian government employees regarding positions under consideration by their governments is sensitive foreign government information and not subject to disclosure.<sup>60</sup></p>
<p><b>D. Response to objections and request for resolution (requesting party)</b></p>	<p>Claimants understand and accept Respondent’s assertion that the position Mexico presented in the <i>Legacy Vulcan</i> arbitration does not reflect an agreement among the USMCA Parties on the interpretation of Annex 14-C or other provisions that are relevant to Respondent’s preliminary objection. Respondent is nonetheless wrong in asserting that Claimants have failed to show that the requested documents are relevant and material. Claimants argue that Respondent has advanced a bad faith, <i>post hoc</i> interpretation of Annex 14-C for the purpose of this arbitration that fundamentally contradicts its earlier representations about the temporal scope of that provision.<sup>61</sup> Respondent disputes that it developed its current interpretation of Annex 14-C solely for the purpose of this arbitration.<sup>62</sup> To support its position, Respondent cites Mexico’s assertion in <i>Legacy Vulcan v. Mexico</i> that Annex 14-C does not allow claims arising from measures taken during the transition period.<sup>63</sup> Claimants have argued that Mexico’s position in <i>Legacy Vulcan</i> was likely the product of proactive outreach by the United States, undermining Respondent’s suggestion that Mexico’s position was the product of an independently held view and reinforcing the fact that Respondent has fabricated its current interpretation of Annex 14-C. Communications between the USMCA Parties about Annex 14-C (as well as Article 14.2 of USMCA and the USMCA Protocol) after USMCA entered into force are therefore directly relevant and material to this argument.</p> <p>Respondent’s argument that it “does not have access to the documents maintained by Mexico regarding how it decided to assert its objection in <i>Legacy Vulcan</i> or submit its non-disputing Party submission in this case” mischaracterizes Claimants’ request. Claimants have requested documents or communications <u>exchanged</u> between the USMCA Parties after USMCA’s entry into force, to which Respondent would necessarily have</p>

<sup>60</sup> IBA Rules, Art. 9.2(f).

<sup>61</sup> See, e.g., Claimants’ Counter-Memorial on Respondent’s Preliminary Objection, Aug. 11, 2023 (“Claimants’ Counter-Memorial on Preliminary Objection”), at Section VII.

<sup>62</sup> See Respondent’s Memorial on Preliminary Objection Section II.B.3

<sup>63</sup> See Respondent’s Memorial on Preliminary Objection at para. 89.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

	<p>access.</p> <p>Respondent has not established that the documents that Claimants have requested constitute sensitive foreign government information, as is its burden.<sup>64</sup></p> <p>With respect to Respondent’s objection on grounds of the deliberative process privilege and/or political sensitivity under Article 9.2(f) of the IBA Rules, NAFTA tribunals require the invoking party to complete the following steps: (i) describe the content of the document, (ii) explain the basis for non-disclosure, (iii) analyze the competing interests by “weighing, on the one hand, the compelling nature of the requested party’s asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party’s case,” and (iv) provide its analysis and conclusion.<sup>65</sup> NAFTA tribunals also require the aforementioned exercise to be performed by senior attorneys familiar with the facts of the dispute.<sup>66</sup> To the extent that Respondent invokes the deliberative process privilege also under Article 9.2(b) of the IBA Rules, Respondent must show that the requested documents are subject to that privilege within the scope of Article 9.2(b). Regardless of whether Respondent invokes Article 9.2(b) or 9.2(f), it has failed to satisfy its burden of showing that the deliberative process privilege or political sensitivity justify non-production. Even when a document may show a government’s deliberative process, or even when there is some political sensitivity involved, tribunals have required disclosure if the documents are important to the claimant’s case and are not otherwise available.<sup>67</sup></p> <p>To the extent that the documents and communications that are the subject of this request are confidential and do not fall within the definition of confidential information in the Confidentiality Order, Claimants are willing</p>
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<sup>64</sup> See, e.g., Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at paras. 22-25.

<sup>65</sup> Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at paras. 22, 24-28. See also Exhibit CL-192, *Glamis Gold v. U.S.*, Decision on Parties’ Requests for Withheld Documents at para. 38.

<sup>66</sup> See Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at para. 24; Exhibit CL-192, *Glamis Gold v. U.S.*, Decision on Parties’ Requests for Withheld Documents at para. 37.

<sup>67</sup> Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at paras. 22, 26 (“[I]n view of an evolving *jurisprudence constante* by prior NAFTA tribunals, that any refusal to produce documents based on their political or institutional sensitivity requires a balancing process, weighing, on the one hand, the compelling nature of the requested party’s asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party’s case. . . . with respect to claims of sensitivity of government deliberations, the Tribunal has generally found the following considerations to be of particular importance: - The Investors’ interest in production of the requested document to advance the Investors’ case . . . - Disclosure or availability of non-privileged sources with related content . . .” (emphasis added); Exhibit CL-196, *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Requests for Production of Documents and Challenges to Assertions of Privilege of Apr. 21, 2006, at para. 14 (“[A]lthough the Tribunal recognizes the assertion of and interests in the deliberative process privilege, it finds the statement of Claimant’s need, particularly given the apparent absence of other documents or other means of proof available to the Claimant, to be sufficiently great to override those interests. Therefore, the Tribunal requests Respondent to produce the ten documents at issue . . .”) (emphasis added); *id.* at para. 48 (“Balancing these interests, the Tribunal holds that there must be a sufficient enough showing of need to ensure that the governmental process is protected. The Tribunal has not found a sufficient statement of need in the arguments presented at this point . . .”).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

	<p>to enter into an amended Confidentiality Order that expands the scope of that definition to cover the requested documents and communications and that includes other provisions necessary to ensure the confidentiality of the requested information.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents and communications described in this Request No. 4 that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023.</p>
<p><b>E. Decision of the Tribunal</b></p>	<p>The Arbitral Tribunal is not convinced of the <i>prima facie</i> relevance of this request, which is therefore rejected.</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 5 Documents Discussing Keystone XL in Connection with NAFTA Renegotiation/USMCA Negotiation**

Document Request No.	Request No. 5 – Documents Discussing Keystone XL in Connection with NAFTA Renegotiation/USMCA Negotiation
A. Documents or category of documents requested (requesting party)	All documents (including, but not limited to, negotiating documents, preparatory works, reports, minutes, draft documents, emails, and other electronic or non-electronic materials) discussing or otherwise relating to the Keystone XL Pipeline (“KXL Pipeline”) in the context of the renegotiation of NAFTA/negotiation of USMCA.
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that NAFTA’s substantive investment obligations do not apply to measures taken with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Respondent argues that, because President Joseph Biden revoked the 2019 Permit authorizing the construction and operation of KXL Pipeline after USMCA entered into force, Claimants’ claims arising from that revocation are not covered by Annex 14-C. <i>See id.</i> Documents discussing the KXL Pipeline in the context of the NAFTA renegotiation/USMCA negotiation are therefore relevant and material to Respondent’s preliminary objection.
C. Objections to document request (objecting party)	<p>The United States objects to Request No. 5. Article 3.3(a)(ii) of the IBA Rules provides that “[a] Request to Produce shall contain . . . a description in sufficient detail (including subject matter) of a <i>narrow and specific</i> requested category of Documents that are <i>reasonably believed to exist</i>.”<sup>68</sup></p> <p>The category of documents sought by Request No. 5 is neither narrow nor specific. It seeks “[a]ll documents” relating to the specified topic without limiting the request to a specific U.S. government agency, group of agencies, or even branch of government. Request No. 5 is overbroad and should be rejected on that basis alone.</p> <p>Request No. 5 also fails to comply with Article 3.3(a)(ii) of the IBA Rules because Claimants have offered no basis to believe that there exist any documents discussing the KXL Pipeline in the context of the USMCA negotiations.</p> <p><i>First</i>, Claimants posed a substantively identical request to USTR via the Freedom of Information Act (“FOIA”) and received the following response: “No records. USTR’s eDiscovery search returned only press clips.”<sup>69</sup> The absence of</p>

<sup>68</sup> IBA Rules, Art. 3.3(a)(ii) (emphasis added).

<sup>69</sup> Email from Monique T. Ricker to Kyle Fiet (Aug. 10, 2023) (C-113).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

	<p>any documents responsive to Request No. 5 at USTR, the lead U.S. agency in negotiating the USMCA, entirely undermines Claimants’ rationale for this request.</p> <p><i>Second</i>, independent of USTR’s confirmation, Request No. 5 is plainly a “fishing expedition” of the type that the IBA Rules were designed to exclude.<sup>70</sup> Claimants appear to posit that members of the Trump administration (1) induced TC Energy’s predecessor to settle the claims in <i>TransCanada PipeLines Limited v. United States of America</i>, ICSID Case No. ARB/16/21; (2) granted a permit for the KXL Pipeline; and then (3) negotiated limits into Annex 14-C that would bar claims based on conduct occurring after the USMCA’s entry into force to pave the way for the Biden administration to avoid liability for revoking the Trump administration’s own KXL Pipeline permit. None of this makes sense, as the United States will address in more detail in its Reply in support of its preliminary objection. Nor does it account for the role of Canada, which chose not to be a part of the USMCA’s new investor-State dispute settlement framework, thereby depriving Claimants of the ability to bring a claim under that framework.</p> <p>Claimants have offered no evidence to support their far-fetched theory and the absence of responsive documents at USTR confirms that it has no basis in reality. A subjective hope that the requested documents will provide evidence for a theory that is otherwise based on pure conjecture is not enough to justify a search for those documents.</p>
<p>D. Response to objections and request for resolution (requesting party)</p>	<p>Respondent is wrong that Claimants’ document production request is not appropriately tailored. As explained above, multiple U.S. Government agencies were involved in the NAFTA renegotiation/USMCA negotiation, meaning that any of those agencies (including their officials and employees) may have produced documents discussing the KXL Pipeline in the context of the NAFTA renegotiation/USMCA negotiation. Furthermore, the State Department obviously played a central role in the earlier NAFTA arbitration and played an important role alongside USTR in the negotiation of the investment chapter of USCMA. As with Request No. 1 to Request No. 3, Claimants are willing to limit the scope of their requests to documents in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department).</p> <p>Respondent has misrepresented Claimants’ arguments in response to its preliminary objection. Respondent asserts Claimants have sought documents discussing the KXL Pipeline in connection with the NAFTA renegotiation/USMCA negotiation to support a theory “that relevant provisions of the USMCA were drafted in 2017-18, under the Trump administration, specifically to exclude Claimants’ claims that relate to actions taken by the Biden administration in 2021.”<sup>71</sup> Claimants have made no such argument. To the contrary, as Claimants have shown in their submissions, USMCA does <u>not</u> exclude Claimants’ claims. Annex 14-C of USMCA allows investors holding legacy investments to</p>

<sup>70</sup> Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, at 9 (Jan. 2021) (“Article 3.3 [of the IBA Rules] is designed to prevent a broad ‘fishing expedition’, while at the same time permitting parties to request documents that can be identified with reasonable specificity and which can be shown to be relevant to the case and material to its outcome.”).

<sup>71</sup> Respondent’s Cover Letter for Respondent’s Responses & Objections to Claimants’ Document Requests, Oct. 11, 2023 (“Respondent’s Letter”), at p. 2.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

assert claims in connection with actions taken during the three-year period after the termination of NAFTA.<sup>72</sup>

Claimants argue that the doctrine of unclean hands forecloses Respondent’s preliminary objection because Respondent induced Claimants to drop their claims against Respondent in 2016 (the “2016 NAFTA Claims”) in exchange for the promise of a Presidential permit. Respondent then reneged on that promise and revoked the Presidential permit on the same basis that led the 2016 NAFTA Claims, and now argues that Claimants have no recourse to arbitration under USMCA for breaches of NAFTA obligations.<sup>73</sup> Evidence bearing on Respondent’s understanding about Claimants’ potential recourse to arbitration while USMCA was being negotiated is relevant and material to this argument.

Furthermore, on the basis of record evidence, it is reasonable for Claimants to believe Respondent may have documents discussing the KXL Pipeline in the context of the NAFTA renegotiation/USMCA negotiation. In an ICSID Review article, Lauren Mandell, the United States’ chief negotiator of USMCA’s investment chapter, linked the Trump Administration’s investment policy to the 2016 NAFTA Claims (and, therefore, the KXL Pipeline). He observed that “[a]s of 20 January 2017, the disputing parties had nominated two of three arbitrators [in Claimants’ pending case against Respondent]; it was up to the Trump Administration to undertake the next steps in the arbitration, as it formulated its new investment policy.”<sup>74</sup> In other words, the Trump Administration decided what actions it might take with respect to the KXL Pipeline—which ultimately involved inviting Claimants’ subsidiary, Keystone Pipeline, L.P., to reapply for a Presidential permit, inducing Claimants to drop their 2016 NAFTA Claims in exchange for a Presidential permit, and actively encouraging the KXL Pipeline’s construction—in the context of its approach to negotiating (or renegotiating) trade and investment agreements. Those agreements included NAFTA/USMCA.

Finally, Respondent’s observation that USTR previously stated that it found no responsive documents in response to the FOIA requests is irrelevant to Claimants’ request here. As explained above, Claimants seek documents discussing the KXL Pipeline in the context of the NAFTA renegotiation/USMCA negotiation from more U.S. Government entities than just USTR.

***Request for the Tribunal:***

Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 5, from January 20, 2017 to the present, that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023.

<sup>72</sup> See, e.g., Claimants’ Counter-Memorial on Preliminary Objection at paras. 1-5.

<sup>73</sup> See Claimants’ Counter-Memorial on Preliminary Objection at Section VIII.B.

<sup>74</sup> Exhibit C-100, Lauren Mandell, “The Trump Administration’s Impact on US Investment Policy,” 35 *ICSID Review* 345 (2020), at p. 350.



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

<p>E. Decision of the Tribunal</p>	<p>The Arbitral Tribunal notes that the Claimants submit that because the Respondent allegedly induced the Claimants to drop their 2016 NAFTA Claims in exchange for the promise of a Presidential permit to then renege on that promise and revoke the Presidential permit on the same basis that led the 2016 NAFTA Claims, they are now barred by the doctrine of unclean hands from arguing that the Claimants have no recourse to arbitration under USMCA for breaches of NAFTA obligations.</p> <p>The Arbitral Tribunal does not express any view at this stage as to whether this argument prevents the Respondent from objecting to its jurisdiction. Nonetheless, at the documents production stage, the documents sought may be <i>prima facie</i> relevant to the unclean hands argument made by the Claimants.</p> <p>The Tribunal also notes that the USTR responded to a FOIA substantively identical request that no responsive documents exist beyond “press clips”. The Tribunal however believes appropriate that the Respondent make additional reasonable searches and confirm that USTR indeed holds no responsive documents, and if any exist – including in the possession, custody and control of the State Department –, that it produces them.</p> <p>The Tribunal therefore orders the Respondent to produce responsive documents in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department).</p>
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*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

***Request No. 6 Documents Discussing Ability of Investors to Submit Claims Arising from Measures Taken during Transition Period***

Document Request No.	Request No. 6 – Documents Discussing Ability of Investors to Submit Claims Arising from Measures Taken during Transition Period
A. Documents or category of documents requested (requesting party)	All documents, including, but not limited to, reports, minutes, draft documents, emails, and other electronic or non-electronic materials—and other than Annex 14-C itself—discussing whether or how investors may submit claims under Annex 14-C of USMCA in connection with measures that were proposed, imposed, taken, or continued on or after July 1, 2020.
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that NAFTA’s substantive investment obligations do not apply to measures taken with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Thus, according to Respondent, Annex 14-C does not allow claims—such as Claimants’ claims in this arbitration—arising from measures taken during the transition period. <i>See id.</i> Documents discussing whether or how Annex 14-C permits claims arising from measures taken during the transition period are therefore relevant and material to Respondent’s preliminary objection.
C. Objections to document request (objecting party)	<p>The United States objects to Request No. 6. Article 3.3(a)(ii) of the IBA Rules provides that “[a] Request to Produce shall contain . . . a description in sufficient detail (including subject matter) of a <i>narrow and specific</i> requested category of Documents that are reasonably believed to exist.”<sup>75</sup></p> <p>The category of documents sought by Request No. 6 is neither narrow nor specific. It seeks “[a]ll documents” relating to the specified topic without limiting the request to a specific U.S. government agency, group of agencies, or even branch of government. As written, the request is not even limited to documents created by the U.S. government. Nor is Request No. 6 limited in time. Request No. 6 is overbroad and should be rejected on that basis alone.</p> <p>In addition, Claimants have not established that the requested documents are relevant to the U.S. preliminary objection or material to its outcome.<sup>76</sup> Claimants do not even attempt to explain how the requested documents could be relevant to the interpretation of Annex 14-C under Articles 31 and 32 of the Vienna Convention. Among other things,</p>

<sup>75</sup> IBA Rules, Art. 3.3(a)(ii) (emphasis added).

<sup>76</sup> IBA Rules, Art. 3.3(b). *See also* Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, at 11 (Jan. 2021) (“Under Article 3.3(b), the content of the requested document needs to be both ‘relevant to the case’ and ‘material to its outcome.’”).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 6 – Documents Discussing Ability of Investors to Submit Claims Arising from Measures Taken during Transition Period
	assessments made after the USMCA’s entry into force would not constitute preparatory work of the treaty or circumstances of its conclusion under Article 32. Moreover, documents reflecting only the U.S. position would not constitute a subsequent practice or agreement under Article 31(3).
D. Response to objections and request for resolution (requesting party)	<p>For the avoidance of doubt, Claimants seek documents that were used or prepared from the beginning of the Trump Presidency (<i>i.e.</i>, January 20, 2017) through the present. As with Request No. 2 and Request No. 3, Claimants are willing to limit the scope of their requests to documents in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department).</p> <p>The requested documents are clearly relevant and material to Respondent’s preliminary objection. Respondent’s preliminary objection turns precisely on whether investors can submit claims to arbitration under Annex 14-C for measures taken during the transition period. Claimants argue that they can. Moreover, as Claimants have shown above, unilateral statements by the U.S. Government (including its agencies, and their officials and employees) constitute supplementary means of interpretation under Article 32 of the Vienna Convention. Accordingly, the documents that Claimants seek may confirm their interpretation of Annex 14-C and therefore confirm that Respondent’s preliminary objection is unfounded. Moreover, as also explained above, the documents that Claimants have requested are relevant to Claimants’ argument that Respondent’s preliminary objection arises from a fabricated, <i>post hoc</i> interpretation of Annex 14-C that contradicts earlier representations the U.S. Government made about investors’ ability to submit claims under Annex 14-C in connection with measures taken during the transition period.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce, by November 27, 2023, all documents in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that were used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government, from January 20, 2017 through the present, discussing whether or how investors may submit claims under Annex 14-C of USMCA in connection with measures that were proposed, imposed, taken, or continued on or after July 1, 2020.</p>

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 6 – Documents Discussing Ability of Investors to Submit Claims Arising from Measures Taken during Transition Period
E. Decision of the Tribunal	The Arbitral Tribunal has ordered, under Request 2.a, documents reflecting or discussing the Respondent’s position in the negotiation of the investment chapter, including Chapter 14, of USMCA. These documents should include documents, if any, reflecting the Respondent’s position in respect of the ability of qualified investors to submit claims arising from measures taken during the transition period. The Arbitral Tribunal has also rejected, under Request 4, documents postdating the USMCA entry into force. The Claimants have not justified to which relevant documents, beyond those ordered under Request 2.a., this request would apply. As a consequence, to the extent it covers documents not included within Request 2.a, Request 6 is rejected.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

***Request No. 7 Documents Discussing Ability of Investors to Submit Claims Against Mexican Energy Measures Taken during Transition Period***

Document Request No.	Request No. 7 – Documents Discussing Ability of Investors to Submit Claims Against Mexican Energy Measures Taken during Transition Period
A. Documents or category of documents requested (requesting party)	To the extent not covered by Request No. 6, all documents, including, but not limited to, reports, minutes, draft documents, emails, and other electronic or non-electronic materials—and other than Annexes 14-C and 14-D themselves—discussing whether or how investors may submit claims under Annex 14-C of USMCA in connection with energy-related measures that Mexico proposed, imposed, took, or continued on or after July 1, 2020.
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that NAFTA’s substantive investment obligations do not apply to measures taken with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Thus, according to Respondent, Annex 14-C does not allow claims—such as Claimants’ claims in this arbitration—arising from measures taken during the transition period. <i>See id.</i> During the transition period, Mexico enacted energy-related measures, which were potentially subject to claims under Annex 14-C. Documents discussing investors’ options for challenging Mexican energy-related measures adopted after USMCA’s entry into force are therefore relevant and material to Respondent’s preliminary objection. The requested documents will also shed light on the U.S. Government’s interpretation of Footnote 21, and the relationship between Annexes 14-C and 14-E of USMCA.
C. Objections to document request (objecting party)	Request No. 7 is duplicative of Request No. 6 and the United States objects for the same reasons stated above.
D. Response to objections and request for resolution (requesting party)	Claimants oppose Respondent’s objection to this document production request for the same reasons they oppose Respondent’s objection to Request No. 6. As with previous requests, Claimants are willing to limit the scope of their requests to documents in the possession, custody, or control of the State Department and National Archives (to the extent that documents in the National Archives originated from USTR or the State Department).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 7 – Documents Discussing Ability of Investors to Submit Claims Against Mexican Energy Measures Taken during Transition Period
	<p>Claimants note that this document production request does not duplicate Request No. 6. As discussed in U.S. Rep. Jodey Arrington’s July 1, 2021 letter to U.S. Trade Representative Katherine Tai and a March 18, 2021 article co-authored by the United States’ former chief negotiator of USMCA’s investment chapter, Mr. Mandell, after USMCA entered into force, Mexico enacted a series of energy measures that arguably mistreated U.S. energy investors in Mexico.<sup>77</sup> As Claimants have explained, the clear implication of Mr. Mandell’s piece is that U.S. investors could submit claims arising from Mexican measures taken after USCMA’s entry into force under Annex 14-C.<sup>78</sup> U.S. Government statements corroborating that understanding would reinforce the fact that Respondent has advocated a bad faith interpretation of Annex 14-C in this arbitration that fundamentally contradicts its earlier representations about the temporal scope of Annex 14-C.</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce, by November 27, 2023, all documents in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) that were used or prepared by or on behalf of any agency, official, or employee of the Executive Branch of the U.S. Government, from July 1, 2020 through the present, discussing whether or how investors may submit claims under Annex 14-C of USMCA in connection with energy-related measures that Mexico proposed, imposed, took, or continued on or after July 1, 2020.</p>
E. Decision of the Tribunal	<p>This request is duplicative of Request 6 and is rejected for the same reasons. The Tribunal has ordered, under Request 2.a, documents reflecting or discussing the Respondent’s position in the negotiation of the investment chapter, including Chapter 14, of USMCA. These documents should include documents, if any, reflecting the Respondent’s position in respect of the ability of qualified investors to submit claims under Annex 14-C of USMCA concerning energy-related measures taken during the transition period.</p>

<sup>77</sup> Exhibit C-104, Letter from Rep. Jodey C. Arrington to Ambassador Katherine Tai, July 1, 2021; Exhibit C-102, 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, *available at* <https://www.wilmerhale.com/en/insights/client-alerts/20210318-three-tips-for-investors-in-mexicos-energy-sector-regarding-potential-usmca-claims>.

<sup>78</sup> See Claimants’ Counter-Memorial on Preliminary Objection at para. 118.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 8 Documents Related to Rep. Jodey C. Arrington’s Letter to Ambassador Katherine Tai**

Document Request No.	Request No. 8 – Documents Related to Rep. Jodey C. Arrington’s Letter to Ambassador Katherine Tai
A. Documents or category of documents requested (requesting party)	Any documents (including, but not limited to, transmitted or draft responses, correspondence, minutes, draft documents, emails, and other electronic or non-electronic materials) related to or otherwise discussing the letter from Rep. Jodey C. Arrington to Ambassador Katherine Tai on July 1, 2021. <i>See</i> Claimants’ Rejoinder on Respondent’s Request for Bifurcation at para. 22; Exhibit C-104, Letter from Rep. Jodey C. Arrington to Ambassador Katherine Tai, July 1, 2021.
B. Relevance and materiality, including references to submissions (requesting party)	The crux of Respondent’s preliminary objection is that NAFTA’s substantive investment obligations do not apply to measures taken with respect to measures taken in relation to legacy investments during the transition period. <i>See</i> Respondent’s Memorial at para. 2. Rep. Arrington’s letter discusses certain Mexican measures introduced during the transition period, notes the “surviving NAFTA commitments,” and concludes that “it is true that U.S. energy sector investors with legacy NAFTA claims or government contracts can initiate investor-State cases to address some of their claims.” Exhibit C-104, Letter from Rep. Jodey C. Arrington to Ambassador Katherine Tai, July 1, 2021, at pp. 1-2. Any correspondence concerning this letter is likely to relate to whether Annex 14-C allows claims arising from measures taken during the transition period and is therefore relevant and material to Respondent’s preliminary objection.
C. Objections to document request (objecting party)	<p>The United States objects to Request No. 8. Article 3.3(a)(ii) of the IBA Rules provides that “[a] Request to Produce shall contain . . . a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are <i>reasonably believed to exist</i>.”<sup>79</sup></p> <p>The letter at issue was addressed to the U.S. Trade Representative, Ambassador Katherine Tai. Claimants posed a substantively identical request to USTR via FOIA and received the following response: “Our search returned only the email dated July 1, 2021 from Rep. Arrington’s Legislative Assistant Clara Cargile which transmitted the letter. The FOIA office then asked USTR’s Office of Congressional Affairs to manually search their files. They too only located the letter from Rep. Arrington’s office. Therefore, USTR has no records responsive to this portion of your request.”<sup>80</sup></p> <p>Based on USTR’s response to Claimants’ FOIA request, there is no reason to believe that the requested documents</p>

<sup>79</sup> IBA Rules, Art. 3.3(a)(ii) (emphasis added).

<sup>80</sup> Email from Monique T. Ricker to Kyle Fiet (July 31, 2023) (C-111).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 8 – Documents Related to Rep. Jodey C. Arrington’s Letter to Ambassador Katherine Tai
	exist.
D. Response to objections and request for resolution (requesting party)	<p>Respondent’s assertion that there is no reason to believe that the requested documents exist is wrong. It would certainly be surprising that an agency that advocates on behalf of U.S. companies internationally and that sits in a coequal branch of government with the U.S. Congress would leave a letter about the protection of U.S. companies from a U.S. Congressman unanswered. However, even if there is no letter from Ambassador Tai responding to the letter from Congressman Arrington, it is reasonable to believe that USTR would have in its possession, custody, or control documents related to this letter (<i>e.g.</i>, talking points, briefing materials, or other similar documents). To that end, this request asks for a different universe of documents than the FOIA requests sought. The FOIA requests sought “correspondence in connection with, or in response to, the letter from Rep. Jodey C. Arrington to Ambassador Katherine Tai on July 1, 2021.”<sup>81</sup> This request seeks a greater range of documents—namely, documents “related to or otherwise discussing the letter.”</p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 8 that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that documents in the National Archives originated from USTR or the State Department) by November 27, 2023.</p>
E. Decision of the Tribunal	<p>The Arbitral Tribunal considers that the Claimants have not justified to its satisfaction the reasonable likelihood that responsive documents exist.</p> <p>The Tribunal will however direct the Respondent to make further reasonable research and confirm that Rep. Arrington’s letter remained unanswered or else to produce any response to that letter.</p>

<sup>81</sup> See Exhibit C-113, Email Exchange between Monique T. Ricker, FOIA Program Manager at USTR, and Sidley Austin LLP regarding FOIA request, June 27 – Aug. 10, 2023, at p. 3.



*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

**Request No. 9 Documents Related to the Decision to Settle ICSID Case No. ARB/16/21**

Document Request No.	Request No. 9 – Documents Related to the Decision to Settle ICSID Case No. ARB/16/21
A. Documents or category of documents requested (requesting party)	All documents (including, but not limited to, negotiating documents, preparatory works, reports, minutes, draft documents, emails, and other electronic or non-electronic materials) related to the decision to settle the ICSID arbitration <i>TransCanada Corporation and TransCanada PipeLines Limited v. United States of America</i> , ICSID Case No. ARB/16/21, and all documents (including, but not limited to, negotiating documents, preparatory works, reports, minutes, draft documents, emails, and other electronic or non-electronic materials) related to the Termination Agreement and Release of NAFTA Claims (the “Termination Agreement”), which memorializes the settlement.
B. Relevance and materiality, including references to submissions (requesting party)	Respondent induced Claimants to drop their 2016 NAFTA Claims in exchange for the promise of a Presidential permit for the KXL Pipeline, as memorialized in the Termination Agreement. Respondent then reneged on that promise by revoking the Presidential permit on the same basis that led to the 2016 NAFTA Claims. Respondent now asserts that Claimants have no recourse to arbitration. Claimants have argued that the doctrine of unclean hands forecloses Respondent’s preliminary objection. See Claimants’ Counter-Memorial at Section VIII.B. Documents relating to Respondent’s decision to settle the 2016 NAFTA Claims and enter into the Termination Agreement are relevant and material to whether the doctrine of unclean hands forecloses Respondent’s preliminary objection.
C. Objections to document request (objecting party)	<p>The United States objects to Request No. 9. Request No. 9 is a “fishing expedition” of the type that the IBA Rules were designed to exclude.<sup>82</sup> As noted in the response to Request No. 5, Claimants appear to posit that members of the Trump administration (1) induced TC Energy to settle the 2016 NAFTA Claims; (2) granted a permit for the KXL Pipeline; and then (3) negotiated limits into Annex 14-C that would bar claims based on conduct occurring after the USMCA’s entry into force to pave the way for the Biden administration to avoid liability for revoking the Trump administration’s own KXL Pipeline permit. None of this makes sense, as the United States will address in more detail in its Reply in support of its preliminary objection. Nor does it account for the role of Canada, which chose not to be a part of the USMCA’s new investor-State dispute settlement framework, thereby depriving Claimants of the ability to bring a claim under that framework.</p> <p>While documents exist concerning the settlement of the claims in <i>TransCanada Corporation and TransCanada</i></p>

<sup>82</sup> Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, at 9 (Jan. 2021) (“Article 3.3 [of the IBA Rules] is designed to prevent a broad ‘fishing expedition’, while at the same time permitting parties to request documents that can be identified with reasonable specificity and which can be shown to be relevant to the case and material to its outcome.”).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 9 – Documents Related to the Decision to Settle ICSID Case No. ARB/16/21
	<p><i>PipeLines Limited v. United States</i>, Claimants have offered no basis to believe that such documents would provide any support for their far-fetched theory. A subjective hope that the requested documents will provide evidence for a theory that is otherwise based on pure conjecture is not enough to justify a search for those documents.</p> <p>In any event, the requested documents, which concern the decision to settle claims in arbitration, the negotiation of the settlement, and the drafting of the settlement agreement are all likely to be subject to one or more of the attorney-client, attorney work product, or deliberative process privileges and should be excluded from production on that basis as well.<sup>83</sup></p>
D. Response to objections and request for resolution (requesting party)	<p>Respondent is wrong that this request amounts to a “fishing expedition.” As with its objection to Request No. 5, Respondent misrepresents Claimants’ unclean hands argument. As noted in their response in Request No. 5, Claimants do not seek documents related to the Termination Agreement in order to show that Respondent negotiated USMCA in order to bar Claimants from submitting claims to arbitration after USMCA’s entry into force. Indeed, that would make no sense, as Claimants maintain that the Tribunal has jurisdiction over their claims under Annex 14-C. Rather, Claimants argue that the doctrine of unclean hands forecloses Respondent’s preliminary objection because Respondent induced Claimants to drop the 2016 NAFTA Claims in exchange for the promise of a Presidential permit, then reneged on that promise and revoked the Presidential permit on the same basis that led the 2016 NAFTA Claims, and now argue that Claimants have no recourse to arbitration under USMCA for breaches of NAFTA obligations. In support of this argument, it is entirely reasonable for Claimants to seek communications addressing Respondent’s rationale for inducing Claimants to drop their 2016 NAFTA Claims, as well as Respondent’s understanding about Claimants’ ability to bring future claims for breaches of NAFTA. The requested documents target these types of communications.</p> <p>Claimants do not seek documents that are properly subject to the attorney-client privilege or attorney work product privilege. However, as noted with respect to the other requests, it does not appear that Respondent has even made an attempt to separate privileged or protected documents from other documents that are not protected. While it is certainly possible that some of the requested documents are privileged or protected, it is impossible to know even the categories of documents that Respondent seeks to withhold. For example, documents that discuss the scope of the settlement after it was already agreed are not documents produced in anticipation of litigation. Similarly, policy documents that do not provide legal advice and were not prepared specifically in anticipation of litigation are not protected. Respondent has simply asserted that the documents are “likely” to be privileged or otherwise protected, without any justification.</p>

<sup>83</sup> IBA Rules, Art. 9.2(b) and (f). For the avoidance of doubt, to the extent that other of Claimants’ requests seek internal U.S. government documents, such documents may likewise be subject to one or more of the same privileges.

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
(ICSID Case No. ARB/21/63)

Document Request No.	Request No. 9 – Documents Related to the Decision to Settle ICSID Case No. ARB/16/21
	<p>With respect to Respondent’s objection on grounds of the deliberative process privilege, it is unclear whether Respondent invokes Article 9.2(b) or Article 9.2(f) of the IBA Rules. Under Article 9.2(f) of the IBA Rules, NAFTA tribunals require the invoking party to: (i) describe the content of the document, (ii) explain the basis for non-disclosure, (iii) analyze the competing interests by “weighing, on the one hand, the compelling nature of the requested party’s asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party’s case,” and (iv) provide its analysis and conclusion.<sup>84</sup> NAFTA tribunals also require the aforementioned exercise to be performed by senior attorneys familiar with the facts of the dispute.<sup>85</sup> Again, Respondent has simply asserted that the documents are “likely” to be privileged and has apparently made no effort to confirm whether the documents are actually privileged. To the extent that Respondent invokes the deliberative process privilege under Article 9.2(b) of the IBA Rules, Respondent must show that the requested documents are subject to that privilege within the scope of Article 9.2(b). Regardless of whether Respondent invokes Article 9.2(b) or 9.2(f), it has failed to satisfy its burden of showing that the deliberative process privilege justifies non-production. Even when a document may show a government’s deliberative process, tribunals have required disclosure if the documents are important to the claimant’s case and are not otherwise available.<sup>86</sup></p> <p><b><i>Request for the Tribunal:</i></b></p> <p>Claimants request that the Tribunal order Respondent to produce the documents described in this Request No. 9 that are in the possession, custody, or control of USTR, the State Department, and the National Archives (to the extent that</p>

<sup>84</sup> Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at paras. 22, 24-28. See also Exhibit CL-192, *Glamis Gold v. U.S.*, Decision on Parties’ Requests for Withheld Documents at para. 38.

<sup>85</sup> See Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at para. 24; Exhibit CL-192, *Glamis Gold v. U.S.*, Decision on Parties’ Requests for Withheld Documents at para. 37.

<sup>86</sup> Exhibit CL-195, *Clayton v. Canada*, Procedural Order No. 13 at paras. 22, 26, 38 (“[I]n view of an evolving *jurisprudence constante* by prior NAFTA tribunals, that any refusal to produce documents based on their political or institutional sensitivity requires a balancing process, weighing, on the one hand, the compelling nature of the requested party’s asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party’s case. . . . [W]ith respect to claims of sensitivity of government deliberations, the Tribunal has generally found the following considerations to be of particular importance: - The Investors’ interest in production of the requested document to advance the Investors’ case . . . - Disclosure or availability of non-privileged sources with related content . . .” (emphasis added); Exhibit CL-196, *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Requests for Production of Documents and Challenges to Assertions of Privilege of Apr. 21, 2006, at para. 14 (“[A]lthough the Tribunal recognizes the assertion of and interests in the deliberative process privilege, it finds the statement of Claimant’s need, particularly given the apparent absence of other documents or other means of proof available to the Claimant, to be sufficiently great to override those interests. Therefore, the Tribunal requests Respondent to produce the ten documents at issue . . .”) (emphasis added); *id.* at para. 48 (“Balancing these interests, the Tribunal holds that there must be a sufficient enough showing of need to ensure that the governmental process is protected. The Tribunal has not found a sufficient statement of need in the arguments presented at this point . . .”).

*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*  
 (ICSID Case No. ARB/21/63)

Document Request No.	Request No. 9 – Documents Related to the Decision to Settle ICSID Case No. ARB/16/21
	documents in the National Archives originated from USTR or the State Department), from January 6, 2016 <sup>87</sup> to the present, by November 27, 2023.
E. Decision of the Tribunal	Request 9 is overbroad and is therefore rejected.

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<sup>87</sup> January 6, 2016 is when Claimants filed their Notice of Intent with respect to the 2016 NAFTA Claims. *See* Exhibit C-140, *TransCanada Corporation & TransCanada PipeLines Limited v. The Government of the United States of America*, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, Jan. 6, 2016.