IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

MERRILL & RING FORESTRY L. P.

CLAIMANT

AND

THE GOVERNMENT OF CANADA

RESPONDENT

(ICSID Administered Case)

DECISION OF THE TRIBUNAL ON PRODUCTION OF DOCUMENTS IN RESPECT OF WHICH CABINET PRIVILEGE HAS BEEN INVOKED

Background

1. On January 21, 2008, the Tribunal issued an Order Concerning Requests for Documents and Certain Evidentiary Matters (the Document Production Order), which was reissued, with amendments, on June 24, 2008. In compliance with the Document Production Order the parties exchanged their respective requests for documents and also raised objections to the production of some such documents. The Order envisaged that a party might object on the basis of any of the reasons set forth in para. 6 therein. To the extent that disagreement between the parties would persist following discussions, it was for the Tribunal to determine the admissibility, relevance, materiality and weight of evidence, and to exclude from evidence or production any document, statement or oral testimony for any of the reasons indicated in para. 6.
2. Among other reasons, para. 6 of the Order includes the following: "(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 Tribunal determines to be compelling."
3. On June 20, 2008, the parties exchanged their lists of refusals to each other's request for production of documents. Some of Canada's refusals were based on Cabinet Privilege. On June 26, 2008, in a letter to the President of the Tribunal, the Investor objected to Canada's refusals based on such Privilege. On July 2, 2008, Canada submitted to the Tribunal a letter explaining its refusals to produce documents on the grounds of relevance and of special political or institutional sensitivity.
4. On the basis of these exchanges, on July 18, 2008, the Tribunal issued its Decision on the Production of Documents, noting that the question of Cabinet

Privilege had not been sufficiently explained by Canada. Accordingly, Canada was directed that if it believed that a document required to be protected under paragraph 6 (f) of the Document Production Order, it should identify such document specifically and its date, as well as provide a description of its general contents. At the same time, Canada was required to provide an appropriate explanation as to why it considered that a claim of privilege could properly be asserted.

5. Following the schedule established by the Tribunal to this effect, Canada submitted on August 4, 2008, the list of specific documents for which it was asserting Cabinet Privilege, all of them relating to documents originating in the Government of British Columbia. Five documents were concerned at that stage (Canada's Documents No. 1-5). The Investor submitted its objections to such assertion by letter of August 20, 2008.

6. Although all documents for which Cabinet Privilege was asserted should have been produced by August 4, 2008, in accordance with the Tribunal's defined schedule, Canada submitted a list of four additional documents on August 25, 2008, in respect of which it was asserting Cabinet Privilege (Canada's Documents 6-9). These documents had only recently been found during the search for document production directed by the Tribunal and in the view of officials of the British Columbia Attorney General's office the documents contain Cabinet privileges as defined in the British Columbia *Crown Proceedings Act*.[1] The Associate Deputy Minister for the Office of the Premier

[1] Section 9 of the British Columbia *Crow Proceedings Act* provides:
"(1) In proceedings against the government and proceedings in which the government is a party, if there are, in the rules of the court in which the proceedings are brought, rules relating to one or more of discovery and inspection of documents, examinations for discovery and interrogatories, those rules apply as if the government were a corporation. (Continued)

of British Columbia accordingly instructed Counsel for Canada, on August 22, 2008, to claim Cabinet privilege for these documents as they contain information that should be protected in the public interest.

7. The Investor objected to this additional assertion of Cabinet privilege on August 25, 2008, first on the ground that it was untimely and, second, on the ground that, like the first assertion, it did not comply with the requirements of the *Crown Proceedings Act* or the relevant judicial decisions in this respect.

8. The Tribunal will now examine these requests together.

The Tribunal's Authority

9. The Investor first raises the question of Canada having informed the Tribunal that the determination on Cabinet privilege had been made by officials of the British Columbia government, when under British Columbia law this issue is for the adjudicator to determine.

10. The Tribunal does not consider that Canada's submission was in any way intended to substitute the British Columbia officials' views for the Tribunal's authority. In fact, the second request of August 25, 2008 clearly indicates that British Columbia officials had instructed Counsel for Canada to claim such privilege, not to convey a determination made by them. The Tribunal accordingly considers this issue moot.

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(2) Subsection (1) does not affect a rule of law that authorizes or requires the withholding of a document, or the refusal to answer a question, on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.
(3) If the government claims that the disclosure of the documents or the answering of the question would be injurious to the public interest, the court may, after holding an inquiry it considers necessary and reasonable, and on finding that the public interest in the administration of justice should prevail over the public interest in withholding the document or answering the question, order, subject to conditions or restrictions it considers appropriate, production and discovery of the document or that the question be answered."

Tardiness

11. The Respondent explained in its submission of August 25, 2008 concerning the second set of documents, that it recognized the deadline of August 4, 2008 established by the Tribunal for asserting Cabinet privileges, but that the documents concerned were only discovered after that date and that, in the circumstances, it has asserted this privilege at the earliest possible moment. The Respondent further argues that the Tribunal has the authority to conduct the proceedings with discretion and flexibility on the basis of Article 15 (1) of the UNCITRAL Arbitration Rules.

12. The Investor objects to this late submission in view of the Tribunal's determination in paragraph 23 of the Document Production Decision that the process for claiming privilege cannot be open-ended because of the potential disruption of the procedural timetable, which was the reason for establishing specific deadlines to this effect. The Investor further argues that in any event, Article 15 (1) of the UNCITRAL Arbitration Rules requires that the parties be treated with equality, which equality would also be affected if the late request were granted.

13. The Tribunal cannot say that the continuing modifications of the timetable are satisfactory. At the same time, it realizes that certain unforeseen situations need to be considered to the extent that they do not seriously interfere with the progress of the arbitration proceedings. Canada's reasons for its late submission are understandable and the Tribunal will accordingly consider the refusal to produce the second set of documents on the ground of Cabinet privilege together with the refusal regarding the first set of documents.

Governing Legal Standards

14. The first legal standard governing a finding on the refusal to produce documents based on the asserted privilege is to be found in para. 6 (f) of the Document Production Order, as amended, which refers to "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 Tribunal determines to be compelling." Political and institutional sensitivity, including material classified as secret, is thus the standard to be examined. If the Tribunal determines that the grounds invoked are compelling, it will then uphold the refusal on this basis.

15. As the sensitivity in question is normally assessed by the government concerned, subject to the determination of the Tribunal, Canada has rightly related the standard of paragraph 6 (f) discussed above to the Cabinet privileges as defined by section 9 (3) of the British Columbia *Crown Proceedings Act*. The latter provides that "(3) If the government claims that the disclosure of the documents or the answering of the question would be injurious to the public interest, the court may, after holding an inquiry it considers necessary and reasonable, and on finding that the public interest in the administration of justice should prevail over the public interest in withholding the document or answering the question, order, subject to conditions or restrictions it considers appropriate, production and discovery of the document or that the question be answered".

16. Canada has asserted its claim for Cabinet privilege on the basis that the documents concerned contain information that should be protected in the public interest, particularly because they contain highly sensitive Ministerial and Cabinet advice on current political issues. In Canada's view, the injury that the

release of these documents would cause outweighs the public interest in the administration of justice.

17. The Investor believes differently. It explains that pursuant to the balancing test established in the law, as interpreted by the Supreme Court of British Columbia in the *Health Services* case (*Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, B. C. J. No. 2464, 2002 BCSC 1509), the documents concerned should be produced not merely because they are *prima facie* relevant to the Investor's ability to make out the case, but because they are in all likelihood critical to this effect. It is further argued that the interest in the administration of justice should prevail in this case over and above the government's interest in not producing the requested documents.

18. The Tribunal notes that both parties are in agreement about the need to apply the balancing test discussed above. They reach, however, the opposite conclusion as to which interest ought to prevail over the other. The Tribunal will accordingly apply this test with reference to the specific documents envisaged in this discussion.

Nature of the Documents Concerned

19. The first question the Tribunal needs to examine is that of the nature of the documents concerned. To the extent that a document might contain information on actual Cabinet discussions or deliberations, the sensitivity might of course be greater than if a document simply relates to material prepared for the consideration of the Cabinet. The distinction was made, the Investor explains, in the *Health Services* case, which dismissed the argument that the fact that the issues envisaged were related to matters of "ongoing concern" was sufficient to refuse the production of the pertinent documents. Indeed, future discussion by

the Cabinet of the information contained in the documents would not be compromised by the disclosure of a document previously brought to its attention.

20. The Tribunal is convinced that this distinction is appropriate in this case. Documents brought to the attention of the Cabinet in preparation of eventual discussions or deliberations do not in fact inhibit at all such exercise. Some documents at hand originate in the work of governmental officials, including ministers, while some other are contributed by private entities unrelated to the government. None of them concern actual discussions or deliberations of the Cabinet, let alone a decision on such recommendations. In practice some documents may not even get to be considered by the Cabinet or may be discarded.

21. The second question the Tribunal needs to consider is the extent to which the availability of such documents might be crucial for the adequate preparation of the Investor's memorials and the presentation of its case. The interest in the proper administration of justice is evident in this connection.

22. While it is not possible for the Tribunal at this stage to assess such influence, it is nonetheless to be noted that all the documents concerned relate to matters that are at the heart of the Investor's argument in support of its claim, as evidenced by the record available. [redacted]

[redacted]

23. It follows that at least *prima facie* the production of these documents, with the exception noted, will weigh in favour of the interest in the administration of justice, particularly in view that they do not compromise the sensitivity of Cabinet discussions and deliberations which would be protected by a public interest in non-disclosing. The Tribunal will accordingly order the production of such documents with the exception noted.

Confidentiality

24. Canada's concern about the injurious effects that an open disclosure could entail is not unwarranted because such documents could eventually be used for purposes entirely unrelated to the interest in the administration of justice that prevails in this case. The Investor has acknowledged this fact in suggesting that the documents produced could be designated as confidential under the terms of the Tribunal's Confidentiality Order, which are also compatible with the applicable British Columbia law. This is a reasonable precaution that the Tribunal adopts.

Decision

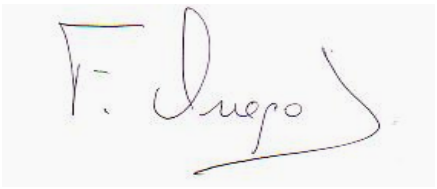
In accordance with the above considerations, the Tribunal decides as follows:

1. Canada shall produce Documents No. 1-4 and No. 6-9 in respect of which Cabinet privilege has been asserted.
2. The production of these documents shall take place within a period of 15 days following the date of this Decision in the case of non-redacted documents, and

within a period of 30 days following the date of this Decision in respect of redacted documents, in accordance with the Tribunal's schedule.

3. The documents so produced shall be designated as Confidential and are to be used solely in the context of this arbitration.

September 3, 2008



Francisco Orrego Vicuña

President, on behalf of the Tribunal