DECISION BY TRIBUNAL

IN

NAFTA UNCITRAL INVESTOR-STATE CLAIM
POPE & TALBOT INC AND THE GOVERNMENT OF CANADA

Canada refuses to produce certain documents upon the grounds that they relate to cabinet confidence, and to other documents upon the basis of solicitor-client privilege. The Investor challenges both grounds of refusal, and asks the Tribunal to make certain orders upon that basis; Canada invites the Tribunal to dismiss the Investor's motion with costs.

1. Cabinet Confidence

1.1 Canada refuses to produce 12 documents, identified to the Tribunal as documents numbered 1-12. It does so in purported reliance on s.39 of the Canada Evidence Act. S39(1) provides inter alia (1) "Where ... 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."

1.2 In support of its refusal Canada relies on a letter, undated, bearing the heading of the Clerk of the Privy Council and Secretary to the Cabinet, and signed by Mel Cappe to the Chairman of the Tribunal. The accompanying fax from Counsel for Canada states "Attached please find a copy of the certificate under s.39 of the Canada Evidence Act signed by the Clerk of the Privy Council in this matter." The above mentioned letter states that it is in response to requests for documents from Counsel for Pope & Talbot Inc. dated February 15, 2000and pursuant to Procedural Orders No. 9 and 10, and continues, "Section 39 of the Canada Evidence Act creates an absolute prohibition on the disclosure of documents which are or contain Cabinet confidences. I confirm that the Government of Canada claims privilege at this time for twelve documents which are confidences of the Queen's Privy Council for Canada as detailed in the attached Schedule." The Schedule lists 12 documents, identified by number only, and including à propos each that it contains information either used for or taken from another document used for a purpose falling within s.39(2)(a)(c)(d) or (e). Having

regard to the views expressed by the Courts in Canada v. Central Cartage Co 1990 2F.C. 641 and Smith Kline & French Laboratories Limited v. Attorney General of Canada 1983 1F.C. 917, and the form of certificate actually given by the Clerk in the Central Cartage case at 649-650, and in Babcock v. Canada (A.G.)2000 BCCA 348 at pages 20-24, the Tribunal is not satisfied that the Cappe document constitutes "certifying in writing" in the terms required by s.39.

1.3 However that may be, 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 to "require the parties to produce documents, exhibits or other evidence," there is no power to compel that production. Indeed, Article 28(3) characterises 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.

1.4 It is not in dispute that a ground that may justify refusal of a party to produce documents to an international arbitral tribunal may be the protection of state secrets. But any reasonable evaluation of the quality of that justification must depend in large part on having some idea of what those documents are. A determination by a Tribunal that documents sufficiently identified deserve protection is a very different matter from acquiescence to a simple assertion, without any identification, that they deserve protection. It is apposite to state that Canada appears to take the view that it has not merely a right to withhold such documents, but that s.39 imposes a duty not to produce them. But, as noted, by its terms s.39 is not applicable here. Moreover, the Tribunal observes that the language of s.39 is worded on the basis that a Minister or Clerk objects by duly certifying, and the recent decision in *Babcock v Canada Attorney General* (June 6, 2000) makes it clear that it is a privilege that can be waived.

1.5 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 simply rely on s.39, might be in an unfairly advantaged position under Chapter 11 by comparison with the United States and Mexico.

1.6 It is for Canada to determine whether it intends to adhere to its refusal. As matters stand, the Tribunal has no means of knowing what sort of material is being withheld, nor to what time scale the material relates. In the Canadian Measure Affecting the Export of Civilian Aircraft case, 14 April 1999, the WTO Panel stated that where a state is justified in withholding information, it is to be expected that it should "explain clearly the basis for the need to protect that information". 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.

1.7 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 if any to which each document relates. It would be of value to the Tribunal if Canada were able to offer reasons why in conformity with a general law relating to State secrets those particular documents, or any of them should be withheld.

1.8 Any issue as to inferences to be drawn in relation to production or non-production of documents will ultimately be disposed of in accordance with UNCITRAL Rule 28(3).

2. Solicitor-Client Relationship

1.9 The Tribunal accepts, in general, the contention by Canada that solicitor-client privilege extends to communication for the purpose of giving or seeking legal advice (Smith v. Jones 1999 1SCR 455; Solosky v. Canada 1980 1SCR 821; Descôt-eaux v. Mierzwinski 1982 1SCR 860). It rejects the contention on behalf of the Investor that the privilege is confined to legal advice given in contemplation of litigation.

1.10 Accordingly, the claim to privilege by Canada on this basis is upheld generally so far as it relates to the documents specified in Schedule B. However, certain of these documents do not appear to be confined to the provision of legal advice, and it appears to the Tribunal that those parts of such documents as do constitute such advice (or summaries thereof) should be excised and the remaining material made available. This ruling applies to B3; B9; B12 ; B24 and B35.

In addition there are two documents B28(b) and B34 which appear to be simply 'status' reports and not to fall under the head of legal advice. Accordingly Canada is required to produce these documents also (under excision if necessary of any legal advice contained therein).

1.11 For the avoidance of doubt the claim to privilege in relation to the Donohue case documents is upheld.

Lord Dervaird
Presiding Arbitrator
On behalf of and after deliberation
with the members of the Tribunal

6th September 2000