

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE
UNCITRAL ARBITRATION RULES (1976)**

Alberta Petroleum Marketing Commission

Claimant

v.

United States of America

Respondent

(ICSID Case No. UNCT/23/4)

**PROCEDURAL ORDER NO. 6
ON CLAIMANT'S FURTHER REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Members of the Tribunal

Prof. Campbell A. McLachlan KC, President of the Tribunal
Mr. Stephen L. Drymer, Arbitrator
Prof. Sean D. Murphy, Arbitrator

Secretary of the Tribunal

Ms. Aïssatou Diop

Assistant to the Tribunal

Mr. Jack L.W. Wass

18 June 2025

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A. Introduction

1. By Procedural Order No. 5 on Requests for the Production of Documents dated 1 April 2025 (**PO No. 5**), the Tribunal made orders on requests by each Party for production of documents from the other, and directed a timetable for the resolution of any outstanding issues as to privilege.
2. This Procedural Order decides the Claimant's Further Requests for Orders for Production of Documents dated 14 May 2025 (**Further Requests**), to which the Respondent filed its Opposition on 26 May 2025 (**Respondent's Opposition**).
3. By its Further Requests, the Claimant challenges the Respondent's claim of deliberative process privilege and (in respect of five specified documents) of attorney-client privilege and seeks consequential orders for the production of documents listed in the privilege log produced by the Respondent in response to PO No. 5.
4. This Order adopts the defined terms used in PO Nos 4 and 5.

B. Background

5. In accordance with PO No. 1, both Parties submitted Redfern Schedules to the Tribunal for the determination of disputed document production requests.
 - (1) The Tribunal's determinations as to relevance
6. The Claimant sought seven categories of documents, each of which related to the Respondent's *ratione temporis* jurisdictional objection. In each case, the Claimant sought the documents on the basis that they would be admissible as supplementary means of interpretation under the Vienna Convention on the Law of Treaties (**VCLT**) Article 32.
7. In summary terms, the Claimant's requests fell into two groups:
 - a. Requests 1-5 sought categories of documents said to disclose negotiating positions or otherwise shed light on the interpretation of the United States-Canada-Mexico Agreement (**USMCA** or **CUSMA**);

- b. Requests 6 and 7 sought disclosure of documents already produced in the *TC Energy* proceedings, and the disclosure of unredacted versions of certain paragraphs of the Award and Dissent referring to such documents.
8. In respect of the first category of requests, the Tribunal drew a distinction between documents that could be expected to disclose information forming part of the admissible *travaux préparatoires* and other documents:
 - a. It was common ground that documents exchanged between the USMCA Contracting Parties before the treaty was signed should be disclosed. These were the subject of Request 1, which was not opposed.
 - b. The Tribunal granted each of Requests 2, 4 and 5 to the extent that it captured documents recording the position taken by the Respondent in negotiations with the other negotiating parties but not otherwise. These categories variously sought documents exchanged within the United States Trade Representative (**USTR**); or between USTR and other U.S. government agencies; or between USTR and former employees of the U.S. negotiating team, regarding the provisions of USMCA and the Protocol.¹ On the same basis, Request 3 was denied on the basis the Claimant had not established that documents exchanged between the Contracting Parties after the treaty had entered into force were relevant and material.
9. In respect of the second category of requests, the Tribunal drew a distinction between documents sought merely because they had been produced in the *TC Energy* proceedings (Request 6) and documents that had been referred to in paragraphs 186-97 of the Award by the tribunal in those proceedings (Request 7):
 - a. The Tribunal recalled that it was bound to assess disputed requests for the production of documents in light of submissions of the Parties to this arbitration, and that it needed to assess for itself whether to order the production of documents by reference to the questions put in issue in this arbitration.²

¹ Request 2 was directed to the negotiating period and Requests 4 and 5 to the period after signature of CUSMA.

² PO No. 5, [13].

- b. The Tribunal did not accept the proposition that the principle of equality of treatment requires the production of documents solely for the reason that they were produced in the *TC Energy* proceeding, or that a ruling on privilege in that proceeding is determinative.³
- c. In accordance with those general observations, the Tribunal denied Request 6, ruling that the 'fact that the Respondent has relied on the decision in *TC Energy* does not, in itself, mean that all documents produced in the course of that arbitration should be ordered to be produced in this arbitration. *But see* Tribunal's Order on Request 7.' (emphasis in underline added)
- d. However, it determined that the considerations weighed differently in relation to documents specifically discussed in the *TC Energy* Award. Accordingly, it granted Request 7 because it was satisfied that given the Respondent's reliance on the Award and the Claimant's reliance on the dissent in *TC Energy*, and taking into account the principle of equality of treatment, it was appropriate to order production of an unredacted version of the Award and the documents referred to at paragraphs 186-197 of the Award.

(2) The Tribunal's directions as to privilege

- 10. In PO No. 5, the Tribunal acknowledged that the Respondent had objected to the production of documents sought in Requests 2-7 on the basis that they were privileged from disclosure. In each case, the Tribunal's rulings on relevance were without prejudice to any questions of privilege.
- 11. Thus, the Tribunal directed that where a Party had been ordered to produce a document that it considers to be privileged from disclosure in terms of Article 9.4 of the IBA Rules, that Party was required to list those documents in a privilege log.⁴ In relation to Request 7, it further directed that if the Respondent maintained a claim to privilege over documents that the privilege master in the *TC Energy* proceedings determined not to be privileged and which had been produced in those proceedings, the Respondent's

³ PO No. 5, [14].

⁴ PO No. 5, [18].

privilege log 'should address the consequences for any continuing claim to privilege' of the fact that the documents had been produced to the claimants in the *TC Energy* proceedings.

12. By application dated 7 April 2025, the Claimant sought by way of clarification or variation of PO No. 5 an order that the Respondent may only withhold production of documents under the ground of attorney-client privilege and not on grounds of deliberative process privilege. The Tribunal dismissed that application on 16 April 2025, ruling that it required the receipt of a privilege log prior to determination of any application for the resolution of outstanding issues as to privilege.

(3) The Respondent's production

13. The Respondent says that it has produced 943 documents totalling 10,417 pages in response to PO No. 5.⁵ On 30 April 2025, the Respondent produced to the Claimant two privilege logs under a cover letter which described them in the following terms:⁶

- Privilege Log A lists (i) privileged documents that are responsive to Request No. 7, *i.e.*, exhibits referred to in paragraphs 186-197 of the *TC Energy Award*; and (ii) privileged documents referred to in other portions of the Award. Privilege Log A also identifies references in the Award and Dissent to these privileged documents that were left redacted in order to maintain privilege.
- Privilege Log B lists privileged documents that are responsive to Request Nos. 2, 4, and 5 to the extent granted by the Tribunal.

To the extent that documents appearing on Privilege Log A would also be responsive to Request Nos. 2, 4, or 5, they have not been duplicated on Privilege Log B. Such documents appear on Privilege Log A only.

14. Privilege Log A⁷ lists 30 documents produced as exhibits in the *TC Energy* proceeding that are referred to in paragraphs 186-197 of that Award, and four other documents over which the Respondent maintains privilege referred to in other paragraphs of the Award.

⁵ Being 897 documents (9,788 pages) in response to Request 1 and 46 documents (629 pages) in response to other requests, including 7 documents referenced in the *TC Energy* award over which it did not assert privilege.

⁶ C-302.

⁷ C-301.

Of those documents, all are said to be covered by deliberative process privilege, and six documents are said to be subject to attorney-client privilege as well.⁸

15. Privilege Log B⁹ lists 164 documents, being documents that are responsive to Requests 2-5 but that are not referred to in the Award. The Respondent asserts deliberative process privilege over all of those documents, and attorney-client privilege over a subset of them.
16. The Respondent's cover letter also explains its position on the relevance that disclosure in the prior proceedings has on the Respondent's claim to privilege in these proceedings, as directed by the Tribunal in PO No. 5.

C. The Claimant's Further Requests

(1) Introduction

17. The Claimant's Further Requests arise out of the Respondent's claims to privilege in Privilege Logs A and B.¹⁰ It seeks orders:
 - a. For the production of all documents listed on Privilege Log A or Privilege Log B which are withheld solely on grounds of deliberative process privilege;
 - b. For the production of *TC Energy* proceedings exhibits C-143, C-150, C-185, C-187 and C-195 over which attorney-client privilege has also been asserted;¹¹ and

⁸ Exhibits C-143, C-150, C-182, C-185, C-187 and C-195. The Tribunal notes that the Respondent's letter states that 'Many of the withheld documents are also protected by the deliberative process privilege' in addition to attorney-client privilege. The Tribunal's notes that deliberative process privilege is asserted over every document in each of the privilege logs.

⁹ C-303.

¹⁰ The Claimant also raises a concern about the scope of the Respondent's production, and particularly whether the Respondent's statement that USTR would 'necessarily' have custody of relevant documents—on the basis of which the Claimant agreed to a searches for a narrower scope of custody than in *TC Energy*—was correct: see Further Requests at [16]-[20]. The Claimant does not seek orders on that point but says it is relevant to the assessment of the Respondent's assertion of attorney-client privilege. The Respondent rejects this criticism: Opposition, [9]-[10].

¹¹ This is a subset of the documents listed in the two privilege logs over which attorney-client privilege has been asserted. The Claimant notes at [35] and [39] of its Further Requests that it is 'willing not to contest Respondent's position regarding documents on which it has declared attorney-client privilege when exchanged within USTR' with the exception of Exhibit C-143, although it reserves its position in relation to other documents over which attorney-client privilege is asserted.

- c. For the production of the *TC Energy* Award and dissent with redactions lifted consequent upon the orders of the Tribunal for production of the underlying exhibits.
18. The Respondent opposes the Further Requests. In its Opposition, it submits that it has fully complied with the PO No. 5, emphasising the difference in the scope of production ordered in the *TC Energy* proceeding, and says that its claims to privilege should be upheld.
- (2) The Parties' submissions on deliberative process privilege
19. The Claimant challenges the Respondent's assertion of deliberative process privilege and submits:¹²
- a. It is for the Tribunal to determine whether it is appropriate to apply a domestic law privilege, citing Article 9.4 of the IBA Rules.
 - b. The Confidentiality Order implemented by PO No. 2 negates any risk of potential publicity that would create 'regulatory chill in domestic politics and government.'
 - c. The issue to which the documents are said to be relevant is not domestic policy-making but determination of the meaning of an international treaty. In that context, the Claimant emphasises the observation of the tribunal in *Biwater Gauff v. Tanzania* that a blanket assertion of state secrecy (or deliberative process) privilege would 'stifle the evaluation of its own conduct and responsibility.'¹³
 - d. As in *TC Energy*, the description of the documents over which the Respondent had claimed privilege suggested that it was invoked 'in the abstract, not out of the sensitivity of particular documents.'¹⁴ It therefore submits that the Respondent has

¹² Claimant's Further Requests, [6]-[15].

¹³ Citing *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2 (25 May 2006), 8 (CLA-95).

¹⁴ Citing *TC Energy Corp. and TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 4 (11 December 2023), [21] (C-259).

not substantiated its interest in withholding the documents and that the Claimant's need for the documents is strong enough to outweigh such interest.

- e. While the Claimant acknowledges that the Tribunal had narrowed the scope of Requests 2, 4 and 5 to documents disclosing interactions between the negotiating parties, 'understanding the position Respondent took in the negotiations inherently goes to a deliberative process of how it was formulated' and internal documents of a negotiating party 'may be of substance to the VCLT Article 32 investigation of the meeting of minds and the circumstances of conclusion of the treaty despite expressing unilateral views and understandings.'¹⁵

20. The Respondent submits that its claim to deliberative process privilege should be upheld, submitting:¹⁶

- a. The deliberative process privilege is a longstanding and critical part of the background expectations against which U.S. government personnel make policy and is intended to enhance the quality of agency decisions by protecting open and frank discussion.¹⁷
- b. It is appropriate to apply the deliberative process privilege in accordance with Articles 9.4(c) and 9.2(b) in circumstances where the government officials that produced the documents were operating under the assumption that their pre-decisional deliberations would be protected from disclosure and such a privilege has been recognised by international tribunals.
- c. The Respondent disputes the Claimant's reliance on the Confidentiality Order to protect against public disclosure, since the prospect of disclosure to an adversary in arbitration or litigation has an equally chilling effect. It disputes the Claimant's reliance on the *Biwater Gauff* decision, since in that case the documents were sought to establish that the respondent state had taken actions for improper reasons, and here the Claimant already had access to the evidence key to its jurisdictional

¹⁵ Citing Counter-Memorial on Preliminary Objections, [105] and the cases there cited.

¹⁶ Respondent's Opposition, [12]-[22].

¹⁷ Citing *U.S. Fish and Wildlife Service v. Sierra Club*, 592 U.S. 261, 267 (2021) (**RL-109**).

case in the form of the text of USMCA and documents exchanged between the negotiating parties.

- d. The Respondent disputes the Claimant's submission that 'understanding the position Respondent took in the negotiations inherently goes to a deliberative process of how it was formulated', submitting that the Tribunal's ruling made it clear that the focus should be on what the negotiating parties said to each other, 'not how they came to say it or what they might have considered saying instead.' On that basis the Respondent says it is justified in withholding documents that may be responsive to Requests 2, 4 or 5 to the extent that they refer to U.S. negotiating positions but were made or exchanged in the course of otherwise privileged internal deliberations, which are of little or no additional value to the interpretative process.¹⁸

(3) The Parties' submissions on attorney-client privilege

21. The Claimant submits that the Respondent's assertion of attorney-client privilege is 'overly broad' and seeks orders for production of five specific documents in Privilege Log A (C-143, C-150, C-185, C-187 and C-195).
22. Those documents are described in Privilege Log A in the following paraphrased terms, so far as relevant to the claim of attorney-client privilege:

#	Date	From	To	Description
C-143	2-Mar-21	USTR	USTR	Emails between USTR attorneys and staff discussing email correspondence from an attorney in the Office of the Legal Adviser regarding the USMCA. Email contains legal analysis.
C-150	24-Mar-21	State Dept.		Draft memorandum from the State Department's Acting Legal Adviser and others to the Secretary of State providing legal advice on pending and potential litigation.
C-185	14-Sep-17	USTR	Dept. of Commerce	Email from USTR staff to Department of Commerce attorney providing information about draft text of investment chapter for purpose of seeking legal advice.
C-187	18-Sep-17	Dept. of Commerce	USTR	Email from attorney in the Department of Commerce to USTR staff discussing draft text of investment chapter and dispute resolution provisions. Email reflects legal advice.
C-195	15-Oct-17	Dept. of State	Dept. of State	Email from attorney in Office of the Legal Adviser to staff in the Bureau of Economic and Business Affairs and other attorneys providing observations on and analysis of negotiations

¹⁸ Giving the example of 'a deliberative email that attaches a document—already produced—that was shared among the USMCA Parties'.

23. The Claimant submits:¹⁹

- a. It agrees with the Respondent that under U.S. law, interagency communications are privileged where an 'appropriate common interest' is established, as reflected in *Animal Welfare Institute v National Oceanic & Atmospheric Administration (Animal Welfare)*.²⁰ However it relies on the finding of the privilege master in the *TC Energy* Proceedings that the client of each listed lawyer was the entity for which the lawyer worked (rather than the client being the U.S. government as a whole); that 'communications between a lawyer ... and someone outside his / her Department or Office' are presumptively not privileged;²¹ and her conclusion that the 5 documents being sought now did not meet the test for privilege under *Animal Welfare* (and in respect of four of which the respondent did not ask the privilege master to reconsider her decision). It notes that two of those documents (C-185 and C-187) are interagency documents but the others (in particular C-150 and C-195) although described as being internal to the State Department 'were exhibits in the *TC Energy* proceedings, indicating that the privilege master made the same determination regarding privilege there.'
- b. The Claimant devotes specific submissions to Exhibit C-143 dated 2 March 2021. It says first, the document is described as involving discussion within USTR of correspondence from the Office of the Legal Adviser at the State Department. The privilege master in *TC Energy* held that this was no longer privileged material once passed to USTR. Second, the document was scrutinized at some length in the *TC Energy* Award and dissent, and in those circumstances the Claimant states that, 'if there is any document of relevance to the issues for determination here not already known and available to Claimant, this is one.'²²

¹⁹ Claimant's Further Requests, [21]-[39].

²⁰ 370 F. Supp. 3d 116 (D.D.C. 2019) (**RL-108**).

²¹ *TC Energy Corp. and TransCanada Pipelines Ltd. v United States of America*, ICSID Case No. ARB/21/63, Privilege Master's Report (18 January 2024), [3.14] (**C-290**).

²² Claimant's Further Requests, [38].

24. The Respondent submits in response that the presumption expressed by the privilege master, and on which the Claimant relies in challenging the Respondent's claim to privilege, has no basis in law. To the contrary, *Animal Welfare* stands for the different proposition that where 'two agencies have a substantial identity of legal interest in a particular matter, the attorneys for each agency can be treated as representing both agencies jointly' such that interagency communications in that context continue to enjoy attorney-client privilege,²³ and this captures the interagency communications in this case. In relation to the specific documents in question, the Respondent submits that the documents lack relevance and are properly treated as privileged:²⁴
- a. Exhibit C-150 is a draft memorandum from the State Department's Acting Legal Adviser to the Secretary of State addressing pending and potential litigation dating from March 2021 and was not shared with Canada or Mexico so is irrelevant in the interpretation exercise. The final version was held to be privileged in *TC Energy*, but the United States was 'mistakenly ordered to produce the draft of this memorandum because it was shared with USTR for input.' This cannot be reconciled with the *Animal Welfare* standard given that the Office of the Legal Adviser 'represents the U.S. and coordinates activities within and outside the Department with respect to all aspects of international claims and investment disputes'²⁵ and USTR has a similar interagency leadership role with respect to U.S. trade policy and negotiations, such that they have a common interest.
 - b. Exhibit C-143 also dates from after the conclusion of the negotiations and does not record U.S. positions in those negotiations. It is privileged because it reflects legal analysis provided by an attorney, a request for further discussions between lawyers and staff members, and the sharing of information by USTR staff with USTR attorneys for further analysis. The Respondent submits that no weight should be given to the privilege master's decision in circumstances where it was not

²³ Citing *Animal Welfare*, 133 (RL-108).

²⁴ Respondent's Opposition, [27]-[38].

²⁵ Citing R-135.

supported by any analysis, and any reliance on the interagency nature of the communication was misplaced.

- c. Exhibits C-185 and C-187 are exchanges between a USTR staff member and an attorney at the Department of Commerce regarding a potential U.S. proposal for the text of the investment chapter. The Respondent submits that in leading negotiations, USTR coordinated with a number of other U.S. government agencies in accordance with its statutory responsibilities, including by consulting with and receiving advice through interagency committees. That shared interest satisfies the *Animal Welfare* standard.
- d. Exhibit C-195 is an internal State Department email sent by a lawyer in the Office of the Legal Adviser to staff in the Bureau of Economic and Business Affairs and other lawyers in the Office of the Legal Adviser providing observations on a negotiating session and legal analysis. The Respondent notes this is not an interagency document and submits the Claimant identifies no reason for displacing the privilege other than the *TC Energy* privilege master's decision.

(4) Redactions from the *TC Energy* Award and Dissent

25. The Claimant seeks orders that it be provided with versions of the Award and dissent with redactions lifted regarding exhibits on Privilege Log A for which the Tribunal gives orders for production. It requests that this include 'orders for lifting of redactions in any case where there could remain undisclosed documents cited in chain footnotes of multiple examples where the other documents have been produced'.²⁶ The Respondent notes that this issue is dependent on the Tribunal's determinations on the prior issues.

D. The Tribunal's assessment

(1) General approach

26. The Tribunal approaches its assessment of the Claimant's Further Requests for Document Production with the following general considerations in mind:

²⁶ Claimant's Further Requests, [44].

- a. The Tribunal has already made its decision as to the relevance of the ordered categories of documents in PO No. 5. This determination is not subject to reconsideration here.
- b. Nevertheless, in PO No. 5, the Tribunal emphasised that its determinations as to document production were subject to the right of either Party to assert a claim that any particular document falling within an ordered category is privileged from production. In that event, such documents were to be itemized in a privilege log so that the Tribunal could assess the admissibility of the claim to privilege with appropriate particularity.
- c. The Respondent has complied with this direction in preparing and serving on the Claimant its two Privilege Logs.
- d. The sole task of the Tribunal now is to assess for itself, on the basis of the information provided in those Logs, and in light of the Parties' written submissions on the Further Requests, whether the claims to privilege are to be upheld or not.
- e. In making these determinations, it is not bound by decisions made in the *TC Energy* proceedings, whether by its tribunal or the privilege master appointed by it to determine certain claims to privilege. There is no identity of parties between those proceedings and the present arbitration. Nevertheless, the Tribunal is invited to, and does, take account of the reliance placed by the Parties in the present proceedings on the *TC Energy* Award and its dissent.

(2) Applicable legal rules

27. The legal framework for the Tribunal's decision is as follows:

- a. By virtue of Rule 34 of the ICSID Arbitration Rules 2006:²⁷
 - (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
 - (2) The Tribunal may, if it deems it necessary at any stage of the proceeding:

²⁷ Applicable in these proceedings pursuant to PO No 1, [1.1]

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- (a) call upon the parties to produce documents, ...
- b. Paragraph 16.2 of PO No 1 provides that, where (as here) the Parties have agreed to conduct a document production process: 'The 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).' (**IBA Rules**).
- c. Article 9 of the IBA Rules on Admissibility and Assessment of Evidence provides, in relevant part:
1. The Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
 2. The Tribunal shall, at the request of a Party, or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:
 - ...
 - (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below);
 - ...
 - (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling;
 - ...
 4. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
 - (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
 - (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
 - (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
 - (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
 - (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

(a) Attorney-client privilege

28. Attorney-client privilege (also known as legal professional privilege) is a matter of law, not discretion, as the careful phrasing of Articles 9(2)(b) and 9(4) IBA Rules reflect. In the present case, the law applicable to such a privilege is U.S. law, as the issue concerns the extent to which the documents in question concerned the confidential communication of legal advice by U.S. attorneys. The fact that U.S. law is applicable to this question is common ground between the Parties, though they dispute the application of the law on the facts of this case.²⁸

(b) Deliberative process privilege

29. The question of documents withheld from production on grounds of deliberative process privilege raises separate considerations. That is a domestic U.S. law concept but is analogous to the concept of 'State secrecy' as discussed in the practice of international tribunals.
30. The Claimant asserts that the Respondent's claim to deliberative process privilege is a matter within the discretion of the Tribunal, which, as an international tribunal, is not bound by U.S. law. But the Claimant submits that even U.S. domestic courts have acknowledged that the need for accurate fact finding can outweigh the government's interest when applying deliberative process privilege.²⁹ The Respondent refers to Article 9(4)(c) IBA Rules, maintaining that '[t]here can be no question that the U.S. government officials that produced the documents reflected in the U.S. privilege logs were operating under the assumption that their pre-decisional deliberations would be protected from disclosure in future legal proceedings.'³⁰ It does not dispute that in principle a balancing exercise may be required, but says that in light of the disclosure ordered by the Tribunal,

²⁸ Further Requests, [21]; Respondent's Opposition, [25].

²⁹ Further Requests, [10], citing *inter alia* *Federal Trade Commission v Warner Communications Inc* 742 F. 2d 1156, 1161 (9th Cir. 1984) (CLA-93).

³⁰ Respondent's Opposition, [14].

the 'withheld documents are of little or no additional value in the interpretative process.'³¹

31. In the Tribunal's view, the question whether there is, under the domestic law of a respondent State, a valid ground upon which production of specific requested documents can be withheld to protect governmental deliberations, is certainly a necessary predicate to an objection to production in an international proceeding.³² That will in turn inform, as the Respondent observes, the expectations of the officials producing the documents. In the present case, both Parties have objected to production of certain documents on such grounds.³³
32. At the same time, where the case is pending before an international arbitral tribunal, the question whether to sustain such an objection or to order production must remain a matter within the discretion of the tribunal.³⁴ That is consistent with the position as a matter of domestic U.S. law. The Tribunal considers that the exercise is appropriately guided by the same principles as inform the assessment of a claim to withhold documents for 'special political or institutional sensitivity' under Article 9(2)(f) of the IBA Rules.³⁵ In such cases, the Tribunal will determine whether the grounds alleged are 'compelling'.³⁶ It so doing, it 'must take into account Claimant's interest in the production of said

³¹ Respondent's Opposition, [21]; *see also* [13], noting Claimant's submission that 'it is for the Tribunal to determine the appropriateness of applying a domestic law privilege in the circumstances' but arguing that the Claimant 'offers no reason why the deliberative process privilege should not be applied here.'

³² *Global Telecom Holding SAE v Canada*, ICSID Case No ARB/16/16, Procedural Order No. 4 (3 November 2018), [39].

³³ Claimant invokes cabinet confidentiality as a ground for objecting to production of certain documents: PO No 5, Annex B, 9, n 11.

³⁴ *Churchill Mining plc v Indonesia*, ICSID Case No ARB/12/14 and ARB/12/40, Decision on Annulment (18 March 2019), [211]; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2 (25 May 2006), 8 (CLA-95).

³⁵ *See, eg, Apotex Holdings Inc v Apotex Inc v United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Procedural Order on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs, [14], [59] (5 July 2013) (RL-169), cited in Opposition, n 21.

³⁶ Art 9(2)(f).

documents in order to determine whether [Respondent's] interests in withholding the documents are outweighed'.³⁷

33. The overall approach is encapsulated in Article 10 of the Resolution of the *Institut de Droit International* on 'Equality of Parties before International Investment Tribunals' (adopted August 2019), which provides:

(1) The tribunal shall apply the equality principle in making decisions with regard to pleas of privilege from disclosure, in light of the fact that the applicable standards may differ between the national laws of the parties. The tribunal should strive to apply a standard that operates equally for both parties.

(2) Where the parties raise objections to disclosure with regard to documents on grounds of, respectively, commercial confidentiality or State secrecy, the tribunal should strive to secure a balance of treatment between the parties so as to ensure that each party has the ability to obtain evidence that is relevant and material to the issues in dispute, whilst at the same time respecting the wider interests of each party beyond the instant case and relevant policy considerations.

(3) In the case of a plea of State secrecy, *the tribunal shall balance the public interest in the administration of justice which supports disclosure against the public interest underlying the confidentiality of governmental communications.*

(4) In so doing, it should invite the parties to agree protocols for the protection of confidentiality or secrecy in documents or parts thereof applicable in the case before the tribunal.

(5) In a case in which an objection to production is raised:

(a) The objection must be justified with sufficient specificity in order to enable the opposing party to contest it and the objection to be determined;

(b) The tribunal has discretion whether to accept the objection, balancing the public interests involved;

(c) *The tribunal shall apply international law to its decision on the objection;*

(d) The tribunal should, in appropriate cases, consider, in consultation with the parties, appointing an independent third party expert to review the documents and decide contested objections to production.³⁸

34. In the present case, the Tribunal determines that it has sufficient information from the Privilege Logs and the Parties' pleadings to make the requisite decisions on production without recourse to a third party expert.

³⁷ *Gallo v Government of Canada*, PCA Case No. 2008-03, Procedural Order No. 3 (8 April 2009), [53].

³⁸ available at: https://www.idi-iil.org/en/sessions/la-haye-2019/?post_type=publication, emphasis added.

35. With these considerations in mind, the Tribunal is now in a position to determine the further requests in this case. It will do so in the following order:
- a. Privilege Log A: Claim of deliberative process privilege only;
 - b. Privilege Log A: Deliberative process process & attorney-client privilege;
 - c. Privilege Log B: Other deliberative process privilege claims.
- (3) Privilege Log A: Claim of deliberative process privilege only
36. The documents listed by the Respondent on Privilege Log A are all listed pursuant to PO No 5, Annex A, Request 7, in that they are documents that were cited in the Award (including the Dissent) in *TC Energy*. Of the 34 documents there listed, production of 28 documents is withheld on grounds of deliberative process privilege alone. A further 6 documents are also withheld on grounds of attorney-client privilege. The Claimant seeks production of 5 of these latter documents. The Tribunal will consider this Request separately in section (4) below. In the present section, it will limit itself to a consideration of the documents withheld on grounds of deliberative process privilege only.
37. All of these documents were produced in the *TC Energy* proceedings, pursuant to a decision of that tribunal that 'the legitimate interest of the Claimants to have access to the USMCA *travaux préparatoires*' outweighed the respondent's interest in non-disclosure.³⁹
38. Following that decision, the *TC Energy* tribunal discussed these materials in its Award, and in the dissent of Arbitrator Alvarez.

³⁹ *TC Energy Corp. and TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 4 (11 December 2023), [20]-[21] (C-259), citing *Glamis Gold Ltd v United States of America*, NAFTA/UNCITRAL, Decision on Requests for Production and Challenges to Assertions of Privilege (21 April 2006), [14] (CLA-92).

39. Both Parties in the present proceedings have adduced into evidence the *TC Energy Award*⁴⁰ and its dissent.⁴¹ At present, the copies of these documents contain redacted portions where there is a quotation from or discussion of one of the documents in respect of which the Respondent asserts privilege.
40. In its decision on Claimant's Request 7 in PO No 5, which seeks production of documents referred to in that Award, the Tribunal ordered:

The request is **granted**. The Tribunal is satisfied that given the Respondent's reliance on the Award in *TC Energy* and the Claimant's reliance on the Dissenting Opinion, and taking into account the principle of equality of treatment, it is appropriate to order production of an unredacted version of the Award and the exhibits referred to.

The Tribunal notes that the Respondent has not suggested that non-production of the documents is necessary to protect any claim to confidentiality owed to the claimants in the *TC Energy* proceedings.

If the Respondent maintains that any of that production would be precluded by privilege, then it shall particularise that claim in a privilege log.

The Respondent has indicated that it maintains a claim to privilege of documents that the Privilege Master in the *TC Energy* proceedings determined not to be privileged, and which were ordered to be produced, and indicates that some of the documents that are the subject of this request fall into that category. If the Respondent maintains a claim to privilege in relation to such documents, its privilege log should address the consequences for any continuing claim to privilege of the fact that the documents have been produced to the Claimants in the *TC Energy* proceedings.

41. Although the final paragraph related to decisions of the privilege master in *TC Energy*, the scope of which were limited to claims of attorney-client privilege, the Respondent gave a more general answer in its letter dated 30 April 2025, under cover of which it produced the privilege logs. It said:

Finally, in response to the question raised by the Tribunal's decision on Request No. 7, the disclosure of certain privileged documents to the claimants in the *TC Energy* case does not have any consequence for the U.S. assertions of privilege with respect to those documents in this case. The United States objected to the disclosure of those documents in the *TC Energy* case and only produced them because it was ordered to do so by the *TC Energy* tribunal. At no point did the United States concede that the documents were not privileged, or otherwise voluntarily waive privilege. To the

⁴⁰ *TC Energy Corp. and TransCanada Pipelines Ltd.*, ICSID Case No. ARB/21/63, Award (12 July 2024) (**RL-60**) (*TC Energy Award*).

⁴¹ *TC Energy Corp. and TransCanada Pipelines Ltd.*, ICSID Case No. ARB/21/63, Dissenting Opinion of Henri C. Alvarez, K.C. (**CLA-64**) (*TC Energy dissent*).

contrary, the United States maintained and continues to maintain its privilege claims with respect to those documents and has taken steps to ensure that they are not disseminated further, including by redacting discussions of and/or excerpts from the privileged documents in the publicly available versions of the parties' pleadings and the *TC Energy* Award. This limited and involuntary disclosure of otherwise privileged documents does not result in a waiver of the applicable privileges.⁴²

42. In their respective pleadings on the preliminary objections, both Parties place reliance on the *TC Energy* Award and its dissent respectively.
43. The Respondent submits that the Claimant's argument in the present proceedings 'was rejected by the *TC Energy* tribunal in a thorough and well-reasoned award.'⁴³ In its written pleadings before us, the Respondent frequently cites that Award with approval.⁴⁴ Such citations include reliance on that Award in its pleading on the relevance of *travaux préparatoires* as supplementary means of interpretation.⁴⁵ In so doing, the Respondent places specific reliance on particular documents produced in the course of the negotiations that are also discussed in the *TC Energy* Award.⁴⁶
44. The Claimant relies on evidence of the negotiating parties' intent as a supplementary means of interpretation under Article 32 VCLT.⁴⁷ In so doing, it refers to paragraphs 15-32 of the *TC Energy* dissent, noting however that 'much of this record is redacted ... and will need to be the subject of disclosure in these proceedings.'⁴⁸
45. It is apparent to the present Tribunal from the redacted versions of the Award and its dissent that documents in Privilege Log A played a material role in the *TC Energy* tribunal's reasoning, even if the majority and the minority reached different views as to the conclusions to be drawn from this material.

⁴² C-302, 2 (citations omitted).

⁴³ Respondent's Memorial on Preliminary Objections, [4]

⁴⁴ *ibid*, [14], [16], [23], [29], [34], [37], [56], [62], [70], [73], [88].

⁴⁵ *ibid*, [90], [92], [93].

⁴⁶ *ibid*, [95], citing the discussion in the *TC Energy* Award of C-250; Reply on Preliminary Objections, [126] citing the discussion in the *TC Energy* Award at [158] of R-49.

⁴⁷ Claimant's Counter-Memorial on Preliminary Objections, [104] ff.

⁴⁸ *ibid*, [110].

46. In the Award:

- a. The majority refers to certain redacted documents in support of its conclusion that 'the word *'rules'* is a reference to the substantive investment obligations.'⁴⁹
- b. At paragraphs [188]-[196], the majority discusses a series of documents produced by both the claimant and the respondent in those proceedings in its assessment of 'whether the material that was exchanged during the negotiations is of significance to the interpretive exercise.'⁵⁰

47. In his dissent, Arbitrator Alvarez states that: 'In my view, a number of documents produced by the Respondent in the document disclosure process ... are admissible pursuant to VCLT Article 32 to confirm the ordinary meaning of Annex 14-C.'⁵¹ Subsequent pages of his dissent appear to contain detailed citation from, and analysis of, a number of those documents. However, at present large portions of [15]-[21] are blanked out such that it is not possible to understand the analysis, or the evidence on which it was based.⁵²

48. At present, the Respondent knows the content of these documents, but the Claimant does not.

49. In the Tribunal's view, the public interest in the maintenance of the confidentiality of the governmental deliberative process in this instance is outweighed by the public interest in the administration of justice, in order to ensure the equality of the Parties in access to materials relating to the preparation of the relevant provisions of the USMCA, which were referred to and relied upon in the *TC Energy* Award, including its dissent.

⁴⁹ *TC Energy* Award (**RL-60**), [111], citing R-150 & R-119.

⁵⁰ *ibid*, [186].

⁵¹ *TC Energy* dissent (**CLA-64**), [13].

⁵² This is also the case in [25]-[32], dealing with material that post-dates the conclusion of the USMCA. In the case of these materials, questions of attorney-client privilege arise, as to which see section (4) below.

50. In the event that the Respondent wishes to maintain the confidentiality of this material outside its proper use in the arbitration, it may, if it so indicates, avail itself of the provisions of the Confidentiality Order in PO No. 2.

(4) Privilege Log A: Deliberative process process & attorney-client privilege

51. The Tribunal now moves to consider the five documents from Privilege Log A, whose production the Claimant seeks, in respect of which the Respondent also maintains a claim of attorney-client privilege. The Tribunal has reproduced in paragraph [22] above the description of these documents in Privilege Log A insofar as it relates to attorney-client privilege.

52. The Parties' arguments are summarised in paragraphs [23] (Claimant) and [24] (Respondent) above. In essence:

- a. The Claimant relies upon the fact that the privilege master appointed by the *TC Energy* Tribunal (who had sight of the documents) determined that they did not attract attorney-client privilege. It invites this Tribunal to take the same view.
- b. The Respondent submits that no weight should be placed on the privilege master's determinations, which were premised on an incorrect reading of the applicable U.S. law. It asserts that the transmission between U.S. government agencies of legal advice where those agencies share a common interest is subject to attorney-client privilege and that this standard is met in relation to the documents in question.

53. This Tribunal held in PO No. 5 that it 'does not accept the proposition that ... a ruling on the question of whether a particular document is privileged in [the *TC Energy*] proceedings is determinative of the question in these proceedings.'⁵³

54. Attorney-client or legal professional privilege is a question of law not discretion. It is not affected by the alleged relevance of the document. This Tribunal will determine the admissibility of the plea of privilege for itself on the basis of the description of the particular document in the privilege log, the Parties' pleadings thereon, and the applicable law.

⁵³ PO No. 5, [14].

55. In the present case, both Parties accept that the scope of attorney-client privilege under U.S. law in cases of inter-agency communications is correctly set forth in the decision of the US District Court in *Animal Welfare*⁵⁴ (though they disagree as to the conclusions to be drawn from that decision in its application to the facts of the present case).
56. In that case, a U.S. governmental agency's claim to withhold production of documents under a freedom of information request was upheld on grounds of attorney-client and work-product privileges.⁵⁵ The Court held inter alia that:
- a. The provision of confidential legal advice between lawyer and client also applies as between a governmental agency and the agency lawyer;⁵⁶
 - b. Where that advice is shared between two agencies, the privilege will not be waived or otherwise lost provided that the agencies are 'engaged in a common effort and [seek] the advice of counsel about fulfilling their statutory mission';⁵⁷ and,
 - c. Such a document may also attract work-product privilege where it was prepared in anticipation of litigation, was shared with the other agency on a confidential basis, and the two agencies shared a common interest in the context of such litigation.⁵⁸
57. Applying these considerations to the documents in question, the Tribunal reasons as follows:
- a. **C-143:** This document, dated 2 March 2021, is stated to be a communication between USTR legal counsel and USTR staff 'discussing email correspondence from an attorney in the Office of the Legal Adviser regarding the USMCA'. The Respondent submits that this is 'squarely within the scope of the attorney-client privilege'.⁵⁹ The Claimant requests production on the grounds that (i) the privilege

⁵⁴ 370 F. Supp. 3d 116 (D.D.C. 2019) (**RL-108**).

⁵⁵ *ibid*, 139.

⁵⁶ *ibid*, 130.

⁵⁷ *ibid*, 133, citing *Modesto Irrigation v Gutierrez* 2007 WL 763370 (E.D. Cal., March 9, 2007).

⁵⁸ *ibid*, 137-8.

⁵⁹ Respondent's Opposition, [29].

master in *TC Energy* had found that this document contained material from the Legal Adviser's Office and that the privilege in it had been waived when it was passed to the USTR;⁶⁰ and (ii) that document is relevant because it was scrutinized in the *TC Energy* Award. In the Tribunal's view, a claim of attorney-client privilege does not depend upon the extent of alleged relevance of the document. It further finds that any privilege in this document was not waived when produced under protest in the *TC Energy* proceedings. It considers that the claim of privilege is properly made in respect of a document that comprises legal advice and was shared between governmental agencies that were engaged in a common effort with respect to a US trade agreement.

- b. **C-150:** This document, dated 24 March 2021, also attracts attorney-client privilege for the additional reason that it is stated to contain 'legal advice on pending and potential litigation' and thus attracts work-product privilege as well. The fact that it was shared between the State Department Acting Legal Adviser and USTR does not destroy that privilege. In the view of this Tribunal, a respondent state's legal adviser is legally entitled to seek input from a responsible agency when considering its position in contemplation of litigation, without losing privilege in the draft advice.
- c. **C-185 & C-187:** These two documents (dated 14 & 18 September 2017) respectively comprise communications between a USTR staff member and an attorney in the US Department of Commerce during the course of the USMCA negotiations. The Respondent submits that such consultation was undertaken pursuant to the interagency trade policy mechanism established under Trade Expansion Act 1962, and accordingly both agencies shared a common interest in the negotiation of the USMCA.⁶¹ The Tribunal finds that these documents are subject to attorney-client privilege in view of the common interest between governmental agencies in obtaining legal advice in the negotiation of a trade treaty.

⁶⁰ Further Requests, [37].

⁶¹ Respondent's Opposition, [35]-[36].

- d. **C-195:** This document dated 15 October 2017 is stated to be a communication between a State Department lawyer and other lawyers and staff within the State Department in which the lawyer 'provides his observations on a USMCA negotiating session, including legal analysis on certain issues.'⁶² This document was not transmitted outside the relevant government agency. The Tribunal finds that the claim of attorney-client privilege is properly made.
58. For the above reasons, the Tribunal upholds the Respondent's plea of attorney-client privilege in respect of the five documents in Privilege Log A where such a privilege claim is made and whose further production was sought by the Claimant.
59. For the avoidance of doubt, Claimant has not challenged the withholding of C-182 on the grounds of attorney-client privilege and therefore that document also need not be produced.
- (5) Privilege Log B: Other deliberative process privilege claims
60. There are 164 documents listed in Privilege Log B dated between 16 August 2017 and 28 November 2018. Attorney-client privilege is asserted in respect of 71 of these. The Claimant pursues no application for further production in respect of them. The remaining 93 documents are listed on the Privilege Log as covered by deliberative process privilege only. The Claimant seeks production of all of the latter.
61. The Tribunal begins its consideration of this category by reference to the specific terms of its orders in PO No. 5, Annex A, Requests 2-5. While each of these four requests differs *ratione personae* and *ratione temporis*, in each case, the Claimant's request had sought *ratione materiae* all documents regarding Chapter 14 and Annex 14-C of CUSMA and the Protocol.
62. By its orders, the Tribunal granted the request, but only '*to the extent that it seeks documents recording the position taken by the Respondent during the negotiations (i.e.*

⁶² *ibid*, [37].

before signature on 10 December 2018) of CUSMA, even if the document in question came into existence afterwards. The request is otherwise **denied**.⁶³

63. The Respondent states that:

It is only exchanges between the USMCA Parties, and not the internal deliberation of one Party, that might evidence a common understanding of the treaty terms. The United States has produced these exchanges already. What the United States is withholding are *documents that may contain references to U.S. negotiating positions, but that were made or exchanged in the context of otherwise privileged internal deliberations* (e.g., a deliberative email that attaches a document—already produced—that was shared among the USMCA Parties). These withheld documents are of little or no value in the interpretative process.⁶⁴

64. The Claimant accepts that ‘doubtless it was the Tribunal’s intent to narrow the documents to those most relevant to how the treaty negotiating parties interacted’.⁶⁵ However it adds: ‘But understanding the position Respondent took in the negotiations *inherently goes to a deliberative process of how it was formulated*.’⁶⁶

65. In the Tribunal’s view, the Claimant’s proposition seeks to reargue the very limitation that the Tribunal inserted in its *dispositif* for each of the pertinent requests. It did, as the Claimant correctly recognises, limit its orders only to those documents most relevant to how the treaty negotiating parties interacted. It is mindful of the consideration enunciated by the arbitral tribunal in *Young Loans*:

A further prerequisite if material is to be considered as a component of *travaux préparatoires* is that it was actually accessible and known to all the original parties. Drafts of particular articles, preparatory documents and proceedings of meetings from which one member or some members of the contracting parties were excluded cannot serve as an indication of common intentions and agreed definitions unless all the parties had become familiar with the documents or material by the time the treaty was signed.⁶⁷

⁶³ Request 4 (emphasis in italics added).

⁶⁴ Respondent’s Opposition, [21], emphasis added.

⁶⁵ Further Requests, [12].

⁶⁶ *ibid*, [13], emphasis added.

⁶⁷ *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2(e) of Annex I A of the 1953 Agreement on German External Debts (Belgium et al v Germany)* (1980) XIX UNRIAA 67, 107, [34].

66. The Tribunal considered that documents recording the position that each party took during the negotiations may be relevant and admissible as *travaux préparatoires*. By contrast, it excluded from the scope of its orders internal documents of one of the parties that concern the formulation of such a position, save to the extent that it evidences the position actually taken vis-à-vis the other contracting States.
67. The Tribunal thus rejects the premise from which the Claimant's application for further production under this head proceeds. Understanding the position that a State party to a treaty negotiation actually took does not inherently involve the deliberative process leading to its formulation. That is what the Tribunal rejected when it crafted its orders in the way that it did in PO No. 5.
68. The Tribunal accepts the Respondent's assurance that the documents in Privilege Log B contain only '*references to U.S. negotiating positions, but that were made or exchanged in the context of otherwise privileged internal deliberations*'.
69. In this context, the Tribunal finds that the Respondent's claim to deliberative process privilege is well founded. The public interest in facilitating a free and frank exchange of views within the relevant government departments outweighs the public interest in the disclosure of internal material that concerns the deliberative process and not an outcome communicated to the other negotiating States.
70. Accordingly, the Tribunal dismisses the Claimant's further production application in respect of deliberative process privilege documents listed in Privilege Log B.

E. DECISION

71. **For the above reasons, the Tribunal hereby orders that:**
- a. **The Respondent shall by Thursday 26 June 2025 produce to the Claimant all those documents listed in Privilege Log A, save those as to which a claim solely of attorney-client privilege is asserted therein;**
 - b. **The Respondent shall serve and file on the arbitration record further copies of the Award and the dissent in *TC Energy* which are unredacted, save only to**

the extent of references to documents in respect of which attorney-client privilege is claimed in Privilege Log A;

- c. **Otherwise the Claimant's Further Requests are denied;**
- d. **Costs reserved.**

For the Tribunal

[signed]

Professor C A McLachlan KC
Presiding Arbitrator

18 June 2025