

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

ADDENDUM TO PRIVILEGE MASTER'S REPORT

1. PROCEDURAL BACKGROUND

1.1 On 18 January 2024, the Privilege Master issued her Report, including Annex A setting out her determinations as to the 1534 documents she had reviewed. Terms used in this Addendum are as defined in the Privilege Master's Report.

1.2 On 20 January 2024, and subject to the approval of the Arbitral Tribunal, Respondent wrote to seek further guidance from the Privilege Master and to ask her to reconsider her determinations as to the following 11 documents, all of which she had determined to be "Not Privileged":

1341A	1347A	1348A	1356A	1366A	1372A
1378A	1405A	1410B	1419A	1614	

("Eleven Documents").

- 1.3 On 22 January 2024, Claimants responded to Respondent's application.
- 1.4 On 23 January 2024, the Arbitral Tribunal informed the Privilege Master that it had considered the parties' observations as to the Privilege Master's Report and, after due deliberation, had concluded that the presumption described in paragraph 3.14 of the Report should not apply to the Eleven Documents.
- 1.5 In paragraph 3.14 of her Report, the Privilege Master said the following:
- In doing my work, I have presumed that the "client" of a lawyer on the Lawyer List is the entity for which the lawyer works (as opposed, for example, to the government of the United States more generally). In other words, I have presumed, for example, that the client of a lawyer working for the State Department is the State Department and the client of a lawyer working for the Trade Office is the Trade Office. As a consequence, I have considered communications between a lawyer on the Lawyer List and someone outside his / her Department or Office presumptively not covered by attorney-client privilege. These are only presumptions, however, and have sometimes been overcome depending on the particularities of the document and its context.*
- 1.6 The Arbitral Tribunal also sought a response from Respondent to Claimants' observations with respect to document 1614, which Respondent provided on 23 January 2024.
- 1.7 The Arbitral Tribunal asked the Privilege Master to reconsider her Report as it relates to the Eleven Documents on the basis that the presumption referred to in paragraph 3.14 of her Report does not apply and in light of the parties' comments on document 1614.

2. RECONSIDERATION AND DECISION

2.1 As directed by the Arbitral Tribunal, I have now reconsidered my Report as it relates to the Eleven Documents on the basis that the presumption referred to in paragraph 3.14 of my Report does not apply and in light of the parties' comments on document 1614.

2.2 Having done so, I remain unpersuaded that the Eleven Documents are covered by attorney-client privilege. I accordingly maintain my determinations that they are "Not Privileged".

2.3 In explaining my reasoning, I first address (A) documents 1341A, 1347A, 1348A, 1356A, 1366A, 1372A and 1378A, followed by (B) documents 1405A, 1410B and 1419A and, finally, (C) document 1614.

A. Documents 1341A, 1347A, 1348A, 1356A, 1366A, 1372A and 1378A

2.4 Documents 1341A, 1347A, 1348A, 1356A, 1366A, 1372A and 1378A are seven identical copies of a two-page document prepared by the State Department in September 2018 setting out five substantive questions and five comments on technical matters with respect to the Investment Chapter text as it stood at that time ("**Memorandum 1**").

2.5 I understand that the State Department—and, principally, lawyers within the State Department—prepared Memorandum 1 after it received the Investment Chapter text from the Trade Office on 12 September 2018. The email from the Trade Office to the State Department transmitting the Investment Chapter text to the State Department is one of the documents I reviewed—namely, document 1330. I determined that

document 1330 was “Not Privileged” in my Report. The Arbitral Tribunal has not asked me to reconsider my Report as it relates to document 1330 and I understand that that document has now been produced to Claimants.

- 2.6 In document 1330, the Trade Office says, in pertinent part, that it is transmitting to the State Department the “trilaterally agreed NAFTA Investment Chapter text”, which remains “subject to final legal scrub”. Although the email is addressed to three lawyers and one non-lawyer in the State Department, the Trade Office does not seek any legal advice or services from the State Department in respect of the Investment Chapter text—not even with respect to “legal scrub”, which surrounding documents (that I have determined to be “Privileged”) show the Trade Office undertaking itself. In fact, the Trade Office (somewhat conspicuously) requests no input from the State Department whatsoever and instead merely offers to “answer any questions” the State Department may have after it has had a chance to review the document.
- 2.7 As set out in paragraph 16 of Procedural Order 4, for the attorney client privilege to apply under *Animal Welfare*, “the applicable standard is the protection of ‘confidential communications from clients to their attorneys made for the purpose of securing legal advice or services’ as well as ‘communications from attorneys to their clients if the communications rest on confidential information obtained from the client.’”
- 2.8 I understand that the State Department prepared and sent Memorandum 1 to the Trade Office in response to document 1330 and in the absence of any request from the Trade Office for legal advice or services or, indeed, any input of any kind. In addition, Memorandum 1 does not rest on any confidential information received from the Trade Office, but rather on the draft Investment Chapter text as trilaterally

agreed by Canada, Mexico and the United States at the time. In these circumstances, I do not consider Memorandum 1 to be an attorney-client communication.

- 2.9 The fact that Memorandum 1 is marked “PRIVILEGED” has no bearing on my determination with respect to it because a person cannot make a document privileged by marking it so. My determination rather depends on the particular facts and circumstances of the document and the standard set out in paragraph 16 of Procedural Order 4.
- 2.10 In closing with respect to Memorandum 1, I note that Respondent has questioned why I determined Memorandum 1 to be “Not Privileged” when I determined “substantially similar documents”—namely, documents 1340A, 1345A and 1346A (“**Substantially Similar Documents**”)—to be “Privileged”. Respondent’s letter dated 20 January 2024 at 2 n.3.
- 2.11 As the Arbitral Tribunal has not asked me to reconsider my Report as it relates to the Substantially Similar Documents—and as those documents have presumably not been produced to Claimants—I am hesitant to discuss the Substantially Similar Documents in the detail necessary to explain the difference in my determinations. I am concerned that doing so might entail revealing information that I consider privileged. Should the Arbitral Tribunal wish to provide any further directions with respect to the Substantially Similar Documents, however, I remain at the Arbitral Tribunal’s disposal.

B. Documents 1405A, 1410B and 1419A

- 2.12 Documents 1405A, 1410B and 1419A are three identical copies of a two-page document prepared by the State Department in early October 2018 setting out eight

items for clarification and five comments on technical matters with respect to the Investment Chapter text as it stood at that time (“**Memorandum 2**”).

- 2.13 I understand that the State Department—and (again) principally lawyers within the State Department—likewise prepared Memorandum 2 after it received the Investment Chapter text from the Trade Office via the email that is document 1330, and that Memorandum 2 is a further elaboration of Memorandum 1.
- 2.14 Between Memorandum 1 and Memorandum 2, I see no evidence of any intervening request from the Trade Office for legal advice or services from the State Department or, indeed, any request for input of any kind. Nor does it appear that the Trade Office provided the State Department with any further information—much less any confidential information—following Memorandum 1 that was used in elaborating Memorandum 2. In light of this, I likewise do not consider Memorandum 2 to be an attorney-client communication for the reasons explained above (§§ 2.5-2.9).
- 2.15 In closing with respect to Memorandum 2, I note that Respondent has questioned why I determined Memorandum 2 to be “Not Privileged” when I determined “[a]nother version of the comments”—namely, documents 1397A, 1400A, 1402A, 1403A and 1404A (“**Versions**”)—to be “Privileged”. Respondent’s letter dated 20 January 2024 at 2 n.3.
- 2.16 Upon review, I now see that document 1404A is another identical copy of Memorandum 2. Had the Arbitral Tribunal asked me to reconsider my Report as it relates to document 1404A, I would have been inclined to change my determination to “Not Privileged”. There is, however, no such request with respect to document 1404A or any of the other Versions, the rest of which are not identical to Memorandum 2.

2.17 As there is no request for me to reconsider my Report as it relates to the Versions, which presumably have not been produced to Claimants, I am hesitant (except where document 1404A is concerned) to discuss them in the detail necessary to explain the difference in my determinations. I am again concerned that doing so might entail revealing information that I consider privileged. Should the Arbitral Tribunal wish to provide any further directions with respect to the Versions, however, I remain at the Arbitral Tribunal's disposal.

C. Document 1614

2.18 Document 1614 is shrouded in ambiguity.

2.19 On the Privilege Log, Respondent says that the approximate date of document 1614 is 24 March 2021, that it is from Khalil Gharbieh and that it is “[i]nternal USTR comments on draft internal USG memo from the Acting Legal Adviser and others reflecting predecisional deliberations on potential application of USMCA Annex 14-C”.

2.20 Having read document 1614, I understand it to be a draft information memo for the Secretary of State that was prepared by one or more lawyers within the State Department. I also understand that Mr. Gharbieh works for the Trade Office, not the State Department, and that he is not a lawyer. How the draft information memo for the Secretary of State came into his possession, or for what purpose, is unclear.

2.21 Two comments in track-changes appear on page 2 of document 1614. One of the comments bears the initials “GKNE”. I understand this comment to be authored by Mr. Gharbieh. It is not clear to me who the author of the second comment is but

note that the author's initials are "KD", initials that do not seem to correspond to any of the names on the Lawyers List.

- 2.22 There is no indication on the Privilege Log that Mr. Gharbieh sent document 1614 to anyone.
- 2.23 Against this background, I determined that document 1614 was "Not Privileged". Upon reconsideration of my Report as it relates to this document in light of the parties' comments, I continue to consider that my determination was correct.
- 2.24 For ease of reference, I again note that, for the attorney client privilege to apply under *Animal Welfare*, "the applicable standard is the protection of 'confidential communications from clients to their attorneys made for the purpose of securing legal advice or services' as well as 'communications from attorneys to their clients if the communications rest on confidential information obtained from the client.'" Procedural Order 4 ¶ 16.
- 2.25 As a preliminary matter, and assuming *arguendo* that document 1614 is some sort of communication, it is not clear to me who is communicating with whom. This is because it is unclear how Mr. Gharbieh came to have the draft information memo for the Secretary of State and there is no indication that he sent document 1614 to anyone.
- 2.26 Having said this, I accept Respondent's contention that the draft information memo for the Secretary of State was privileged so long as it remained within the State Department. I disagree, however, that *Animal Welfare* supports Respondent's contention that it remained privileged even after it somehow ended up with Mr. Gharbieh in the Trade Office.

2.27 In the governmental context, “[w]hen one agency shares a privileged document with another agency, the sharing of the document can destroy the privilege.” *Animal Welfare*, Ex. RL67, at 10. “However, when the 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.” *Id.* (internal quotation marks omitted). “Government agencies share a substantial identity of legal interest when they are engaged in a common effort and [seek] the advice of counsel about fulfilling their statutory mission.” *Id.* (internal quotation marks omitted). Such circumstances give rise to a “common interest privilege” that allows the two agencies to share privileged documents between them without destroying the privilege. *Id.*

2.28 Respondent contends that the common interest privilege applies to document 1614 (Respondent’s letter dated 20 January 2024 at 2-3), but I do not consider that this is the case. This is because the common interest privilege covers situations where lawyers for two different agencies can be considered to be representing both agencies jointly. Mr. Gharbieh is not a lawyer and I see no indication in the documents I’ve reviewed that lawyers from the Trade Office were collaborating with lawyers in the State Department with respect to the matter at issue in the draft information memo for the Secretary of State. In these circumstances, I consider that the privilege that applied to the draft information memo for the Secretary of State when it was within the State Department was destroyed when it was shared with the Trade Office.¹

¹ For avoidance of doubt, I do not understand Respondent to contend that document 1614 is protected by attorney-client privilege under the “consultant corollary”. *Animal Welfare*, Ex, RL67, at 9.

2.29 Respondent also contends that document 1614 “was labelled as privileged”.

Respondent’s letter dated 20 January 2024 at 3. I confess that I fail to see any such label on the document. It rather appears that document 1614 is labelled “ATTORNEY WORK PRODUCT”. In all events, however, were document 1614 labelled “PRIVILEGED” it would have no bearing on my decision for the reasons explained above (¶ 2.9).

* * *

2.30 In closing, and at the risk of stating the obvious, issues of attorney-client privilege in the governmental context can be tricky. My determinations as to which documents are “Privileged” and “Not Privileged” reflect nothing more (or less) than my personal best judgment in light of the information provided to me and the standards the Arbitral Tribunal has established. The decision as to whether Respondent should have to produce any given document rests at all times with the Arbitral Tribunal.

2.31 Should the Arbitral Tribunal have any questions or wish anything further, I remain at its disposal.

Date: 30 January 2024

[signed]

Jennifer Kirby
Privilege Master