UNDER THE UNCITRAL ARBITRATION RULES AND THE NORTH AMERICAN FREE TRADE AGREEMENT

UNITED PARCEL SERVICE OF AMERICA INC.

Claimant / Investor

-AND-

GOVERNMENT OF CANADA

Respondent / Party

INVESTOR'S MOTION ON CANADA'S ASSERTIONS OF CABINET PRIVILEGE

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I. OVERVIEW

1. The Investor makes the following Motion arising out of Canada's refusal to answer the Investor's document requests on the purported basis of Cabinet privilege.

2. Canada claims Cabinet privilege over 377 documents, apparently on the basis of section 39 of the *Canada Evidence Act*. Canada's claim is unfounded because:

   a) This Tribunal is not a body to which section 39(1) of the *Canada Evidence Act* refers.
   b) Section 39, as a provision of domestic law, is inapplicable to an arbitration governed by international law. While international law recognizes a state secrecy privilege, this is much narrower than the privilege provided for in section 39. The documents identified by Canada do not fall within this narrow privilege.
   c) Canada's attempted reliance on domestic law to claim Cabinet privilege is inconsistent with a previous direction of this Tribunal.
   d) Canada's claim prejudices the Investor's rights under NAFTA Articles 1502(3) and 1503(2).
   e) Canada's claim breaches principles of equality contained within the UNCITRAL Arbitration Rules and the NAFTA.

3. This Tribunal should request production of the documents and draw the appropriate adverse inference if Canada subsequently fails to produce them.

II. PROCEDURAL HISTORY

4. In its Procedural Direction of August 1, 2003, the Tribunal set October 1, 2003, as the final deadline for the production of documents.

5. On October 1, 2003, the Investor delivered the last instalment of twenty binders of documents responsive to Canada's document request. At 5:30pm on October 1, 2003, Canada informed the Investor that it was not in a position to tender any documents responsive to the Investor's request.

6. In joint letters to the Tribunal of November 7, 2003 and January 19, 2004, the Investor and Canada agreed to suspend the operation of time periods. On February 23, 2004, the Investor informed Canada the time periods would recommence at 5:00pm on February 26, 2004.

7. In its letter of February 26, 2004, Canada informed the Investor that "[t]here is a class of documents that may fall within the Request for Documents that are currently under review for Cabinet privilege."[1]

8. In its letter of June 11, 2004, more than eight months after it was originally obliged to produce the documents, Canada informed the Investor that it was claiming "public interest immunity" over 377 documents. Canada attached a letter of May 25, 2004, from the Clerk of the Privy Council, informing the Tribunal that the 377 documents were privileged as "Cabinet confidences."[2]

9. The Schedule attached to the Clerk's letter does not identify which of the 377 documents respond to the Investor's Information Request or are merely, in the words of Canada's counsel, "relevant in the arbitration in a broader sense". Nor has the Clerk made any attempt to justify or properly explain the specific nature of the secrecy of the 377 documents. Rather, for each document, the Clerk has merely indicated that the document contains information from one of several classes of documents. These classes are identical to those set out in section 39 of the *Canada Evidence Act*, which provides that:

> (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.
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> (2) For the purposes of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in
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> (a) a memorandum the purpose of which is to present proposals or recommendations to Council;
> (b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
> (c) an agendum of Council or a record recording deliberations of decisions of Council;
> (d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
> (e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and
> (f) draft legislation.[3]

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[1] Letter from I. Whitehall to B. Appleton dated February 26, 2004, attached as Appendix A.

[2] Letter from I. Whitehall to Sir Kenneth Keith dated June 11, 2004, attached as Appendix B.

[3] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39, attached as Appendix C.

A chart indicating which documents in the Schedule fall into these various categories is attached as Appendix D.

10. The Clerk's letter claims that "[i]n Canada, there is a prohibition that does not allow the disclosure of documents that are considered to be Cabinet confidences." This statement does not accurately describe the Canadian law at issue.

11. As the Supreme Court of Canada has confirmed in *Babcock v Canada (Attorney General)*,[4] the *Canada Evidence Act* does not contain a prohibition against disclosure but merely creates a privilege that may be waived. It does not restrain voluntary disclosure of confidential information. The privilege prevents a Canadian court from compelling the production of certified documents, but does not prohibit the court from drawing adverse inferences from the failure to produce a Cabinet document. The Supreme Court of Canada has urged trial courts to make use of adverse inferences where the government asserts privilege as a litigation tactic.

12. The Supreme Court of Canada has also confirmed that the section 39 privilege goes beyond the protections of Cabinet confidences that previously existed in Anglo-Canadian common law. These protections were not absolute and entitled courts to balance any interest in confidentiality against the public interest in disclosure.

III. CANADA'S CLAIM OF PRIVILEGE IS UNFOUNDED

13. The section 39 privilege is inapplicable to these proceedings because this Tribunal is not a body to which the section refers and because, as a provision of Canadian domestic law, it cannot influence proceedings that are governed by international law.

A. This Tribunal is not a body to which the *Canada Evidence Act* refers

14. Section 39(1) of the *Canada Evidence Act* only allows the Clerk of the Privy Council to object to the disclosure of information "before a court, person or body with jurisdiction to compel the production of information." The sub-section is inapplicable because this NAFTA Tribunal does not have such jurisdiction.

15. This conclusion was reached in the *Decision of the Tribunal on Cabinet Confidence* in *Pope & Talbot Inc. and the Government of Canada*.[5] In that case, Canada also sought to rely on section 39 to avoid producing documents. The Tribunal rejected Canada's claim, concluding:

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[4] [2002] 3 S.C.R. 3 at Appendix E. See in particular paras 19, 22 and 36.

[5] September 6, 2000, attached as Appendix F.

> ...the Tribunal does not in any event consider that s.39 of the Canada Evidence Act is applicable. The Tribunal is not "a court, person or body with jurisdiction to compel the production of information." It is operating under the UNCITRAL Rules. While Article 24(3) of those rules empowers [it] to "require the parties to produce documents, exhibits or other evidence," there is no power to compel that production. Indeed, Article 28(3) characterizes this requirement to produce as an invitation:
>
> > If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.[6]

16. This Tribunal is also operating under the UNCITRAL Rules and, accordingly, has no jurisdiction to compel production. Following the decision in *Pope & Talbot*, Canada cannot rely on section 39 to refuse production.

B. Section 39, as a provision of domestic law, is inapplicable to an arbitration governed by international law

i) International law governs this arbitration

17. This arbitration is governed by the UNCITRAL Arbitration Rules, the NAFTA and international law. NAFTA Article 1131(1) establishes the role of the NAFTA and international law. This Article states:

> A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

18. This NAFTA Article must be interpreted in accordance with NAFTA Article 102(2), which states:

> The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

19. NAFTA Article 1120(2) establishes the role of the UNCITRAL Rules to this arbitration. The Article states:

> The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

20. The NAFTA does refer to domestic law in very limited circumstances. For example, NAFTA Article 1139 directs the Tribunal to look to domestic law to establish whether an "enterprise of a party" exists. Similarly, Article 1503 enables a Party to define for itself what constitutes a state trading enterprise. These express references to domestic law

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[6] At para. 1.3.

reinforce the conclusion that the rest of the NAFTA, which does not contain such references, is not affected by domestic law.

ii) International law privilege is narrower than the privilege claimed by Canada

21. Generally, international law does not recognize broad rights to claim privilege that may exist under domestic law. In his seminal treatise, *Evidence Before International Tribunals*, Professor Sandifer states:

> A general rule is to be deprecated that would permit parties to defeat the production of essential documents by refusing to give their consent on the ground of their confidential character.[7]

22. Consistent with its reluctance to accept broad claims of privilege, international law does not recognise the broad Cabinet confidence privilege claimed by Canada. Although international law does recognise that certain government documents will be privileged, privilege of this kind is limited to documents that contain state secrets. Professor Sandifer states that:

> There are two general rules of privilege in municipal procedure having apparent potential importance in international proceedings, namely, the exemption of certain professional persons from revealing information confided to them in their professional capacity *and the privilege for facts constituting secrets of state.*[8]

23. The privilege of state secrecy is far narrower than the cabinet privilege claimed by Canada. While the Clerk of the Privy Council's letter claims privilege over "documents that contain evidence of Ministers' discussions and deliberative process", the international law privilege of state secrecy only protects documents actually containing state secrets. The day to day process of briefing Cabinet Ministers cannot be equated with any notion of state secrecy know to international law.

24. Circumstances in which international tribunals have considered the privilege confirm its narrow application. In the *Corfu Channel* case,[9] for example, the International Court of Justice accepted the UK's refusal to produce documents because they contained navy secrets, and their disclosure would compromise the UK's national security.

25. The memoranda to Cabinet, briefing notes and draft legislation prepared by Ministerial staff, that are claimed as privileged by Canada, do not fall within the narrow international law state secrecy privilege. These records are routine government documents that merely summarize issues for the benefit of a Minister. Correspondence between Ministers is

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[7] Derward Sandifer, *Evidence Before International Tribunals* (1975) at 381, attached at Appendix G.

[8] Sandifer at 376 (emphasis added).

[9] [1949] ICJ 32, attached at Appendix H

also a routine matter. At best, only records of Cabinet deliberations may rise to the level of state secrets. Even then, some evidence of the nature of the deliberations is required to justify Canada's position.

iii) Canada has not complied with the appropriate procedure for claiming privilege

26. Some of the documents over which Canada claims privilege are actual Cabinet deliberations. The Investor accepts that some of these documents could fall within the narrow international law state secrecy privilege. However, Canada has failed to comply with the widely accepted procedure for claiming such privilege by refusing to identify precisely the aspect of the dispute to which the documents relate.

27. The *Pope & Talbot Decision on Cabinet Confidence* of September 6, 2000, confirms that the state must identify the aspect of the dispute to which each document relates. In that Decision, the Tribunal stated:

> So too does this Tribunal expect clarity. For example in paragraphs 72 and 79 of its Reply, Canada hints that there may have been discussion at cabinet level about the SLA or its implementation. As this case concerns implementation of the SLA it may be that the documents refused are not germane to the issues in any event. But without further information the Tribunal has no means of knowing.
>
> The Tribunal accordingly as a first step invites Canada to furnish it with the dates of each of the documents 1-12 referred to, an identification of each document, *and an indication of the aspect of the dispute to which each document relates.*[10]

28. The same *Pope & Talbot* decision and the WTO Panel decision in *Canada - Measures Affecting the Export of Civilian Aircraft* confirm that, in addition to identifying the aspect of the dispute to which each document relates, the state claiming privilege must explain why each specific document contains a state secret. In *Canada - Aircraft*, the Panel stated:

> With regard to cabinet privilege, we note that in certain circumstances, such as national security, a Member may consider itself justified in withholding certain information from a panel. *However, in such circumstances, we would expect that Member to explain clearly the basis for the need to protect that information.* In the present case, Canada has invoked cabinet privilege for the purpose of protecting documents concerning the approval of contributions under the TPC. Canada has failed to explain why such information needs to be protected. In the absence of any such explanation, we are not at all convinced of the merits of Canada's reliance on cabinet privilege in the present case.[11]

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[10] At paras. 1.6 - 1.7 (emphasis added).

[11] WT/DS70/R (14 April 1999) at footnote 633, para. 9.347 attached as Appendix I While the decision was appealed, it was appealed by Brazil, who did not challenge the Panel's finding on this point.

29. Previous international tribunal decisions therefore establish that a state claiming state secrecy privilege must indicate:

a) the aspect of the dispute to which each document relates; and
b) the basis for the need to protect that information.

30. Canada has failed to satisfy either of these requirements. With regard to the first requirement, Canada has simply listed 377 documents, stating that "[t]hese include documents that are responsive to UPS' demand for documents, as well as documents that may be relevant in the arbitration in the broader sense." Canada has therefore not provided, as the *Pope & Talbot* Tribunal required, "an indication of the aspect of the dispute to which each document relates." At the very least, this would require Canada to specify the question from the Investor's request for documents to which the document relates.

31. Canada has failed to satisfy the second requirement by providing no explanation for the need to protect the information. For each document, Canada has simply stated the sub-section of 39(2) of the *Canada Evidence Act* in which the document falls. In justifying its refusal to produce the first document on its list, for example, Canada merely states that it "contains information from a memorandum the purpose of which is to present proposals or recommendations to Council."

32. This justification does not satisfy the requirement to explain the basis for the need to protect the information. Canada fails to explain how any of the documents substantively contain state secrets, as required by both the *Pope & Talbot* and *Canada - Aircraft* tribunals.

iv) Canada cannot rely on domestic law to avoid its international law obligations

33. By relying on section 39(1) of the *Canada Evidence Act* to claim privilege that it cannot claim under international law, Canada is attempting to rely on its domestic law to avoid its international law obligation to produce documents. Article 3 of the International Law Commission's Articles on State Responsibility confirm that a state cannot rely on domestic law to justify its breach of its international law obligations. The Article states:

> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

34. Article 27 of the *Vienna Convention on the Law of Treaties* also prevents a party from invoking the provisions of its internal law as justification for its failure to perform a treaty.

35. The *Parker* decision, of the Mexican-United States General Claims Commission, is a good example of the application of this principle to rules of evidence. In that decision, the Commission stated that:

> ...municipal restrictive rules of adjective law or evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law" or "the general theory of law", and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted ... As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure. On the contrary it holds that is it the duty of the respective Agencies to co-operate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented.[12]

C. Canada's claim for privilege is inconsistent with a previous direction of this Tribunal

36. By claiming Cabinet privilege under domestic law, Canada ignores this Tribunal's *Decision on the Place of Arbitration* of October 17, 2001. Paragraph 4 of that Decision states that "such a claim [for Cabinet privilege] would have to be assessed not under the law of Canada but under the law governing the Tribunal."[13]

37. Furthermore, as the Tribunal stated in paragraph 16 of its *Decision on the Place of Arbitration*, the Tribunal partly chose to hold the arbitration in the United States to avoid the "troubling" interpretation of Canadian domestic law advocated by Canada in its intervention in the *Metalclad* judicial review and that was subsequently raised by it unsuccessfully in the *S.D. Myers* judicial review. To allow Canada to rely now on its domestic law to influence these proceedings conflicts with the decision to hold the arbitration in the US to avoid the application of Canadian law.

D. Canada's position prejudices the Investor's claim under Articles 1502(3) and 1503(2)

38. The Investor is claiming against Canada under, *inter alia*, NAFTA Articles 1502(3) and 1503(2). Article 1502(3) provides, in part:

> Each Party shall ensure, *through regulatory control, administrative supervision or the application of other measures*, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates ... [emphasis added].

39. Similarly, Article 1503(2) provides, in part:

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[12] *Parker Case* (1926) Mexico-U.S. General Claims Commission, IV RIAA 39. Attached as Appendix J.

[13] Attached as Appendix K.

> Each Party shall ensure, *through regulatory control, administrative supervision or the application of other measures*, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven ... [emphasis added].

40. Both Articles therefore entitle the Tribunal to review the adequacy of a Party's "regulatory control" and "administrative supervision." Canada's claimed privilege prevents the Tribunal from fully examining Canada's regulatory control and administrative supervision and therefore has the effect of prejudicing the Investor's ability to bring claims under Articles 1502(3) and 1503(2).

41. If accepted, Canada's claimed broad privilege would also undermine NAFTA tribunals' ability to decide cases based on other NAFTA articles. Governments are involved in every investor-state dispute. In deciding on such disputes, tribunals will often need to determine the motivation behind a government measure. Permitting a government to withhold its deliberative documents would undermine tribunals' ability to resolve investor-state disputes.

E. Canada's claim breaches principles of equality contained within the UNCITRAL Arbitration Rules and the NAFTA

42. NAFTA and UNCITRAL Rules addressing equality of the parties confirm that Canada cannot rely on its domestic privilege rules to avoid producing documents in this arbitration. Article 15(1) of the UNCITRAL Rules states that:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, *provided 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 [emphasis added].

43. Allowing Canada to rely on the broad privilege that they have claimed would imply that the parties are not treated with equality. Canada would be able to assert a privilege that is not available to the Investor.

44. Similarly, allowing Canada to rely on the privilege undermines the equality principles contained in Article 1115 of the NAFTA. That Article emphasises the importance of equal treatment among investors. The Article states:

> ... this Section establishes a mechanism for the settlement of investment disputes *that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity* and due process before an impartial tribunal [emphasis added].

45. Neither Mexico nor the United States has domestic laws providing for such a broad privilege as is accorded by section 39 of the *Canada Evidence Act*. Allowing Canada to rely on section 39 therefore disadvantages investors in Canada, in breach of the equality principle contained in Article 1115. The *Pope & Talbot* Tribunal agreed with this conclusion, stating that:

> other NAFTA Parties do not, so far as the Tribunal has been made aware, have domestic law that would permit or require them to withhold documents from Chapter 11 tribunals without any justification beyond a simple certification that they are some kind of state secret. In these circumstances, Canada, if it could simply rely on s.39 might be in an unfairly advantaged position under Chapter 11 by comparison with the United States or Mexico.[14]

46. Canada's broad claim of privilege is also inconsistent with the direction in Article 102 of the NAFTA that transparency is both an objective of the Agreement and a principle, in light of which, the Agreement shall be interpreted. Canada's refusal to provide potentially disadvantageous evidence because it has constrained itself under domestic law also breaches its obligation in Article 1105 to treat investors, including the Investor, fairly and equitably.

IV. THE TRIBUNAL CAN DRAW ADVERSE INFERENCES FROM CANADA'S FAILURE TO PRODUCE THE DOCUMENTS OVER WHICH IT CLAIMS PRIVILEGE

47. If Canada continues to refuse to produce the 377 documents, this Tribunal should exercise its ability to make adverse inferences from a party's unjustified failure to produce relevant documents. The Investor has discussed the Tribunal's power to draw such inferences in its motion dated June 9, 2004 on Canada's non-compliance with the Investor's Information Request. Additional authority in support of that power is discussed below.

48. Professor Sandifer recognizes international tribunals' general ability to draw an adverse inference from a party's failure to produce documents:

> The obligation of a party to produce evidence in its possession and not accessible to the opposing party is thus generally recognized. In the absence of a specific limitation in the arbitral agreement, tribunals have assumed that they possess the power to draw an adverse inference from the failure or refusal of a party to produce such evidence. Unless a party can show a very convincing reason for not producing essential evidence in his possession or control he withholds it on peril of an adverse decision. The obligation holds even with reference to evidence that may be adverse to a party's own interest.[15]

49. Professor Bin Cheng comes to a similar conclusion in his treatise, *General Principles of Law as applied by International Courts and Tribunals.*[16]

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[14] Decision on Cabinet Confidence, September 6, 2000 at para. 1.5.

[15] Sandifer at 153.

[16] Cheng at 324 - 326. Attached as Appendix L.

50. Similarly, Judge Charles Brower acknowledges that the Iran-US Claims Tribunal, which applied procedural rules modelled on the UNCITRAL Rules, also upheld this principle. He states:

> When it reasonably should be expected that certain evidence exists and that it is in the control of a party, the failure of that party to produce such evidence gives rise to a justifiable inference that such evidence, if produced, would be adverse to that party.[17]

51. Recently, the WTO Appellate Body confirmed international tribunals' ability to draw an adverse inference from a party's failure to produce evidence:

> ...the appropriate inference is that the authority to draw adverse inferences from a Member's refusal to provide information belongs *a fortiori* also to panels examining claims of prohibited export subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals.[18]

V. CONCLUSION

52. The Investor therefore requests that the Tribunal provide the following relief:

(i) An order requiring Canada to indicate which documents listed in the Schedule to the Clerk's letter are responsive to specific document requests in the Investor's Information Request, within three weeks time;

(ii) An order requiring Canada to produce such documents within three weeks; and

(iii) A declaration that the Tribunal will make the appropriate adverse inferences in the event of Canada's failure to comply with these orders.

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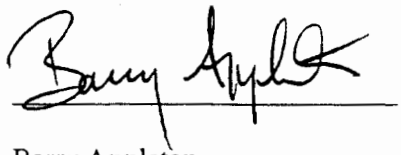
[17] Charles Brower, "The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning The Evaluation of Evidence" in *Fact-Finding by International Tribunals* (1992) at 151. Attached as Appendix M.

[18] *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, August 2, 1999, at para 202. Attached as Appendix N.

All of which is respectfully submitted.

Submitted this 17th day of June, 2004



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