

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

SUPPLEMENT 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 Supplement are as defined in the Privilege Master's Report.
- 1.2 On 30 January 2024, the Privilege Master issued an Addendum to her Report ("**Addendum**").
- 1.3 In her Addendum, the Privileged Master, among other things, confirmed her determination that document 1614 was "Not Privileged".
- 1.4 The Arbitral Tribunal subsequently directed that Respondent produce document 1614 to Claimants, which Respondent did on 31 January 2024.

- 1.5 As further detailed in the Addendum, document 1614 is a draft information memo for the Secretary of State. After receiving it, Claimants asked Respondent to produce to them the final version of the memo (“**Final Memo**”)—a document Respondent had not included on its Privilege Log or previously submitted for the Privilege Master’s review. After a further search, Respondent found the Final Memo, but refused to produce it on the grounds that it was protected by attorney-client privilege.
- 1.6 On 6 February 2024, Claimants asked the Arbitral Tribunal to order Respondent to produce the Final Memo.
- 1.7 On 7 February 2024, Respondent filed comments opposing Claimants’ application.
- 1.8 On 8 February 2024, the Arbitral Tribunal informed the parties that it considered that a determination from the Privilege Master would be beneficial before issuing a decision on the matter. The Arbitral Tribunal accordingly directed Respondent to provide a copy of the Final Memo to the Privilege Master, which Respondent did later that same day. The Arbitral Tribunal granted the Privilege Master until 9 February 2024 to make her determination.

2. REASONING AND DETERMINATION

- 2.1 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.’”

- 2.2 The Final Memo was prepared by one or more lawyers within the State Department and provides legal advice to the Secretary of State on a litigation pending in the United States District Court for the Western District of Michigan. On its face, it appears to be based on confidential information received from people within the State Department. It is accordingly an attorney-client communication that is “Privileged”.
- 2.3 Claimants consider that the Final Memo is not protected by attorney-client privilege because I determined that document 1614—an earlier draft of the Final Memo—was “Not Privileged” and the Arbitral Tribunal ordered it produced to Claimants, but I do not agree.
- 2.4 As explained in the Addendum, my determination that document 1614 was “Not Privileged” was tied to its having come from Khalil Gharbieh, a non-lawyer who works for the Trade Office, in circumstances where it was unclear how the draft memo for the Secretary of State had come into his possession, or for what purpose. There was also no indication that Mr. Gharbieh had sent document 1614 to anyone. Assuming *arguendo* that document 1614 was some sort of communication, it was not clear to me who was communicating with whom.
- 2.5 I also did not consider that there was any basis on which the common interest privilege would apply to document 1614 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 saw no indication in the documents I 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 memo for the Secretary of State.

- 2.6 In these circumstances, I considered that, although the attorney-client privilege applied to document 1614 when it was within the State Department, it was destroyed when it was shared with the Trade Office.
- 2.7 The Final Memo is not identical to document 1614. It is an elaboration of document 1614 that appears to reflect the evolving thoughts of one or more lawyers within the State Department. Moreover, in contrast to the earlier draft that is document 1614, I see nothing to indicate that the Final Memo was shared with other agencies at all, much less in circumstances that would destroy the privilege. The Final Memo reflects that it was “Cleared” by various people—some inside the State Department, some at other agencies. But my understanding is that the document the State Department circulated for clearance would have been an earlier draft—possibly document 1614—not the Final Memo. In these circumstances, I see nothing inconsistent in my determinations that the Final Memo is “Privileged” and document 1614 is not.
- 2.8 Should the Arbitral Tribunal have any questions or wish anything further, I remain at its disposal.

Date: 9 February 2024

[signed]

Jennifer Kirby
Privilege Master