IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

B E T W E E N

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant/Investor

AND

GOVERNMENT OF CANADA

Respondent/Party

REPLY OF THE GOVERNMENT OF CANADA TO THE INVESTOR'S MOTION ON CANADA'S ASSERTIONS OF CABINET PRIVILEGE

(13 August 2004)

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PART I – INTRODUCTION

1. This Reply responds to the "Investor's Motion" dated 17 June 2004.

2. United Parcel Services of America, Inc ("UPS") seeks an order requiring that Canada, from the documents listed in the Clerk of the Privy Council's letter of 25 May 2004, produce and indicate documents that respond to the Investor's Request for Documents. UPS also requests a declaration from the Tribunal that it will make the appropriate adverse inferences in the event of Canada's failure to comply with its order.

3. Canada notes that the Tribunal has specifically preserved the right to rule on evidentiary privileges, exemptions and immunities.[1] Accordingly, Canada makes the following submission on the need to protect certain types of official government information from disclosure.

PART II – FACTS

4. On 4 April 2003, the Tribunal issued its Procedural Directions and Order ("Procedural Directions") on document production and interrogatories. In its Direction of 1 August 2003, the Tribunal ordered that the production of document should be completed by 1 October 2003.

5. Despite UPS' insinuation, neither party delivered documents to the other on that date as a result of a mutually-agreed suspension of time of the arbitration.[2] Once the suspension was over, on 26 February 2004, both parties delivered their documents.

6. UPS delivered its restricted documents, since it had already provided Canada with its public documents. Canada delivered its public documents and placed its restricted documents into escrow, pending a ruling from the Tribunal on the confidentiality undertaking. Canada also informed UPS that a class of documents that may include documents responsive to its information request were currently under review for Cabinet privilege.

7. Canada submitted all potentially privileged documents to the Clerk of the Privy Council for his consideration, and for the issuance of a certificate in compliance with section 39 of the *Canada Evidence Act*.[3] The majority of these documents were submitted to the Clerk of the Privy Council in September 2003. However, with Canada's document discovery process ongoing, other potential cabinet confidences were identified and submitted to the Privy Council for review by the Clerk in November 2003 and in January 2004.

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[1] Procedural Directions and Order of the Tribunal, 4 April 2003, at para. 10.

[2] Letter from I.G. Whitehall and Barry Appleton to The Right Honourable Sir Kenneth J. Keith, January 19, 2004, at Tab 5 of the Submissions of Canada Regarding the Production of Restricted Documents, 26 February 2004.

[3] *Canada Evidence Act*, R.S.C., 1985, c. E-10. (Tab C of the Investor's Motion on Canada's Assertions of Cabinet Privilege, 17 June 2004).

8. Not all documents submitted to the Clerk were responsive to UPS' information request. Canada gave over all documents relevant to the arbitration in the broader sense, including both documents responsive to UPS' claim and documents which Canada thought it may wish to rely on in the arbitration. Canada took this action because the assertion of a public interest immunity by the Clerk of the Privy Council also prohibits Canada from producing a document in support of its own case.

9. On 11 June 2004, Canada wrote to the Tribunal and to UPS to inform them that the Clerk of the Privy Council of Canada had completed his review and asserted a public interest immunity in respect of 377 documents. The documents were subsequently reviewed for their responsiveness to UPS' information request.

10. Of the 377 documents, 170 documents are responsive in whole or in part. Of those, 27 documents have been delivered to UPS in redacted form. They contain information that is responsive to UPS' information request and has not been subjected to a public interest immunity claim by the Clerk of the Privy Council.

11. On 14 June 2004, the Investor initiated a motion to compel Canada to produce the documents.

12. Canada is bound by its domestic law not to produce documents that must be protected on account of public interest immunity. In compliance with the same law, Canada attaches at Tab 18 two schedules supplied by the Privy Council of Canada. The fist schedule lists 27 documents which were provided to UPS in redacted form on 30 July 2004. The second schedule lists 143 documents which are also responsive to UPS' Information Request, but cannot be produced as this information is privileged. Both schedules contain the requisite information about the document, including its date, title, author, recipient and the reason for which they are to be protected from disclosure. They also note the UPS question from its Information Request to which the document relates.

Canadian Law

13. Section 39 of the *Canada Evidence Act* prohibits the disclosure of information constituting a confidence of the Queen's Privy Council. It provides:

> 39. (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.

(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

(*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 or 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) For the purposes of subsection (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(4) Subsection (1) does not apply in respect of

(*a*) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(*b*) a discussion paper described in paragraph (2)(*b*)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

14. In *Babcock* v. *Canada (AG)*,[4] the Supreme Court confirmed that s. 39 is Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings. Certification by the Clerk of the Privy Council is the trigger by which information becomes protected on the basis that the 'information constitutes a confidence of the Queen's Privy Council for Canada'. And in the words of the Supreme Court,

[4] [2002] 3 SCR 3 at para. 21. (Tab E of the Investor's Motion on Canada's Assertions of Cabinet Privilege, 17 June 2004)

> The function of the Clerk under the Act is to protect Cabinet confidences, and this alone. It is not to thwart public inquiry nor is it to gain tactical advantage in litigation.[5]

15. The Supreme Court concluded at paragraph 27 that certification is generally valid if:

> (1) it is done by the Clerk or minister; (2) it relates to information within s. 39(2); (3) it is done in a *bona fide* exercise of delegated power; (4) it is done to prevent disclosure of hitherto confidential information.

16. The Supreme Court went on to comment on the formal aspects of certification, acknowledging that it is up to the Clerk to determine two things:

> (1) that the information is a Cabinet confidence within s.39; and (2) that it is desirable that confidentiality be retained taking into account the competing interests in disclosure and retaining confidentiality. What formal certification requirements flow from this? The second, discretionary element may be taken as satisfied by the act of certification. However, the first element of the Clerk's decision requires that her certificate bring the information within the ambit of the Act. This means that the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) or an analogous category [...] The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue.[6]

17. It is therefore clear in Canadian law that for a contested claim of confidence of the Queen's Privy Council to be valid, the Clerk must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence, having weighed the competing

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[5] [2002] 3 SCR 3 at para. 25. (Tab E of the Investor's Motion on Canada's Assertions of Cabinet Privilege, 17 June 2004)

[6] [2002] 3 SCR 3, at para. 28. (Tab E of the Investor's Motion on Canada's Assertions of Cabinet Privilege, 17 June 2004). This interpretation of s. 39 of the *Canada Evidence Act* has recently been relied on by the Federal Court in *Pelletier* v. *Procureur Général du Canada*, Dossier T-668-04, Réf 2004 CF1072, 4 Auguste 2004. (Tab 2). In that case, Hugessen J. rejected a claim of privilege on the basis that the documents described "souffrent d'un défaut formel et fatal." The Court stated at paragraph 5 that:

Il faut spécifier adéquatement le document pour lequel on réclame un privilège afin de permettre non seulement de décider si la demande de privilège est bien fondée mais surtout afin de permettre d'identifier le document si à une étape subséquente des procédures on tente de l'introduire en preuve ou par un hasard quelconque ou même par inadvertance, il est produit devant la Cour. Dans le cas présent, pour les documents que j'ai mentionnés tout à l'heure, il n'en n'est rien, aucun détail utile n'est donné.

public interests in disclosure and retaining confidentiality. This normally requires the disclosure of the document's date, title, author and recipient.

18. Canada has applied the same standard for claimed privileges in this arbitration.

19. The case law cited above postdates the decisions made by the *Myers* and *Pope & Talbot* tribunals. Accordingly, the Tribunal must not seek guidance from either of those arbitrations without first assessing Canada's compliance with its international obligations according to current domestic procedures to protect confidences of the Queen's Privy Council for Canada.

20. Canada does not expect the Tribunal to apply s. 39 as law governing this arbitral proceeding. Instead, it asks the Tribunal to consider it along with the Canadian case law as a description of the mechanism by which the Clerk of the Privy Council for Canada responsibly exercises the power to claim Cabinet confidentiality. Certification is the trigger by which information becomes protected on the basis that the documents are of a certain character and that it is desirable that confidentiality be retained because the public interest in so doing outweighs other interests.

PART III – ARGUMENT

A. Summary

21. The Tribunal has maintained the power to rule on claims of privilege pursuant to the UNCITRAL rules and in accordance with international law.

22. UPS admits that international law "does recognize that certain government documents will be privileged," but argues that the Tribunal should limit the privilege to cover documents that actually contain state secrets.[7]

23. Canada submits that the privilege in international law relating to official government information covers more than state secrets. The international general principle governing government information protects the disclosure of all information which would be dangerous to the national interest or harmful to national security and/or diplomatic relations, but also documents that reveal cabinet discussions and deliberations.

24. Canada's domestic law is consistent with the general principle of international law that official government information, such as cabinet confidences, requires special protection. Canada has provided the requisite detail of each document to demonstrate that it contains privileged information.

25. Finally, Canada submits that it would be improper for the Tribunal to draw an adverse inference against it.

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[7] Investor's Motion on Canada's Assertion of Cabinet Privilege, 17 June 2004, at para. 22.

B. Applicable Law

26. Article 1131 of NAFTA provides that "[a] Tribunal established under this section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Article 1120 provides that applicable arbitration rules under which a claim is submitted shall govern the arbitration except to the extent modified by this section.

27. UPS brought its claim under the UNCITRAL Rules.[8] UNCITRAL Rule 24(3) allows a tribunal to require production of documents. The provision provides:

> 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine;

28. According to the Tribunal's Procedural Directions, the Tribunal will rule on evidentiary privileges, exemptions and immunities as they arise. The Directions provide as follows:

> 10. If the Government of Canada objects to the disclosure of any information on the basis of a privilege, ground for exemption or non disclosure or public interest immunity arising at common law or by Act of the Parliament of Canada, the Tribunal will decide on the basis of submissions by the disputing parties on the action to be taken.

29. Since the NAFTA and the UNCITRAL Rules do not dictate how privileges shall be applied, the governing law must be complemented by applicable rules of international law. The Tribunal may therefore seek guidance from other sources of international law.

30. Guidance on the limits of the privilege can be found Article 9 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.[9] Article 9 states that it is for the Tribunal to determine the admissibility, relevance, materiality and weight of evidence. It goes on to provide:

> 2. 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 for any of the following reasons:
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> ...
>
> (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
>
> ...

[8] In accordance with NAFTA Article 1120(1).

[9] *IBA Rules on the Taking of Evidence in International Commercial Arbitration,* International Bar Association (1999), Article 9(2)(c). (Tab 3)

(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;

31. The words "political or institutional sensitivity" specifically *include* but cannot be limited to government secrets.

32. Guidance can also be sought from other recognized sources of international law of general application, including "general principles of law recognized by civilized nations".[10] The meaning of this phrase, as attested to by a long line of publicists, is "to authorize the Court to apply the general principles of municipal jurisprudence, insofar as they are applicable to relations of states."[11]

33. According *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.[12]

34. Therefore, while the authority of the Tribunal to determine the boundaries of the international legal privilege on official government information and its application in this case is rooted in Article 1131 of NAFTA, the Tribunal should seek guidance from other rules of international law as well as the municipal legal principles applicable to the procedure of a NAFTA Chapter 11 arbitration.

C. The Procedure of the Privy Council of Canada to Protect Cabinet Confidences Complies with Canada's Obligations in International Law

a. General Principles of International Law Rely on Municipal Law

35. For the Tribunal to assess whether Canada's protections of privileged information is in accordance with international law, it must refer to municipal law for guidance. This is a common approach adopted in international dispute settlement when the laws governing procedure are not sufficiently detailed.[13]

36. Justice Jessup stated in *Barcelona Traction* that the court, in determining matters of evidence, may consider whether disclosure could be prejudicial to the government interest. To this end, Justice Jessup referred to the *Corfu Channel* case, where the United

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[10] Article 38(1)(c) of the *Statute of the International Court of Justice*.

[11] *See* the long line of authors cited in R. Jennings & A. Watts (eds.), *Oppenheim's International Law*, Volume 1 (9th ed.), (Longman: New York, 1996) at para. 12, fn. 2, at 37. (Tab 4)

[12] *Idib.* at 36, para. 12. (Tab 4)

[13] *See* for instance the *Case Concerning The Barcelona Traction, Light and Power Company, Limited,* (1970) ICJ 3, at 58 and 215 (separate opinions of Justice Jessup and Justice Fitzmaurice) ["*Barcelona Traction*"] (Tab 5) in which Justice Jessup, in his separate concurring opinion, indicated that where the court did not have fully developed rules of evidence, it is appropriate to consider common law rules.

Kingdom successfully invoked "naval secrecy" as a justification for its failure to disclose information.[14]

37. Further, in *Barcelona Traction,* the Court considered the challenges posed by commercial disputes in an international arena. The Court expressed its opinion on the issue as follows:

> 50. In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case involves factors derived from municipal law - the distinction and the community between the company and the shareholder - which the parties, however widely their interpretation may differ, each take as the point of departure of their reasoning. *If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties.* It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. *It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.* (Emphasis added)[15]

38. The interaction between domestic law and international law in commercial arbitration was also considered by a NAFTA Chapter 11 Tribunal in *Myers* v. *Government of Canada.*[16] In that case, the Claimant objected to Canada's assertion of Cabinet confidence and the Tribunal was asked to consider the issue of Cabinet confidence.

39. By Procedural Order, the Tribunal indicated that Canada was not required to produce the documents requested by the Claimant, which constituted cabinet confidences, as determined by the Clerk of the Privy Council.[17] However, the Tribunal declined to decide whether production of these documents could be required if the Claimant wished to make a further motion on the issue.

40. Hence, while the Tribunal in *Myers* did not expressly deal with the issue of Cabinet confidence, it nonetheless clearly recognized its authority to consider domestic law, and contemplated the appropriateness of domestic considerations when dealing with Investor-State disputes.

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[14] *Corfu Channel Case,* (1949) I.C.J. 4 at 32 as cited in *Barcelona Traction, ibid.* (Tab 6)
[15] *Barcelona Traction, ibid.* at 37. (Tab 5)
[16] *S.D. Myers* v. *Government of Canada,* ["*Myers*"], (16 November 1999), (Procedural Order No. 10). (Tab 7)
[17] *Ibid.*

41. The *Pope & Talbot* Tribunal, on the other hand, did not limit itself to a consideration of whether Canada's cabinet confidence protections meet with Canada's international law obligations, but took it upon itself to judge the actions of the Clerk of the Privy Council according to his compliance with s. 39 of the *Canada Evidence Act*. The Tribunal proclaimed that "the Tribunal is not satisfied that the Cappe document [the Clerk's certificate] constitutes 'certifying in writing' in the terms required by s. 39."

42. As a result, the *Pope & Talbot* Tribunal misunderstood one of the fundamentals of international law, namely that an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. As the Permanent Court of Justice stated in the *Treatment of Polish Nationals* case:

> ...according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted...[18]

43. When this Tribunal assesses Canada's compliance with its international obligations it must do so in accordance with the general principles of international law, which in turn rely on municipal law. It is not for the Tribunal to assess Canada's actions according to its domestic law, but according to its international obligations.

b. Official Government Information Is Protected by Many States

44. UPS argues that the privilege of state secrecy is far narrower than the cabinet privilege claimed by Canada. According to UPS, the international law privilege of state secrecy only protects documents actually containing state secrets, not Ministerial discussions and deliberative processes.[19]

45. For this assertion, UPS cites one author, Prof. Durward Sandifer, who writes about "state secrets" without ever defining the meaning he ascribes to the term. In its motion, UPS cites two passages from Sandifer's text,[20] but fails to bring the Tribunal's attention to Sandifer's reference to the conclusion drawn by the Second Committee responsible for drafting the 1936 Rules of the Permanent Court. The Committee thought it wise to say nothing about a duty of States to produce all relevant information in its possession, because, in its words, there were:

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[18] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory 1932, PCIJ Series A/B, No. 44,* 4 at 24. (Tab 8)

[19] Investor's Motion on Canada's Assertions of Cabinet Privilege, 17 June 2004, at para. 23.

[20] Investor's Motion on Canada's Assertion of Cabinet Privilege, 17 June 2004, at paras. 21 and 22.

> great difficulties in the way because in its own courts every government must claim to exercise occasionally the right to refuse to produce a document on the ground of public interest and of that interest it claims to be the sole judge.[21]

46. Public interest privileges must include more types of information than the narrow meaning that UPS is attempting to attribute to a 'state secrecy' privilege. UPS' argument that the international law privilege is narrow demonstrates a profound misunderstanding for the importance of protecting official information in Canada and around the world.

47. Likewise, when the *Pope & Talbot* Tribunal drew the conclusion that "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" [22] demonstrated its misunderstanding of the issue.

48. The principle of cabinet confidentiality comes from the convention that ministers are collectively responsible to Parliament for the decisions and actions of the government.[23]

49. The confidentiality of cabinet deliberations sustains the system of responsible government. It supports the collegiality and solidarity among Ministers essential for the operation of collective responsibility and the effectiveness of the government. Through assurances of Cabinet confidentiality, Ministers can freely state their positions on various proposals, thereby adequately representing their constituents.[24]

50. The confidential character of cabinet deliberations is vital to the democratic system which requires that a decision, once made, represents the decision of the government as a whole.[25]

51. The confidentiality of cabinet information is hardly unique to Canada. In 1976, a report was tabled in the British Parliament on the subject canvassing the relevant law and practice in France, Sweden, Canada, and the United States. The report concluded that:

> Governmental representatives in all four countries took it for granted that a Government cannot function completely in the open, but must be able to preserve the confidential nature of its internal processes, especially at the highest levels of policy making.[26]

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[21] D. Sandifer, *Evidence Before International Tribunals*, Revised ed. (1975), University Press of Virginia Charlottesville, at p. 378. (Tab 17)

[22] Decision by Tribunal, 16 September 2000, at para. 1.5. (Tab F of Investor's Motion on Canada's Assertions of Cabinet Privilege, 17 June 2004)

[23] Affidavit of Nicholas d'Ombrain ["d'Ombrain Affidavit"] used by the Government of Canada in at *Myers, Pope & Talbot* as well as in proceedings before the Supreme Court of Canada and the Federal Court of Appeal, 27 April 1999, para. 15. (Tab 9)

[24] d'Ombrain Affidavit, at paras. 16-19, and 36-37. (Tab 9)

[25] d'Ombrain Affidavit, at paras. 2-22. (Tab 9)

[26] d'Ombrain Affidavit. at para. (Tab 9)

52. Similarly, a leading English case articulated the fundamental importance of Crown privilege:

> In my opinion it is necessary in the national interest for the proper functioning of government in this country that documents of this kind, being documents relating to the formulation of issues of government policy at the highest level, namely Cabinet Committees and Cabinet, should be withheld from production. The importance of confidentiality for the inner working of government at this level has been widely recognized and I respectfully refer to the observations for Lord Reid in *Conway v. Rimmer* [1968] A.C. 910, 952. Since that judgment the confidentiality of Cabinet proceedings has been considered by two independent committees, the Franks Committee on Section 2 of the *Official Secrets Act 1911* (1972) (Cmnd. 5104) and the Radcliffe Committee on ministerial memoirs (1976) (Cmnd. 6368). Both reaffirmed without qualification the importance of preserving the confidentiality of the proceedings in Cabinet and Cabinet Committees.[27]

53. The prevalence in Westminster style governments of Cabinet confidence is noted and explained more fully in the d'Ombrain affidavit attached to this Reply.[28] Recent examples of the recognition of Cabinet confidence in constitutional systems include the United Kingdom, the United States, New Zealand, and Australia, but are not limited to common law countries.

54. In the United States, the common law privilege has been codified by the Federal Rules of Evidence[29] and covers documents classified as confidential, secret and top secret.[30] The US also has an executive privilege, allowing the President and high-level executive branch officers to withhold information from Congress, the courts and ultimately the public.[31]

55. The fact is that special protections for official government documents exist in many legal systems, but they are especially provided in common law jurisdictions due to the extensive discovery provisions known there.[32]

56. Where there is a need for document discovery and interrogatories, as in this arbitration, it is in keeping with general principles of international law that official government information be

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[27] *Air Canada et al.* v. *Secretary of State for Trade et al*, [1983] 2 A.C. 394 at 406. (Tab 10)
[28] d'Ombrain Affidavit, at para. 40. (Tab 9)
[29] Federal Rules of Evidence, Rule 501 (3d. ed.). (Tab 11)
[30] *See* generally *Clift* v. *United States,* 808 F. Supp. 101 (D.Conn., 1991). (Tab 12)
[31] *See* for example M. Rozell, "Executive Privilege and the Modern Presidents: in Nixon's Shadow", 83 Minn. L. Rev. 1069, which describes the history of the privilege in the US following its constitutional status by the Supreme Court in *Nixon* v. *United States*, 94 S.Ct. 3090 (1974). (Tab 13)
[32] R. Mosk and T. Ginsberg, "Evidentiary Privileges in International Arbitration," 50 ICLQ 345, at 363. (Tab 14)

privileged. As a result, 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.

c. The Public Interest to Protect Cabinet Confidences Outweighs the Need for UPS to Access Requested Documents

57. As noted above, the Clerk of the Privy Council has considered all documents submitted to him and has claimed privilege on 377 documents, 170 of which are responsive to UPS' Information Request.

58. Prior to objecting to the disclosure of documents, the Clerk must be confident that the information comes within the Cabinet confidence definition. He must also exercise his judgement to conclude that it is information the government wishes to protect, taking into account the competing public interests in disclosure and retaining confidentiality.

59. The Privy Council Office schedules attached as Tab 18 to this Reply describe in detail the documents, including their date, title, author and recipient. The schedules also note the UPS question to which the document relates, and the reason for which the document is privileged.

60. Canada provides this information in compliance with its own law. However, that law is itself in compliance with the general principle that official government information may be precluded from disclosure in international arbitration on the basis that the public interest protecting draft legislation and Ministerial discussions and deliberations outweighs UPS' need to access the documents.

61. The Tribunal's power to require parties to produce documents is subject to a party's entitlement to claim privilege. As a matter of both international law, and Canadian municipal law, cabinet confidentiality is a recognized basis for an assertion of privilege.

d. Conclusion

62. In the instant case, a longstanding domestic law premised on public policy concerns that are equally applicable in the international context, requires Canada to assert privilege over cabinet documents. In explaining its position Canada has shown sufficient cause for its refusal to produce certain documents. These reasons are set out in the d'Ombrain affidavit and include preservation of a national system of democracy, as recognized by many countries, including the United States. They also include the obligation to adhere to domestic legislation in the absence of international evidentiary rules.

D. No Adverse Inference Should Be Drawn

63. UNCITRAL Rule 28(3) provides:

> 3. 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.* (Emphasis added)

64. UNCITRAL Rule 28(3) does not require a Tribunal to draw an adverse inference and instead, instructs the Tribunal to make a determination based on the available evidence. As no specific direction is given as to when a Tribunal should draw negative inferences it should be very cautious in doing so.

65. This is especially true when dealing with governments, which may be unable to produce requested documents because of prohibitions contained in their laws or national security concerns.[33] As Kazazi concludes,

> 5. Adverse inference shall be drawn against a party which has not produced documents in its possession without providing any justification. Thus, explanations provided by a party as reasons for not producing the requested documents should be weighed by the tribunal and taken into account before drawing any adverse inference. For instance, governments might have difficulties arising from their laws or national security concerns. An international tribunal would be more cautious in drawing negative inferences against government.

66. In any event, the request to draw an adverse inference at this stage is premature. As the Appellate Body in *Canada - Measures Affecting the Export of Civilian Aircraft* indicated, "the full assembly of the facts on the record" may be necessary for a tribunal to draw any negative inference.[34] At this point in the proceedings, this Tribunal does not have the benefit of any evidence from Canada, let alone the complete record upon which it will ultimately have to make its determination.

67. Given that Canada's refusal to disclose documents is based in a long-standing and internationally recognized privilege, and given that Canada has identified the documents that are responsive and the reason for their non-disclosure, Canada submits that it would be improper for the Tribunal to draw any negative inference.

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[33] M. Kazazi, *Burden of Proof and Related Issues - A Study of Evidence Before International Tribunals*, Kluwer Law International, The Hague, at 321-322. (Tab 15)

[34] *Canada - Measures Affecting the Export of Civilian Aircraft,* ["*Canada – Aircraft*"], Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999, at paras. 203 to 205. (Tab 16)

PART IV - RELIEF SOUGHT

69. For the foregoing reasons, Canada asks that the motion be dismissed with costs.

Submitted this 13th day of August, 2004, at Ottawa, Ontario, Canada.

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Agent for the Attorney General of Canada