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. 5 ON REQUESTS FOR THE 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

1 April 2025

A. Introduction

1. Procedural Order No. 1 dated 18 December 2023 ("**PO No. 1**") provides, in paragraph 11, for the Parties to request the production of documents from the other in accordance with the procedural calendar attached as Annex B to that Order, as corrected by the Tribunal's letter dated 21 December 2023.

2. Those requests are to be assessed in accordance with Article 24 of the UNCITRAL Arbitration Rules 1976 and guided by Articles 3 and 9 of the IBA Rules on the Taking of Evidence in International Arbitration (2020) ("**IBA Rules**"), as provided by paragraph 11.3 of PO No. 1.

3. Procedural Order No. 2 on Confidentality dated 5 February 2024 incorporated a confidentiality order governing the confidentiality of information exchanged in this arbitration ("**Confidentiality Order**").

4. On 16 May 2024, the Respondent submitted a request for bifurcation of the Respondent's jurisdictional objections from the merits.

5. By Procedural Order No. 3 on Claimant's Request for Revision of the Procedural Timetable dated 11 June 2024 ("**PO No. 3**"), the Tribunal denied the Claimant's request that the Tribunal order a preliminary document production phase prior to the Claimant's submission of observations on the Respondent's request for bifurcation.

6. After the exchange of submissions, the Tribunal issued Procedural Order No. 4 on Application for Bifurcation on 7 August 2024 ("**PO No. 4**"), ordering that the Tribunal would hear and determine two specified jurisdictional objections as preliminary questions.

7. In accordance with the procedural timetable set in PO No. 1, the Parties each submitted to the Tribunal a Redfern schedule containing their requests for production of documents.

B. Tribunal's decisions

(1) Claimant's requests for the production of documents

8. The Tribunal's decisions on the Claimant's requests for the production of documents are set out in Annex A to this Order.

9. The Tribunal notes the following general points concerning the disposition of the Claimant's requests.

10. Each of the Claimant's requests seeks documents relevant to the first of the two jurisdictional objections that the Tribunal directed to be heard as preliminary issues, namely that:

> Annex 14-C does not provide jurisdiction *ratione temporis*, because Annex 14-C only applies to breaches of obligations of the NAFTA, and the NAFTA was terminated six months before the alleged breach

11. The Respondent was party to the separate claim in *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America,* ICSID Case No. ARB/21/63, that was concluded by Award dated 12 July 2024 (Mourre P & Crook; Alvarez dissenting) ("***TC Energy* proceedings**"). In the context of that arbitration, the Claimant made various requests for production of documents from the Respondent. Those requests were granted in part.[1] The Respondent claimed attorney-client and deliberative process privilege over a number of documents responsive to requests granted by the Tribunal, which were resolved by a Privilege Master's Report in accordance with Terms of Reference made by the Tribunal.[2]

12. Both Parties have made extensive reference to the *TC Energy* proceedings, including the document production ordered in those proceedings.

13. As the Tribunal observed in paragraph 5(e) of PO No. 3, the Tribunal is bound to assess disputed requests for the production of documents "in light of the submissions of the Parties to this arbitration, and not (save to the extent that they may shed light on questions of law) by reference to submissions that may be made in other proceedings." In making that observation, the Tribunal expressed no view on whether documents ordered to be produced in the *TC Energy* proceedings should also be ordered to be produced in this arbitration. The Tribunal has assessed for itself whether an order should be made for

[1] *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America* ICSID Case No. ARB/21/63, Procedural Order No. 3 (6 November 2023) ("***TC Energy* PO No. 3**").

[2] *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America* ICSID Case No. ARB/21/63, Procedural Order No. 3 (11 December 2023) and Report of Jennifer Kirby (18 January 2024).

production of each category of documents sought by reference to the questions put in issue by the Parties to these proceedings.

14. The Tribunal does not accept the proposition that the principle of equality of treatment, as reflected in Article 15(1) of the UNCITRAL Rules, requires the production of documents in this arbitration solely for the reason that they were ordered to be produced in the *TC Energy* proceeding, or that a ruling on the question of whether a particular document is privileged in those proceedings is determinative of the question in these proceedings. The principle of equality of treatment does not require that the Claimant be put in an equal position with a claimant in another case.

15. Notwithstanding those observations, the Tribunal observes that the Parties have joined issue in these proceedings on the relevance of the approach taken by the *TC Energy* tribunal and the Tribunal has considered their submissions as part of the context for its determinations.

(2) Respondent's requests for the production of documents

16. The Tribunal's decisions on the Respondent's requests for the production of documents are set out in Annex B to this Order.

(3) General orders

17. Where a Party has been ordered to produce a document that it considers contains Confidential Information as defined in the Confidentiality Order, then the Parties shall comply with the terms of that Order. The Parties shall confer in an attempt to resolve any issues arising out of the application of the Confidentiality Order. If either Party seeks relief from the Tribunal in relation to the protection of Confidential Information, including without limitation to seek additional protections from the Tribunal, such application shall be made within 15 working days of this decision or as soon as practicable thereafter.

18. Where a Party has 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 shall list those documents in a privilege log to be produced to the other Party within 15 working days of

this Order. Any application to the Tribunal for the resolution of outstanding issues as to privilege shall be made within 10 working days thereafter.

19. Any determination as to the relevance and materiality of requests to produce is made on a preliminary basis without any prejudice to the Tribunal's decision of any question of jurisdiction or merits.

20. In accordance with paragraph 11.5, documents produced shall not be sent to the Tribunal and shall not form part of the record unless and until a party subsequently submits them in evidence as exhibits to its written submissions in accordance with PO No. 1.

21. Leave is reserved for either Party to apply for a variation of this Order, provided that any such application is reasoned and is made no later than 7 days from the date of issue of this Order., *i.e.* by 8 April 2025.

22. The timetable provided in Annex B of Procedural Order No 1 (as corrected on 21 December 2024) is extended such that:

    a. Production of remaining documents shall be made by 15 April 2025;

    b. Reply on Preliminary Objections shall be filed by 15 May 2025 (30 days from production of the remaining documents);

    c. Rejoinder on Preliminary Objections shall be filed by 30 June 2025;

    d. Inter partes notification of witnesses: 7 July 2025;

    e. Notification of witnesses to the Tribunal: 10 July 2025;

    f. Pre-hearing conference call: 14 July 2025.

For the Tribunal

[signed]

Professor C A McLachlan KC
Presiding Arbitrator

1 2025

Alberta Petroleum Marketing Commission v. United States of America
(ICSID Case No. UNCT/23/4)
Procedural Order No 5: Annex A

Claimant's Redfern Schedule

Introduction

1. In this Redfern schedule "documents" is as defined by the IBA Rules on the Taking of Evidence in International Arbitration 2020 (the "**IBA Rules**").

2. Terms used herein are as defined in Claimant's Counter-Memorial on Preliminary Objections dated 16 December 2024 ("**Claimant's Counter-Memorial**").

3. As noted in Procedural Order No. 1 paragraph 11.3, requests for production of documents in this case "*shall be guided by Articles 3 and 9 of the* [IBA Rules] *in form and scope*."

> Pursuant to Article 3(c)(i) of the IBA Rules, Claimant hereby affirms that, to the best of its knowledge and belief, none of the documents requested below are in its possession, custody, or control.
>
> Pursuant to Articles 3(a), 3(b) and 3(c)(ii) of the IBA Rules, Claimant makes below its requests for documents describing the class of documents, and providing reasons for relevance and materiality, and reasons for belief that documents are in the possession of Respondent.

4. For each Request, Respondent is asked to produce all responsive Documents within its possession, custody, or control.

5. Claimant notes that it has been seeking documents essentially conforming to the categories proposed below for well over a year from departments and agencies of Respondent through FOIA processes to almost no avail.[1] Document production requests in this proceeding are therefore a necessary step to ensure the entrance into the record of such documents in good order.

[1] Email from U.S. Department of State to Crowell and Moring, dated 18 December 2023 (C-248); Series of emails between U.S. Department of State, FOIA Requester Service Center and Crowell and Moring, dated 24 February 2023-21 October 2024 (estimated date of completion is 31 December 2025) (C-298); Series of emails between U.S. Department of State, FOIA Requester Service Center and Crowell and Moring, dated 17 June 2024-20 November 2024 (estimated date of completion is 29 May 2026) (C-299); Series of emails between U.S. Department of State, FOIA Requester Service Center and Crowell and Moring, dated 31 July 2024-1 November 2024 (estimated date of completion is 30 April 2026) (C-300).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
1.	**Documents produced between 18 May 2017 and 30 November 2018 and exchanged between the CUSMA Parties' negotiating teams, including, but not limited to, memoranda, minutes of conferences, summary records of discussion, drafts of the treaty text under negotiation exchanged between the CUSMA Parties, and, in particular, copies of the negotiating text drafts circulated prior to each negotiating meeting, and any presentations or notes exchanged between the CUSMA Parties in relation to each session regarding:** **(a) The provisions of CUSMA Chapter 14 (Investment) and Annex 14-C (Legacy Investment Claims and**	As discussed in Claimant's Counter-Memorial,[2] a broad range of "*supplementary means*" may be reviewed to assist treaty interpretation under VCLT Article 32, including explicitly "*the preparatory work of the treaty*." Regardless of the primary interpretation of the treaty text under VCLT Article 31, "*The fact that the general rule of interpretation leads to a clear conclusion does however not preclude the Arbitral Tribunal from applying Article 32*."[3] Thus, evidence applicable to VCLT Article 32 is *prima facie* admissible as relevant and potentially material to the interpretation of treaty text. This category encompasses preparatory work of the drafting of CUSMA Chapter 14, its Annex 14-C, and the Protocol to CUSMA.	Subject to any further guidance from the Tribunal, the United States is willing to produce documents responsive to this request in its possession, custody, or control. M: We note, however, that Claimant has not established that the requested documents are material to the resolution of the U.S. preliminary objection.[8] Article 32 of the Vienna Convention on the Law of Treaties (the "VCLT") provides that "[r]ecourse *may* 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	Claimant is grateful for Respondent's primary position and looks forward to disclosure of documents responsive to request 1. M: Respondent's further comments on this request have general application to the remaining requests but are addressed here for convenience. First, in suggesting that Claimant has not established that the requested documents are material to the resolution of the objection, Respondent reveals the inadequacy of the requests made in its own Redfern, given they do not attempt to discuss materiality, let alone come close to establishing it. Second, Claimant notes that Respondent does not actually	In light of the Respondent's confirmation that it will produce documents responsive to this request, no order is required from the Tribunal.

[2] Claimant's Counter-Memorial, paras. 90, 137.

[3] *TC Energy* Award, para. 180 (RL-60). *See also* Claimant's Counter-Memorial, para. 89; Expert Report of Professor Richard Gardiner, dated 11 October 2024, para. E.1; Alvarez Dissent, para. 13 (CLA-64); Respondent's Memorial on Preliminary Objections, para. 76.

[8] IBA Rules, Art. 3.3(b) (RL-0105). *See also* Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, at 11 (Jan. 2021) (RL-0106) ("Under Article 3.3(b), the content of the requested document needs to be both 'relevant to the case' and 'material to its outcome.'").

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
	Pending Claims), and any prior versions of sections of CUSMA treaty text not so named but dealing with the same subjects; and **(b) The 30 November 2018 Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States ("Protocol").**	The interpretation of these treaty instruments is the core issue of Respondent's *ratione temporis* objection. This category of evidence is therefore explicitly contemplated under VCLT Article 32 as relevant and material to the issue for determination. The date range of this request is defined by the announcement by the United States of its intention to commence negotiations with Canada and Mexico "*regarding the modernization of NAFTA*" and the conclusion of those negotiations by treaty signature of CUSMA,[4] which appropriately circumscribes the period in which preparatory work of the treaty CUSMA was generated. Documents in this category are known to exist. Claimant has already discussed how Respondent produced hundreds	meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[9] As explained in the U.S. Memorial on Preliminary Objections, the application of VCLT Article 31 to Annex 14-C unambiguously establishes that it does not extend the NAFTA's substantive investment obligations beyond the NAFTA's termination.[10] Moreover, there is nothing manifestly absurd or unreasonable about this choice of the USMCA Parties.[11]	resist the contention that review of evidence for treaty interpretation analysis pursuant to VCLT Article 32 is always available to supplement Article 31 analysis. It is simply not enough to claim that Annex 14-C unambiguously establishes Respondent's position. The question of interpretation is the core of the objection and obviously contested, not just by Claimant but various other parties as set out and evidenced in Claimant's submissions. For purposes of disclosure requests, the issue can only be whether the requested documents are *prima facie* relevant and potentially material to the issues for determination, regardless of whether Respondent would claim the	

4 *See* Organization of American States, Foreign Trade Information System: Trade Policy Developments: USMCA.

9 Vienna Convention on the Law of Treaties, Art. 32 (RL-0017) (emphasis added).

10 Respondent's Memorial on Preliminary Objections ¶ 75 & n.102.

11 *See, e.g.*, Expert Report of Professor Richard Gardiner ("Gardiner Report") ¶ G.3 ("[T]here is nothing in the interpretative process to suggest an outcome that leaves the meaning 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.").

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
		of documents in this class in the *TC Energy* proceedings.[5] Certain of those documents are referenced in the public versions of the *TC Energy* Award and opinion of arbitrator Henri Alvarez.[6] Claimant is aware that the CUSMA Parties entered into an Agreement on Confidentiality in 2017, which required the confidentiality of material exchanged between them regarding the CUSMA negotiations be maintained until 1 July 2024.[7] Claimant therefore trusts, that date being long past, Respondent will not raise the Agreement as an objection to production.		correctness of its position is "unambiguous."	
2.	**Documents produced between 18 May 2017 and 30 November 2018 and exchanged within the Office of**	The relevance and materiality of category 1 apply to this request *mutatis mutandis*.	The United States objects to Request No. 2 because Claimant has not established that the requested documents are	R/M: As the commentary which Respondent itself offered states, "*requests for documents to be produced*	The request is **granted** to the extent that it captures documents recording the position taken by the

[5] *See* Claimant's Request for Revision of the Schedule and Production of Documents dated 22 May 2024, para. 13; see also *TC Energy Corp. and TransCanada PipeLines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 4, dated 11 December 2023, para. 5 (C-259).

[6] *TC Energy* Award, paras. 186 ("*On that basis, the Tribunal first needs to assess whether the material that was exchanged during the negotiations is of significance to the interpretive exercise*" (emphasis added)), 187-97 (referencing over thirty exhibits on the record in the ensuing discussion) (RL-60); Alvarez Dissent, paras. 15-32 (CLA-64).

[7] NAFTA Agreement on Confidentiality (C-293).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
	the United States Trade Representative (USTR), or between USTR and other U.S. government agencies, including, but not limited to, background papers, briefing notes, memoranda, meeting minutes, emails, telephone logs, and reports prepared by U.S. government officials for negotiation sessions with Canadian and Mexican negotiators regarding: **(a) The provisions of CUSMA Chapter 14 (Investment) and Annex 14-C (Legacy Investment Claims and Pending Claims), and any prior versions of sections of CUSMA treaty text not so named but dealing with the same subjects; and** **(b) the Protocol.**	Respondent's own position is that the common understanding of the three CUSMA parties is relevant to VCLT Article 32 interpretation.[12] Documents internal to a negotiating party may be relevant and material to elucidate this understanding and "*the circumstances of* [a treaty's] *conclusion*."[13] Documents in this category are known to exist and include documents already on the record of these proceedings.[14]	relevant or material to the resolution of the U.S. preliminary objection and because the documents are subject to attorney-client and deliberative process privileges. M: First, for the reasons already discussed in connection with Request No. 1, Claimant has not established that the requested documents, which could only be used as supplementary means under VCLT Article 32, would be material to the outcome of the U.S. preliminary objection in light of the unambiguous text of Annex 14-C. R/M: Second, Claimant has failed to establish that internal U.S. government documents – which were never shared with the other two USMCA Parties – could ever be considered	*should be carefully tailored to issues that are relevant and material to the determination of the case*."[21] The issue at hand under the request is plainly material – the drafting and interpretation of treaty text forming the basis of Respondent's objection. Claimant has already referred to multiple examples in which internal documents of one treaty party or unilateral statements of a government official have been considered at least relevant and potentially material to treaty interpretation and regarding the "*circumstances of its conclusion.*" Respondent's primary complaint that the requested category of documents	Respondent in negotiations with the other negotiating parties of the relevant sections of CUSMA. To the extent that the Claimant considers that any responsive documents are privileged, such documents are to be listed in a privilege log in accordance with the directions given in this Order.

12 Respondent's Memorial on Preliminary Objections, paras. 77, 90.

13 *See* Claimant's Counter-Memorial, para. 105 (*citing Churchill Mining Plc v. Republic of Indonesia,* ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction dated 24 February 2014, paras. 181, 212 (CLA-82); *Sempra Energy Int'l v Argentine Republic*, ICSID Case No ARB/02/16, Decision on Objections to Jurisdiction dated 11 May 2005, para. 145 (CLA-83); Appellate Body Report, European Communities—Customs Classification of Frozen Boneless Chicken Cuts, para. 289, WTO Doc. WT/DS269/AB/R and WT/DS286/AB/R (adopted 12 September 2005) (CLA-84)).

14 *See, e.g.,* U.S. Trade Representative FOIA package (C-250).

21 Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, at 8 (Jan. 2021) (RL-0106).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
			relevant and material under VCLT Article 32. As special rapporteur Humphrey Waldock observed with respect to *travaux préparatoires*, "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."[15] Professor Richard Gardiner likewise explains in his treatise on treaty interpretation: "The admission of material generated by one party needs to be carefully approached in the light of the principle that *preparatory work should illuminate a common understanding of the agreement, not unilateral hopes and inclinations*."[16] If such a common understanding was	internal to a treaty party cannot be relevant to VCLT Article 32 is not coherent. Respondent concedes that, at minimum, "*internal documents of the United States are not likely to evidence such a common understanding of the three USMCA Parties*." Thus, Respondent complains Claimant has failed to establish that internal documents "*could ever be considered relevant and material*" while admitting they could, in fact, be so. In any event, it is not for Respondent to unilaterally assert the materiality of such documents in advance. Equally, this matter is distinguished from *Methanex*, where the award indicated the claimants had not offered specific grounds that there was evidence providing a	

[15] Humphrey Waldock, Third Report on the Law of Treaties 58 (¶ 21), U.N. Doc. A/CN.4/167 (1964) (RL-0089) (emphasis in original).

[16] RICHARD K. GARDINER, TREATY INTERPRETATION 119 (2d ed. 2015) (RL-0058 *bis*) (emphasis added). *See also* Gardiner Report ¶ E.1 ("A further functional test for admitting material into the interpretative process as supplementary means of interpretation is whether the material provides proof of 'the common understanding of the parties.'") (citation omitted).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
			reached, it would be evidenced in the treaty itself, or in documents exchanged between the USMCA Parties. The internal documents of the United States are not likely to evidence such a common understanding of the three USMCA Parties.[17] P/[U]: Third, the United States objects to Request No. 2 because it seeks internal documents related to the development of U.S. positions during the negotiation of the USMCA, which are likely to be subject to attorney-client privilege[18] and/or deliberative	*prima facie* basis to investigate beyond a VCLT Article 31 analysis.[22] Here, Claimant has already discussed the various points of existing public record which plainly contradict Respondent's interpretation and demonstrate there is with certainty a further record to explore regarding internal documents. P: Under IBA Rules Article 9.2(b) and (f) the matter of exclusion is for the Tribunal to determine, "[in the case of privilege] *under the legal or*	

[17] For these reasons, multiple tribunals have rejected requests for internal documents produced during treaty negotiations. For example, the tribunal in *Methanex v. United States* explained in rejecting Methanex's request for internal U.S. documents prepared during negotiation of the NAFTA that "[i]t was . . . for [the claimant] 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." *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part II, Chapter H, ¶ 25 (Aug. 3, 2005) (RL-0100). 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." *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 5, ¶ 19 (May 28, 2004) (RL-0107).

[18] *See, e.g.*, *Animal Welfare Inst. v. National Oceanic & Atmospheric Admin.*, 370 F. Supp. 3d 116, 130 (D.D.C. 2019) (RL-0108) ("'The attorney-client privilege protects 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.'") (citation omitted).

[22] *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits dated 3 August 2005, Part II, Chapter H, paras. 1-26 (RL-0100).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
			process privilege[19] and should therefore be excluded from document production.[20] It would be unreasonably burdensome for the United States to search for these documents solely for the purpose of listing them on a privilege log.	*ethical rules determined by the Arbitral Tribunal to be applicable* [and regarding] *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*; . . .") (emphasis added). Claimant considers it reasonable for the Tribunal to apply Respondent's attorney-client privilege, which it may assert via a privilege log, regarding any documents	

[19] *See, e.g.*, *U.S. Fish and Wildlife Service et al. v. Sierra Club, Inc.*, 141 S.Ct. 777, 783 (2021) (RL-0109) ("the deliberative process privilege . . . protects from disclosure documents generated during an agency's deliberations about a policy, as opposed to documents that embody or explain a policy that the agency adopts"); *Department of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8 (2001) (RL-0110) ("deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated") (internal quotations and citation omitted).

[20] IBA Rules, Art. 9.2(b) and (f) (RL-0105) ("The Arbitral 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; . . . ."). *See also id.*, Art. 9.4(a) and (c) ("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; . . . (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; . . . .").

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
				within this category not disclosed in the *TC Energy* proceeding. Claimant's primary case is that for any documents already considered in those proceedings, it would be disproportionate to engage in repeat scrutiny as discussed in the context of request no .6 below. Respondent's reliance on deliberative process privilege is unacceptable, for the same reasons Claimant has previously discussed in these proceedings and as reviewed by the *TC Energy* tribunal. Prior tribunals in the NAFTA context considering secrecy objections including a U.S. government assertion of deliberative process privilege have chosen not to apply it where the interest in the evidence for the requesting party's case was evident.[23]	

[23] *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, dated 11 July 2012, paras. 22-26 (CLA-91); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Requests for Production of Documents and Challenges to Assertions of Privilege, dated 21 April 2006, para. 14 (CLA-92) (citing *Federal Trade Commission v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (CLA-93)).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
				Here the issue is the interpretation and "*circumstances of conclusion*" of the treaty text and the evidence is uniquely at Respondent's disposal. Moreover, disclosure may be ordered within the confines of the confidentiality of Procedural Order No. 2. Respondent cannot be prejudiced in Claimant having confidential access to the same material as Respondent on an issue raised by Respondent's own objection, absent the withholding of actual legal advice. The public policy concerns giving rise to deliberative process restrictions within domestic litigation regarding any "chilling effects" on domestic policy creation are not concerns which appropriately arise in the present context. U: Respondent's contention that burden would be excessive in providing a privilege log, if it is to have any credibility at all, is	

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
				contingent on its disclosure being wider in any meaningful sense than it was in *TC Energy*, since that work has already occurred. That seems highly unlikely, and the point will be returned to in the context of request no. 6 below.	
3.	**Documents exchanged between 1 December 2018 and the present between the CUSMA Parties including, but not limited to, memoranda, minutes of conferences, summary records of discussion between the CUSMA Parties, regarding:** **(a) The provisions of CUSMA Chapter 14 (Investment) and Annex 14-C (Legacy Investment Claims and Pending Claims); and** **(b) The Protocol.**	The relevance and materiality of categories 1 and 2 apply to this request *mutatis mutandis*. The date range defined by this class includes documents subsequent to the conclusion of negotiations of CUSMA. There is no *prima facie* reason a document post-dating the conclusion of a treaty cannot record an understanding reached prior to its conclusion and elucidate "*the circumstances of* [a treaty's] *conclusion*." There have been public statements from each CUSMA party post-dating the CUSMA's conclusion regarding its view of	The United States objects to Request No. 3 because Claimant has not established that the requested documents are relevant or material to the resolution of the U.S. preliminary objection. M: First, for the reasons already discussed in connection with Request Nos. 1 and 2, Claimant has not established that the requested documents, which could only be used as supplementary means under VCLT Article 32, would be material to the outcome of the U.S. preliminary objection in light of the unambiguous text of Annex 14-C.	R/M: Claimant relies on its replies regarding requests 1 and 2 as to the relevance and materiality of the requested documents under VCLT Article 32 *mutatis mutandis*. R: As Claimant has already discussed,[26] there is no consensus that litigation submissions are even appropriately taken into account, let alone of mandatory consideration, under VCLT Article 31(3). But Respondent does contend that evidence going to the intent of the treaty parties is relevant under VCLT Article 32. Therefore, such documents are *prima facie*	The request is **denied**. The Claimant has not identified documents that are reasonably believed to exist and which would be relevant to the case and material to its outcome, in circumstances where Claimant seeks documents which post-date the entry into force of CUSMA. The Claimant remains free to make such submissions as it wishes about the relevance of litigation submissions made by the Contracting Parties.

[26] Claimant's Counter-Memorial on Preliminary Objections, para. 83; *see also* Schreuer Expert Report, sec. F.

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
		Chapter 14.[24] It is credible that the CUSMA parties have continued to discuss the text of Chapter 14 and the Protocol since signature of CUSMA.	R: Second, documents postdating the conclusion of the USMCA cannot constitute preparatory work of the treaty or circumstances of its conclusion under VCLT Article 32, as Claimant implicitly acknowledges. Claimant's suggestion that such documents may nevertheless "record an understanding" that predates the USMCA's conclusion is entirely speculative. To the extent such understandings were reached and are recorded, they would be found in documents exchanged between the USMCA Parties while negotiations were ongoing, which the United States has agreed to produce in response to Request No. 1. R: Third, while the concordant positions that the three USMCA Parties have publicly adopted since the treaty's conclusion must be taken into account	relevant and material and Claimant has already discussed public evidence in this case suggesting the litigation positions of the CUSMA parties contradict their prior intent.	

[24] *See, e.g.,* Government of Canada, Minister of International Trade – Briefing Book (C-255); Secretaría de Relaciones Exteriores, United States – Mexico – Canada Agreement (USMCA): Investment and Investor-State Dispute Settlement Mechanism (R-0021).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
			under VCLT Article 31(3),[25] Claimant has identified no provision of the VCLT that would permit the Tribunal to consider records of any preliminary discussions held in advance of the decision to take such positions.		
4.	**Documents produced between 1 December 2018 and the present exchanged within USTR, or between USTR and other U.S. agencies, including, but not limited to, memoranda, minutes of conferences, summary records of discussion regarding:** **(a) The provisions of CUSMA Chapter 14 (Investment) and Annex 14-C (Legacy Investment Claims and Pending Claims); and** **(b) The Protocol,**	The relevance and materiality of categories 1, 2 and 3 apply to this request *mutatis mutandis*. Documents in this category are already known to exist.[27]	The United States objects to Request No. 4 because Claimant has not established that the requested documents are relevant or material to the resolution of the U.S. preliminary objection. R/M: First, for the reasons already discussed in connection with Request Nos. 1 and 2, Claimant has not established that the requested documents, which could only be used as supplementary means under VCLT Article 32, would be relevant or material to the outcome of the U.S. preliminary	R/M: Claimant relies on its replies regarding requests 1, 2, and 3 as to the relevance of the requested documents under VCLT Article 32 *mutatis mutandis*.	The request is **granted** to the extent that it seeks documents recording the position taken by the Respondent during the negotiations (*i.e.* before signature on 10 December 2018) of CUSMA, even if the document in question came into existence afterwards. The request is otherwise **denied**.

[25] Respondent's Memorial on Preliminary Objections ¶¶ 65-67. *See also* Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128 (Jan. 15, 2025); Submission of Mexico Pursuant to NAFTA Article 1128 (Jan. 15, 2025).

[27] *See* Alvarez Dissent, paras. 25-32 (CLA-64); *TC Energy* award, para. 196 (RL-60) (both discussing C-143 on the record of that proceeding, an internal exchange at USTR regarding a discussion between Mr. Lauren Mandell and Mr. Khalil Garbieh, then USTR Director for Investment, explicitly discussed as taking place after conclusion of CUSMA).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
	but not including privileged documents related to pending or potential claims under CUSMA Chapter 14 (Investment) and Annex 14-C (Legacy Investment Claims and Pending Claims)		objection in light of the unambiguous text of Annex 14-C. R: Second, while the concordant positions that the three USMCA Parties have publicly adopted since the treaty's conclusion must be taken into account under VCLT Article 31(3),[28] Claimant has identified no provision of the VCLT that would permit the Tribunal to consider purely internal discussions of a single Party occurring after a treaty's conclusion.		
5.	**Documents produced between 1 December 2018 and the present exchanged between USTR and former employees on the United States Government CUSMA negotiating team including, but not limited to, memoranda, minutes of**	The relevance and materiality of categories 1, 2 and 3 apply to this request *mutatis mutandis*. Documents in this category are already known to exist and Claimant has specifically discussed them to impeach arguments of both Respondent	The United States objects to Request No. 5 because Claimant has not established that the requested documents are relevant or material to the resolution of the U.S. preliminary objection. R/M: First, for the reasons already discussed in connection	R/M: Claimant relies on its replies regarding requests 1, 2, and 3 regarding the relevance of the requested documents under VCLT Article 32 *mutatis mutandis*. Respondent's repeated assertion that a personal view is irrelevant to the	The request is **granted** to the extent that it seeks documents recording the position taken by the Respondent during the negotiations (*i.e.* before signature on 10 December 2018) of CUSMA, even if the document in question came

[28] *See supra* footnote 25.

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
	conferences, summary records of discussion regarding: **(a) The provisions of CUSMA Chapter 14 (Investment) and Annex 14-C (Legacy Investment Claims and Pending Claims); and** **(b) The Protocol.**	and the *TC Energy* award majority.[29]	with Request Nos. 1 and 2, Claimant has not established that the requested documents, which could only be used as supplementary means under VCLT Article 32, would be relevant or material to the outcome of the U.S. preliminary objection in light of the unambiguous text of Annex 14-C. R/M: Second, Claimant has failed to explain how communications with a former member of the USMCA negotiating team occurring after the treaty's conclusion could be relevant or material to the USMCA's interpretation. The personal views and recollections of former employees expressed years after the treaty's conclusion are irrelevant because they are not the views of the United States itself. The views of the United States – and the concordant views of the other two USMCA Parties – are already on the record in detailed	interpretive exercise of VCLT Article 32 remains beside the point. The existing evidence does not demonstrate personal views but recollections of collective views and negotiations of the CUSMA parties. Claimant simply seeks to complete any further record of such exchanges.	into existence afterwards. The request is otherwise **denied**.

[29] *See* Claimant's Counter-Memorial, para. 106.

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
			submissions made to the Tribunal.[30]		
6.	**Documents produced by the United States Government in the arbitration: *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America* (ICSID Case No. ARB/21/64).**	Claimant relies on the reasons it set out in its 22 May 2024 request for these documents as to relevance, materiality, and the fairness of process resulting in production of these documents in the *TC Energy* proceedings.[31] Claimant further relies on the reasons for relevance and materiality of request categories 1, 2 and 3 *mutatis mutandis*. The matter is essentially one of the spirit of the Tribunal's obligation under Article 15(1) of the UNCITRAL Rules to ensure that "*the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case*," particularly	R/M/P: The United States objects to Request No. 6 because it seeks documents that are irrelevant, immaterial, duplicative, and subject to attorney-client and deliberative process privileges. This is the third time that Claimant has requested production of documents that a different tribunal ordered the United States to produce to a different claimant in a different case. Claimant abandoned its initial request for this material, made prior to the first procedural conference, and the Tribunal rejected Claimant's second request in Procedural Order No. 3.[33] The Tribunal	R/M: The Tribunal's decision in Procedural Order No. 3 is irrelevant to this request. That order was a matter of timing and case management only, and did not address the substance of whether the document class should be disclosed generally. Claimant agrees that this request is in part potentially duplicative of the requests above.[35] Claimant has made this request independently of its prior requests given that among the matters for the Tribunal to consider is the question of burden. Respondent rightly makes no objection as to burden under	The request is **denied**. Whether documents should be ordered to be produced must be assessed by the Tribunal in light of the submissions of the Parties to this arbitration. That assessment is not determined by whether documents were produced in the *TC Energy* proceedings. 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 Orders on Claimant's Request 7.

30 *See supra* footnote 25.

31 *See* Claimant's Request for Revision of the Schedule and Production of Documents dated 22 May 2024, paras. 7-18.

33 *See* Procedural Order No. 3, ¶¶ 5-6 (June 11, 2024).

35 Request categories no. 3 (regarding post-signature exchanges between the CUSMA parties) and no. 5 (regarding post-signature communications with former Respondent employees) do not overlap with the order of the *TC Energy* tribunal. *See* Claimant's Request for Revision of the Schedule and Production of Documents dated 22 May 2024, para. 7, for a restatement of the categories which were ordered regarding the *TC Energy* Produced Documents.

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
		in light of Respondent's reliance on the *TC Energy* Award in arguing its *ratione temporis* objection (discussed further below regarding category 7). Further, Respondent did not previously suggest that Claimant had unfairly characterized the process leading to the production of the Produced Documents in the *TC Energy* proceeding.[32] The *TC Energy* tribunal did order a category of documents regarding any material discussing the Keystone XL Project in the context of the renegotiation of NAFTA and negotiation of CUSMA. Claimant understands that Respondent made no production of documents in this class in the *TC Energy* proceedings and therefore the appropriateness of further disclosure in these proceedings may be a moot point.	should likewise reject this third request. First, as the Tribunal ruled in Procedural Order No. 3, it is "bound to assess [the relevance and admissibility of any disputed categories of documents] . . . in light of the submissions of the Parties to this arbitration, and not (save to the extent that they may shed light on questions of law) by reference to submissions that may be made in other proceedings."[34] Request No. 6 asks the Tribunal to countermand this ruling by, in effect, adopting wholesale the *TC Energy* tribunal's determinations on matters of relevance, materiality, and privilege, and its order to produce privileged documents over the United States' repeated and strenuous objections. The Tribunal's ruling in Procedural Order No. 3 was correct and should be maintained.	this request because the material is known and easily identified. Claimant does not consider the burden on Respondent excessive regarding requests nos. 1-5. Claimant notes Respondent's repetition of its irrelevant point regarding equality of arms with a claimant in another proceeding. The equality at issue is as between Claimant and Respondent in this proceeding. P: Claimant maintains the request in the alternative to the above requests as a simple approach to achieving at least the record available in the *TC Energy* proceeding, and in connection with request no. 7 below. Claimant maintains that the procedure in *TC Energy* was fair and independent, involving third party determinations on the issue of attorney-client	

[32] Claimant's Letter to the Tribunal dated 7 June 2024, para. 7.
[34] Procedural Order No. 3, ¶ 5(e) (June 11, 2024).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
			Second, Request No. 6 is duplicative of Request Nos. 1-5 because the *TC Energy* claimants sought many of the same categories of documents in their requests for production as Claimant has requested above. Accordingly, by ruling on Request Nos. 1-5, the Tribunal can make its own decisions – in light of the arguments made by the disputing parties in this case – about which categories of documents are relevant and material to the U.S. preliminary objections. Third, as the United States explained in its June 4, 2024, letter, Claimant's argument regarding Article 15(1) of the UNCITRAL Rules is baseless. Nothing in that article requires that Claimant be put in an equal position with another claimant in another case.	privilege. There is no need to duplicate this work.	
7.	**Unredacted versions of the Award (RL-60) and Alvarez Dissent (CLA-64) dated 12 July 2024 in *TC Energy Corporation and TransCanada Pipelines Limited v. United States of***	Respondent has relied upon the *TC Energy* Award in making its *ratione temporis* preliminary objection and, in particular, has	P: The United States objects to this Request No. 7 because the information sought is subject to attorney-client and deliberative process privileges. The redactions to the *TC Energy*	P: Respondent's comments regarding privilege are addressed above. Respondent's assertion that it relies on the redacted Award	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

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
	***America* (ICSID Case No. ARB/21/64), and exhibits referred to in paragraphs 186-97 of the Award.**	suggested that the award is "*well-reasoned*."[36] Claimant has critiqued the Award; in particular, Claimant has noted incorrect statements in the Award regarding the evidentiary record pertinent to the examination of Annex 14-C of CUSMA, and further noted arbitrator Alvarez's criticism of the Award's treatment of the evidence,[37] which undermine the Award's credibility. However, the Award and Dissent documents presently on the record in these proceedings are redacted public versions. In the spirit of the equality of arms under Article 15(1) of the UNCITRAL Rules, Claimant should have the equal opportunity to comment and rely upon the material of these documents in full in order to fully test Respondent's case.	Award are protecting privileged material. As the United States explained in its June 10, 2024, letter, the *TC Energy* tribunal ordered the United States to produce, over its objection, (1) all documents subject to the deliberative process privilege; and (2) several documents that are clearly subject to the attorney-client privilege.[39] The United States complied with the *TC Energy* tribunal's order but maintained, and continues to maintain, its position that the documents are protected by applicable privileges and therefore exempt from disclosure. Claimant's suggestion that Article 15(1) of the UNCITRAL Rules requires production of the unredacted Award is meritless. To the extent the United States has relied on the *TC Energy* Award, it is the redacted, public version of the Award, which is the same version to which	is not realistic. It relies on the award as well-reasoned in its conclusions. Among those conclusions are those in paragraphs 186-97 based on information from documents largely unavailable to Claimant, and which influenced the Award's overall conclusions. Claimant agrees that this request is duplicative of other requests insofar as it requests the exhibits referred to in paragraphs 186-97 of the Award. As well as the unredacted Award, the exhibits commented upon therein are the minimum possible relevant material required to properly examine it. As noted with regard to request no. 6 above, Claimant's request is meant to allow the Tribunal to consider a range of disclosure orders primarily on the basis of any consideration of burden	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

[36] Respondent's Memorial on Preliminary Objections, para. 4.
[37] Claimant's Counter-Memorial, paras. 110-11, 113, n.78.
[39] U.S. Letter to the Tribunal, at 2 (June 10, 2024).

	Documents Requested	Relevance and Materiality	Objection to the Documents Requested	Reply to Objections to the Documents Requested	Tribunal's Decision
		Given redacted versions of these documents are on the record, manifestly unredacted versions will exist. As a party to the *TC Energy* proceedings, Respondent will naturally possess them. Further, in order to properly critique the Award's reasoning in full, Claimant should have available the actual documents referred to in the Award's discussion of Produced Documents at paragraphs 186 to 197. Where a document is already available to Claimant, it has already been able to comment on unredacted analysis in the Award.[38]	Claimant has access. Accordingly, there is no inequality of treatment here. Finally, Claimant's request for documents referenced in the *TC Energy* Award, which were produced by the United States in response to document requests in that case, is duplicative of Request No. 6 and should be rejected for the same reasons explained above.	issues, but with Claimant's request no. 7 arising out of Respondent's own choice to affirmatively put the Award in issue. Depending upon the Tribunal's views with respect to other disclosure orders, an order with respect to the exhibits referred to at paragraphs 186-97 of the Award may be redundant.	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.

[38] *See* Claimant's Counter-Memorial, n.155.

Annex B - Confidential