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 REJOINDER ON CANADA'S ASSERTIONS OF CABINET PRIVILEGE

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I. OVERVIEW

1. Canada's long awaited Reply to the Investor's Motion on Canada's Assertions of Cabinet Privilege asks this Tribunal to condone Canada's decision to withhold highly relevant and necessary evidence from the Investor and this Tribunal. Canada's request is contrary to well established international law, fundamentally unfair to the Investor and prejudicial to the NAFTA investor-state process. Canada's attempt to withhold relevant and material evidence is based on an erroneous description of Canadian law and on the misconceived notion that international law should simply mirror the unusual and highly restrictive procedures adopted in Canadian legislation.

2. This Tribunal should declare that Canada's assertions of Cabinet Privilege over responsive documents are invalid as:

   A. the responsive documents contain highly relevant evidence and Canada has not justified its refusal to disclose them;

   B. Canada is not "bound" to withhold the responsive documents;

   C. international law does not recognize the form of privilege asserted by Canada and this international law rule cannot be circumvented by an appeal to "general principles of law"; and

   D. in any event, the forms of common law privilege cited by Canada are much narrower than the privilege established by the *Canada Evidence Act*.

3. As a result, the Tribunal should clearly indicate to Canada that it will not accept Canada's wide ranging assertions of Cabinet Privilege and that a continued failure to disclose responsive documents may be appropriately sanctioned by the drawing of adverse inferences.

II. CANADA'S RECENT DOCUMENT PRODUCTION

4. Until the filing of its Reply on August 13, 2004, Canada had identified 377 documents that were potentially responsive to the Investor's Document Request and that would not be produced in their entirety on grounds of Cabinet Privilege. In its Reply, Canada has narrowed the number of responsive documents to 170. Redacted versions of 27 of these responsive documents were delivered to the Investor on July 30, 2004. Canada has confirmed in its Reply that it will not be delivering any of the remaining 143 documents.[1]

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[1] Reply of the Government of Canada to the Investor's Motion on Canada's Assertions of Cabinet Privilege dated August 13, 2004 ("Canada's Reply") at para. 12.

5. Until the delivery of its Reply, Canada had not even indicated how many of the 377 documents were responsive to the Investor's Document Request. Nor had it indicated the specific question in the Document Request to which the documents were responsive. Canada should have provided this information no later than February 26, 2004. The Tribunal should consider Canada's inordinate delay in supplying this information in awarding costs of this motion.

6. Even the small sample of 27 redacted documents provided to date reveals that the responsive documents withheld by Canada contain highly relevant and material information. For example, Canada has provided:

   A. A letter from the Chairman of Canada Post to the Minister of Finance discussing proposed growth financing of Purolator Courier through resources provided by Canada Post.[2] The letter constitutes highly probative evidence to support the Investor's allegation that Purolator has been able to draw upon the financial strength of Canada Post and Canada to compete against UPS Canada.[3] Details of the proposed debt financing for Purolator have been redacted based on allegations of Cabinet Privilege, even though this is merely a reporting letter from the Chairman of Canada Post.

   B. An internal bureaucratic memorandum discussing the government's response to the Canada Post Mandate Review.[4] The recommendations of the Mandate Review and the government's failure to respond to them have been expressly pleaded by the Investor.[5] This memorandum is not addressed to a Cabinet Minister and it is unclear why portions have been redacted.

   C. A briefing note discussing an analysis of Canada Post's operations by TD Securities prepared in response to the Mandate Review.[6] Again, this document relates to a central issue raised by the Investor. There is no indication that this document was prepared for a Cabinet discussion or any specific explanation for why portions of the document have been redacted.

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[2] Letter from André Ouellet to Hon. Paul Martin dated May 10, 1999, attached as Tab A to this Rejoinder. (Produced as CPC-TAB232C-3 Binder 43).

[3] See paragraphs 28(d) and 30 of the Revised Amended Statement of Claim ("RASC").

[4] Memorandum from David Watters to Peter Harder dated August 8, 1996, attached as Tab B to this Rejoinder. (Produced as CPC-TAB247-23 Binder 43).

[5] RASC at para. 14.

[6] Briefing Note prepared by Paul Thibault dated January 30, 1997, attached as Tab C to this Rejoinder. (Produced as CPC-TAB247-27 Binder 43).

7. Canada has not demonstrated any overriding public interest that would justify its failure to disclose the redacted portions of these documents or its failure to disclose the remaining 143 responsive documents. Canada merely relies on the fact that the Clerk of the Privy Council has certified that the responsive documents fall within the enumerated categories in section 39 of the *Canada Evidence Act*. These categories go well beyond records of actual Cabinet deliberations and encompass nearly any document containing information for Cabinet Ministers.

III. THE *CANADA EVIDENCE ACT* DOES NOT COMPEL CANADA TO SUPPRESS THIS EVIDENCE

8. Canada's Reply repeatedly asserts that Canada is bound by its domestic law not to produce documents that fall within section 39 of the *Canada Evidence Act*. Although a provision of its domestic law could not excuse Canada from an international law obligation, it is important to clarify that Canada's description of its domestic law is simply incorrect.

9. The Supreme Court of Canada confirmed in *Babcock v. Canada (Attorney General)* that the *Canada Evidence Act* does not contain a prohibition against disclosure but merely creates a privilege that may be waived.[7] Canada is attempting to introduce this special domestic law privilege created by its own legislation into the international law arena.

10. Canada alleges that this Tribunal should not seek guidance from the *S.D. Myers* and *Pope & Talbot* decisions on Cabinet Privilege as they predate the Supreme Court of Canada's decision in *Babcock*. However, there is nothing in the Supreme Court's decision that would have led these NAFTA tribunals to reach a different conclusion, nor could a Canadian domestic court override decisions taken by a NAFTA Tribunal.

11. In *Pope & Talbot*, the NAFTA Tribunal referred to a lower court ruling in the *Babcock* case as clarifying that the privilege created by section 39 of the *Canada Evidence Act* can be waived. The Supreme Court of Canada expressly confirmed the lower court's ruling on this point.[8] Thus, the Supreme Court's decision merely reinforces the validity of the *Pope & Talbot* Tribunal's conclusion.

12. In *S.D. Myers*, the NAFTA Tribunal did not rule on the issue of Cabinet Privilege, but left it open to the Investor to bring a separate motion seeking disclosure of documents

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[7] *Babcock v. Canada* (Attorney General) [2002] 3 S.C.R. 3, attached as Appendix E of the Investor's Motion on Canada's Assertions of Cabinet Privilege dated June 17, 2004 ("Investor's Motion"). See in particular paras. 19, 22 and 36.

[8] *Pope & Talbot Inc. and the Government of Canada*, Decision of the Tribunal on Cabinet Confidences dated September 6, 2000 at para.1.4. Attached as Appendix F of the Investor's Motion.

withheld by Canada on this ground. In an explanatory note, the *S.D. Myers* Tribunal gave an indication of how it might approach such a motion. The Tribunal stated:

> In the absence of the certificate, the issuance of which appears to be at CANADA's discretion, the Tribunal likely would follow the approach taken by the WTO panel in the Brazil-Canada airplane dispute and, on a "document-by-document" basis, require CANADA to give sufficient information and justification to sustain privilege for each document.[9]

Thus the *S.D. Myers* Tribunal clearly found that they had the authority, if called upon, to look behind Canada's blanket claims of Cabinet Privilege.

13. As stated in the Investor's first submission on this motion, the "document-by-document" approach of the WTO panel referred to by the *S.D. Myers* Tribunal requires Canada to demonstrate the need to protect information in each document covered by the privilege claim. The WTO panel cited "national security" as an example of circumstances that might justify the withholding of information on such a document-by-document basis.[10]

14. Again, nothing in the Supreme Court's decision in *Babcock* would modify the reasoning of the WTO and NAFTA Tribunals cited above. Nor does Canada's list of the date, author and recipient of each document meet the burden of justification established in these decisions. It is not sufficient for Canada to simply certify that each document falls within the classes of documents covered by section 39 of the *Canada Evidence Act*. Rather, Canada must demonstrate that there is a clear basis for withholding each document that outweighs any prejudice to the Investor in this claim governed by NAFTA and international law. No such specific justification has been offered.

IV. CANADA'S PRIVILEGE ASSERTIONS ARE CONTRARY TO INTERNATIONAL LAW

15. Canada now acknowledges that this arbitration is governed by international law and that, as a result, it cannot apply the *Canada Evidence Act* directly to this Tribunal.[11] However, Canada appeals to "general principles of law recognized by civilized nations" as the source of a new international rule. This new rule proposed by Canada, drawn from the purported practice of certain states, is allegedly identical to the procedure set out in the *Canada Evidence Act*.[12]

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[9] *S.D. Myers and the Government of Canada*, Explanatory Note to Procedural Order No.10 (concerning Crown privilege) dated November 16, 1999 at para. 5. Attached as Appendix 7 of Canada's Reply.

[10] *Canada - Measures Affecting the Export of Civilian Aircraft* WT/DS70/R (14 April 1999) at footnote 633, para. 9.347, attached as Appendix 1 of the Investor's Motion.

[11] Canada's Reply at para. 26.

[12] Canada's Reply at paras. 32 and 56.

16. Canada's position cannot be sustained as:

A. Canada cannot appeal to "general principles of law" to circumvent well established rules of international law;

B. There are no "general principles" applicable to this issue; and

C. The provisions of the *Canada Evidence Act* go well beyond the protections for official information in the municipal law examples cited by Canada.

A. *Canada Cannot Circumvent Well Established Rules of International Law*

17. Canada suggests that this Tribunal may look to municipal law for guidance "when the laws governing procedure are not sufficiently detailed".[13] However, this is not a case where the relevant procedural law is not sufficiently detailed. Rather, it is a case where there is a consistent line of authorities rejecting Canada's approach. Canada is asking this Tribunal to decline to follow these international authorities and adopt instead an approach fashioned from Canada's own unusually restrictive municipal law.

18. The international law rule applicable in this case was clearly articulated by the *Pope & Talbot* Tribunal:

> In the specific context of a NAFTA arbitration where the parties have agreed to operate by UNCITRAL Rules, it is an overriding principle (Article 15) that the parties be treated with equality. The 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 rely on s.39, might be in an unfairly advantaged position under Chapter 11 by comparison with the United States and Mexico.[14]

19. The *Pope & Talbot* Tribunal then invited Canada "to offer reasons why in conformity with a general law relating to State secrets those particular documents, or any of them should be withheld".[15] This approach is consistent with the "document by document" justification of non-disclosure outlined by the *S.D Myers* Tribunal and the WTO panel in the *Canada-Aircraft* case described above.

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[13] Canada's Reply at para. 35.

[14] *Pope & Talbot and Canada*, Decision on Cabinet Confidences at para.1.5, attached as Appendix F of the Investor's Motion.

[15] *Pope & Talbot and Canada*, Decision on Cabinet Confidences at para.1.7, attached as Appendix F of the Investor's Motion.

20. Recognizing that the decision of the *Pope & Talbot* Tribunal is directly on point, Canada makes two unfair criticisms of this decision.[16] First, Canada asserts that the Tribunal found an international wrong merely because Canada did not follow its own internal law and not because it violated international law. Second, Canada alleges that the Tribunal was unaware of the U.S. doctrine of executive privilege. Neither criticism is valid.

21. The *Pope & Talbot* Tribunal was not examining whether Canada committed an international wrong, but merely considering the merits of Canada's argument that its internal law prevented the disclosure of the documents. In that regard, the Tribunal observed that the certificate of the Clerk of the Privy Council was not even in conformity with Canadian law. Nor was the Tribunal unaware of the U.S. doctrine of executive privilege. As elaborated upon below, that doctrine does not allow non-disclosure based on a simple certification by the executive. Rather, it requires the courts to perform a case-by-case balancing of the competing interests involved. Canada's submissions to the *Pope & Talbot* Tribunal are nearly identical to those made in this case.[17]

22. The approach adopted by the *Pope & Talbot* and other international trade tribunals is consistent with the requirements of equality in Article 15 of the UNCITRAL Arbitration Rules and Article 1115 of NAFTA. It is also consistent with the NAFTA principle of transparency recognized in Article 102 of NAFTA and the express protections from disclosure of certain types of information, set out in Chapter 21 of NAFTA.

23. Where the NAFTA parties wished to protect access to sensitive information, they created express protections to this effect. Thus, Article 2102(1)(c) protects access to information the disclosure of which would be contrary to "essential security interests". Article 2105 (Disclosure of Information) expressly provides that "Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy ...". Had the NAFTA Parties wished to ensure that the documents covered by section 39 of the *Canada Evidence Act* received similar protection, presumably they would have done so directly in the text of the treaty.

B. *There Are No General Principles Applicable to This Issue*

24. Canada's appeal to "general principles of law" to overturn the established international law rule regarding the scope of the state secrets privilege is based on a fundamental misunderstanding of the meaning of this phrase. The concept of "general principles of law" refers to legal maxims that are found in all sophisticated legal orders and not to specific rules of substantive law or procedure that are common to the practice of a number of states.

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[16] Canada's Reply at paras. 41 and 47.

[17] A copy of Canada's submission is attached as Tab D to this Rejoinder.

25. The role of "general principles of law recognized by civilized nations" as a source of international law is codified by Article 38(1)(c) of the Statute of the International Court of Justice. Professor Bin Cheng explains the meaning of Article 38(1)(c) in his seminal work on the subject, *General Principles of Law as applied by International Courts and Tribunals*:

> This part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of judicial truth, in short of Law.[18]

26. Professor Cheng's exhaustive survey demonstrates that the principles that international tribunals have found falling within Article 38(1)(c) all contain the features of judicial truth and universality. Professor Cheng provides the following examples:

A. "both parties must be heard";
B. "the body sitting as a judicial organ must be legally competent";
C. "no one should be judge in his own cause";
D. "the judge must not neglect the examination of any relevant point of fact or of law";
E. "the decision must be based on the law applicable"; and
F. "there should always be the greatest respect for the principle of *res judicata*."[19]

27. In its Reply, Canada acknowledges the meaning of Article 38(1)(c), including its requirement that the principles express judicial truth and are universal. They state that:

> According [sic] *Oppenheim's International Law*, general principles naturally commend themselves to states for application in the international legal system, as being almost *necessarily inherent* in *any* legal system within the experience of states.[20]

28. Canada's assertion that the specific form of Cabinet Privilege adopted in section 39 of the *Canada Evidence Act* is part of a general principle of law cannot be reconciled with the requirement of a principle "necessarily inherent in any legal system". As explained by Professor Cheng, "specific rules formulated for practical purposes" do not fall within Article 38(1)(c).

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[18] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge University Press, Cambridge, 1994) at 24, attached as Tab E to this Rejoinder.

[19] Cheng, *General Principles of Law* at 258, attached as Tab E to this Rejoinder.

[20] Canada's Reply at para. 33 (emphasis added).

29. Canada argues that Cabinet Privilege serves a number of practical purposes that advance the objective of good government.[21] Even if this were so, this justification does not elevate Cabinet Privilege to a general principle of law. It merely demonstrates the "practical purpose" of this specific rule and not its inherent truth.

30. Cabinet Privilege cannot be a general principle of law if it is merely a feature of Westminister style governments. While other constitutional systems may also have some form of protection for government deliberations, Canada has not pointed to a universal practice of all nations. Indeed, Canada has not even established a practice common to all members of the NAFTA region.

31. As discussed below, different nations strike a different balance between the requirement of protecting government deliberations and other requirements such as freedom of information and the juridical equality of litigants. While countries like Canada may find the arguments for protecting government deliberations compelling, other jurisdictions place more weight on freedom of information and juridical equality. Thus, there is no general principle to draw upon.

32. Canada relies on the *Barcelona Traction* decision to support its claim that international courts and tribunals may simply adopt municipal rules of evidence. However, a close reading of that decision does not support Canada's position.

33. In that case, Justice Fitzmaurice and Justice Jessup reached different conclusions regarding whether an adverse inference should be drawn from Belgium's failure to produce certain documents. Justice Fitzmaurice refused to draw an adverse inference because he concluded that the common law "best evidence" rule did not apply to international law and the content of the documents could be established by secondary sources. Justice Fitzmaurice noted that the application of the "best evidence" rule by a municipal tribunal would prevent the introduction of secondary evidence of the contents of the documents, but observed that "International tribunals are not tied by such firm rules, however, many of which are not appropriate for litigation between governments".[22]

34. Justice Jessup agreed with Justice Fitzmaurice that the ICJ did not have elaborate rules of evidence such as the "best evidence" rule. However, he felt it would be appropriate to apply the common law rule of drawing an adverse inference from a failure to produce on demand a relevant document.[23] This rule is also a well established rule of international law. The adoption into international law of the practice of drawing an adverse inference

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[21] Canada's Reply at paras. 49 to 50.

[22] *Case Concerning The Barcelona Traction, Light and Power Company, Limited*, (1970) ICJ 3 at 69, para. 58, attached as Tab 5 of Canada's Reply.

[23] *Barcelona Traction* at 146, para. 97, attached as Tab 5 of Canada's Reply.

from a failure to produce relevant documents cannot serve as a precedent for the recognition of Cabinet Privilege in international law. The former rule is specifically recognized by Professor Cheng as a universal feature of any legal order[24] while the latter is specific to the practical objectives of the Canadian legal system.

35. Justice Jessup went on to explain that international law placed a high burden on any state seeking to avoid the disclosure of relevant evidence, but allowed states to invoke national security concerns such as naval secrecy:

> Although it is true that, as Sir Gerald Fitzmaurice emphasizes, that one should give due weight to the pressures engendered by situation in the Second World War, international law has long taken cognizance of practices designed to thwart belligerents by concealing the truth ... If disclosure of the text of the trust deeds would have prejudiced some governmental interest, Belgium could have pleaded this fact, as the United Kingdom successfully pleaded "naval secrecy" in the Corfu Channel case ... .[25]

This passage only confirms the Investor's earlier submission that the state secrets privilege in international law relates to national security matters or similar issues.

36. There are many aspects of international practice that differ from widely shared municipal practice. For example, although courts throughout the common law world apply elaborate rules of evidence, such as the rule against the admissibility of hearsay or the "best evidence" rule, international tribunals reject such an approach.[26] Indeed, international courts have specifically declared that these evidentiary practices, though widely adopted in the common law world, are not "universal principles of law".[27]

C. *Other Approaches to Official Information Are Less Restrictive*

37. Although the municipal law approaches surveyed by Canada cannot overturn an established international law rule, it is important to emphasize that none of the examples of state practice cited by Canada are as extreme as the approach taken by the *Canada Evidence Act*. In each case, the simple certification by the executive that the documents fall within a category of state secrets is not sufficient to justify non-disclosure. Rather, the courts will balance the interests of the government against the requirements of equality of the litigants and other societal values.

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[24] Cheng, *General Principles of Law* at 324 to 326, attached as Tab L of the Investor's Motion.

[25] *Barcelona Traction* at 146, para. 96, attached as Tab 5 of Canada's Reply.

[26] Opinion of Justice Fitzmaurice, *Barcelona Traction* at 69, para. 58, attached as Tab 5 of Canada's Reply.

[27] See *William A. Parker v. The United Mexican States* IV RIAA 35 at para. 5, attached as Tab J to the Investor's Motion.

i. The Common Law of Westminister-Style States

38. Section 39 of the *Canada Evidence Act* is not a codification of the English common law principles relating to Cabinet Privilege. The breadth of privilege under section 39 and the process provided therein do not reflect the approach taken under the common law.

39. Under the common law claim of Cabinet Privilege, two equal and often competing public interests must be balanced: (1) the harm that may be done to the nation or the public service by the disclosure of certain documents; and (2) the harm that may be done to the administration of justice if the documents are not disclosed.[28]

40. It is the *exclusive* domain of the courts to weigh the one competing aspect of the public interest against the other and decide where the balance lies. As the Supreme Court of Canada has ruled in commenting on the common law approach (which continues to apply to Canadian provincial governments):

> In the end, it is for the court and not the Crown to determine the issue. ... The opposite view will go against the spirit of the legislation enacted in every jurisdiction in Canada that the Crown may be sued like any other person. More fundamentally, it would be contrary to the constitutional relationship that ought to prevail between the executive and the courts in this country.[29]

41. Among the variables to be weighed is the nature of the policy sought to be protected, whether the policy is contemporary or not and the nature and importance of the case before the court.[30]

42. In assessing the competing interests of government confidentiality and the proper administration of justice, the courts have the authority to order disclosure of the documents for judicial inspection.[31] In Canada, courts generally use a broad and flexible approach in ordering inspection of documents. The Supreme Court of Canada has endorsed the principle that as long as the documents are relevant to issues in dispute in the case, they should be available for inspection.[32]

43. Section 39 of the Act departs from the approach taken under the common law. Section 39 does not employ a balancing test between the competing interests of government confidentiality and the proper administration of justice. Once the Clerk of the Privy

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[28] *Sankey v Whitlam* (1970) 142 CLR 1 (High Court of Australia) at para. 37, attached as Tab F to this Rejoinder; See also *Babcock v. Canada* at para. 19, attached as Tab E of the Investor's Motion.

[29] *Carey v. The Queen* [1986] 2 SCR 637 at para. 39, attached as Tab G to this Rejoinder.

[30] *Carey v. The Queen*, attached as Tab G to this Rejoinder.

[31] *Carey v. The Queen* at para. 86, attached as Tab G to this Rejoinder.

[32] *Carey v. The Queen* at para. 108, attached as Tab G to this Rejoinder.

Council or the Minister of the Crown certifies the information in the documents as confidential, privilege attaches. Once certified, the common law no longer applies to that information precisely because a domestic court loses its legal authority to balance the competing public interests. The court is effectively left with no choice but to refuse disclosure.[33]

44. The restrictive approach towards disclosure which section 39 of the Act employs is not consistent with the more flexible approach under the common law. Nor is it in line with the traditions of the Westminister styles of government. As Lord Morris observed in the English case of *Conway v Rimmer*:

> There will be situations in which a decision ought to be made whether the harm that may result on the production of documents will be greater than the harm that may result on their non production. Who then is to hold the scales? Who is to judge where the greater weight lies?
>
> We could have a system under which the Minister of the Crown gave a certificate that a document should not be produced, the courts would be obliged to give full affect to such certificate and, in every case and without exception, to treat both as binding, final conclusive. Such a system (though it could be laid down by some specific statutory enactment) would, in my view, be out of harmony with the spirit which in this country has guided the ordering of our affairs and in particular the administration of justice.[34]

Thus, the system established by the *Canada Evidence Act* is "out of harmony" with the English common law tradition which Canada claims is a general principle of law.

ii. <u>The U.S. Doctrine of Executive Privilege</u>

45. Canada suggests that the common law privilege is "codified" in the United States by the Federal Rules of Evidence. In fact, these rules merely state that privilege is determined by common law doctrines.[35] Canada then cites two examples of U.S. common law privileges. The first deals with military secrets and is not relevant for our purposes.[36] The second example is the doctrine of executive privilege discussed by the United States Supreme Court in *Nixon v. United States*.[37]

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[33] *Babcock v. Canada* at para. 23, attached as Tab E of the Investor's Motion.

[34] *Conway v Rimmer* [1968] AC 910 at 940 (H.L.) at 15, attached as Tab H to this Rejoinder.

[35] Federal Rules of Evidence, Rule 501, attached as Tab 11 of Canada's Reply.

[36] *Clift v. United States*, 808 F.Supp. 101 (D.Conn., 1991) attached as Tab 12 of Canada's Reply.

[37] *Nixon v. United States*, 418 U.S. 683 (1974) attached as Tab I of this Rejoinder.

46. In the *Nixon* case, the United States Supreme Court recognized the existence of an executive privilege based on the separation of powers in the U.S. Constitution but cautioned that the privilege was not absolute. Only the most sensitive circumstances would justify the non-disclosure of information and that such circumstances were for the courts to determine:

> However, neither the doctrine of separation of powers , nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers call for great deference from the courts. However, when the privilege depends solely on the broad , undifferentiated claim of public interest in the confidentiality of such conversations, a confrontations with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security interests , we find it difficult to accept the argument that even the very important interests in confidentiality of Presidential communications is significantly diminished by the production of such material for in camera inspection with all the protection that a district court will be obliged to provide.[38]

Accordingly, the U.S. doctrine of executive privilege is far less restrictive and different from the approach adopted under the *Canada Evidence Act*.

iii. <u>The IBA Rules</u>

47. Canada refers to the privilege on grounds of "special political or institutional sensitivity" in Article 9(2)(f) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration as part of its discussion of the applicable international law. However, this Tribunal has not adopted the IBA Rules in their entirety, particularly in light of the Investor's express objection to this provision in its earlier submissions.[39]

48. The privilege in Article 9(2)(f) of the IBA Rules is reasonable in the context of ordinary international commercial arbitration between private parties. In such cases, there is no reason for believing that the privilege will inherently favor one party over another. However, in the context of investor-state arbitration, the unqualified application of this privilege would violate the overriding requirement of equality set out in NAFTA Article 1115 and UNCITRAL Rule 15 by systematically favoring the respondent.

49. Moreover, a careful reading of the Article 9(2)(f) reveals that its scope is limited to grounds "that the Arbitral Tribunal *determines to be compelling*". Thus, the IBA rules contemplate that the tribunal itself will make a determination of the privilege and that a simple certification by the executive is not sufficient.

iv. <u>Canada Has Not Followed A Balancing Approach</u>

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[38] *Nixon* at 10, attached as Tab I of this Rejoinder.

[39] See letter from Counsel for the Investor to Sir Kenneth Keith, dated March 26, 2003, attached as Tab J to this Rejoinder.

50. Canada has implicitly recognized that the practices of states surveyed in its Reply involve a balancing of the competing interests for and against disclosure. Canada states "where the harm to the public interest by releasing documents containing cabinet confidences, such as draft legislation, cabinet deliberations and ministerial discussions, *outweighs* the need for UPS to access the information, such confidences must not be disclosed".[40] However, Canada has not provided any example of another state in which the weighing of the competing interests is performed by the executive itself rather than by the courts.

51. Moreover, it is apparent from the categories of documents identified in the letter from the Clerk of the Privy Council that only some of the responsive documents are "draft legislation, cabinet deliberations and ministerial discussions" which are protected in sections 39(2)(f), (c) and (d) of the *Canada Evidence Act*, respectively. Presumably, Canada has emphasized these categories as they reflect a more compelling state interest than other categories of documents in section 39(2)(a) or (e). These consist of, respectively, memoranda that which present proposals or recommendations to Cabinet and records the purpose of which is to brief Ministers on matters that are to be brought before Cabinet or are the subject of Ministerial discussions. A large number of the documents identified in the letter from the Clerk of the Privy Council fall into these more routine categories of briefings and summaries prepared by Ministerial staff that do not reflect any deliberative process.

52. In any event, all that the Clerk's certificate establishes is that the listed documents may fall within a category of section 39 of the *Canada Evidence Act*. The fact that a document may fall within such a category is not a sufficient justification to withhold it from the Investor.

V. CONCLUSION

53. Although the precise adverse inference to be drawn from Canada's withholding of documents should be left to a later date, the Tribunal should give clear directions that Canada's actions will not be excused by its invocation of Cabinet Privilege. Canada will therefore have the option of complying with the Tribunal's directions or running the risk of appropriate sanctions.

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

    (i) An order requiring Canada to produce unredacted versions of the 170 documents identified as responsive to the Investor's Information Request, within three weeks time; and

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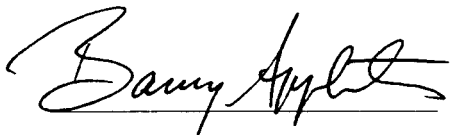
[40] Canada's Reply at para. 56.

(ii) A declaration that the Tribunal will make the appropriate adverse inferences in the event of Canada's failure to comply with this order.

All of which is respectfully submitted.

Submitted this 26th day of August, 2004



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