

**IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES**

**S.D. MYERS, Inc.**  
**(Claimant)**  
**('MYERS')**

**-and-**

**GOVERNMENT OF CANADA**  
**(Respondent)**  
**('CANADA')**

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**PROCEDURAL ORDER No. 10**  
**(concerning crown privilege)**

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After considering the parties' most recent written submissions, and their oral submissions made at the Third Case Management Meeting held on 28 October 1999, the Tribunal gives the following procedural directions:

**Crown Privilege**

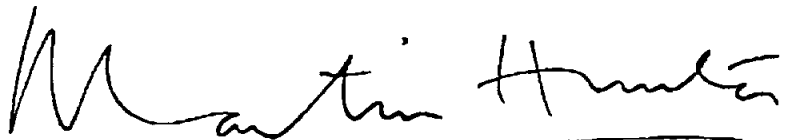
1. CANADA shall not at this stage be required to produce any documents in respect of which a 'certificate' of the appropriate authority has been provided pursuant to section 39 of the Canada Evidence Act 1985.
2. It shall be a matter for each party to determine the manner in which it will proceed in the light of the Tribunal's decision not to make any order concerning documents in

respect of which a Canada Evidence Act 'certificate' has been produced, bearing in mind that the closing date for the production of documents is 30 November 1999.

3. If MYERS elects to renew its application for an order for production of documents in respect of which a 'certificate' of the appropriate authority has been provided, the Tribunal will give directions for the parties to submit memoranda dealing with the issues mentioned in the Tribunal's 'Explanatory Note' that accompanies this Procedural Order.
4. Any questions relating to the drawing of 'adverse inferences' and/or the discharge of any burden of proof by either party will be determined by the Tribunal after consideration of written or oral statements when the evidentiary record is closed.

**Other Matters**

5. Either party may apply to the Tribunal at any time for the terms of this Order to be supplemented, varied or reviewed.



Signed: .....

(on behalf of the Tribunal)

Dated: 16 November 1999

## Explanatory Note to Procedural Order No. 10

1. The purpose of this explanatory note is to summarize the Tribunal's reasoning underlying Procedural Order No. 10 and to give some guidance to the parties if production of documents for which cabinet privilege is claimed were pursued.
2. CANADA resists production of certain requested documents relying on a certificate issued pursuant to Section 39 of the *Canada Evidence Act* R.S.C. 1970, c. E-10 as amended, that is, that the documents contain information that is "... a confidence of the Queen's Privy Council for Canada..." MYERS contends that this "privilege" is inapplicable in a NAFTA Chapter 11 proceeding and calls in aid the principles of public international law.
3. The submissions advanced to date by the parties are not sufficient to brief the Tribunal on this highly complex matter.
4. In the Tribunal's view, MYERS correctly does not seek production of documents containing information of actual cabinet deliberations. The documents in issue are "peripheral" to such discussions and include briefing papers for individual ministers.
5. 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.
6. The circumstances of the present case involve a number of complicating factors: first, CANADA has invoked a domestic law that applies to it and other NAFTA Chapter 11 panels have taken into account the "personal" legal rights and obligations of parties; secondly, the seat of the arbitration is Toronto, Canada; thirdly, the arbitration is being conducted under the UNCITRAL Arbitration Rules which are designed for

international commercial arbitrations (private sector disputes); other Chapter 11 proceedings are conducted under the ICSID Special Facility which is designed for mixed international commercial arbitrations (private sector or state agencies); fourthly, the claim is an alleged breach of the NAFTA, a treaty, that includes, *inter alia*, CANADA's obligation "... to accord to [MYERS and its investments] treatment in accordance with international law, including fair and equitable treatment ..."; fifthly, the substantive governing law is public international law, a source of law that concerns the relationship between states.

7. There is some precedent in Canadian law, in contexts where section 39 is not applicable or not dispositive, for the consideration of documents on a document-by-document basis. The Brazil-Canada decision at least contemplates that executive privilege might be accepted in some circumstances by a tribunal deciding issues of international law.
8. Insofar as Canadian law is relevant, in addition to the *Canada Evidence Act*, several enactments may need to be considered. These include: the *Commercial Arbitration Act* and the *NAFTA Implementation Act*.
9. Each NAFTA Chapter 11 tribunal must grapple with the essentials of the individual case before it.
10. The Tribunal recognizes that this issue must be decided in the context of this NAFTA Chapter 11 dispute which is being conducted under the UNCITRAL Rules (which afford to the Tribunal considerable discretion in the management of the dispute) and which potentially embraces consideration of international and domestic law.
11. If MYERS were to pursue the matter it would be essential for the parties to provide to the arbitrators briefing on the full range of complex issues that are brought into play by it.

*MAD*  
17 November 1999