Foreign Affairs and International Trade Canada

Department of Justice

CANADA

Affaires étrangères et Commerce international Canada

Ministère de la Justice

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By Email and By Courier

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Dear Sirs,

Re: *Merrill & Ring Forestry L.P. v. Canada*

Further to the Tribunal's email of July 11, 2008, Canada responds as follows to the joint petition of Communication, Energy and Paperworkers Union of Canada, the United Steelworkers and the British Columbia Federation of Labour ("petitioners") to intervene in the present proceedings.

While the petitioners do not elaborate on the desired form of their intervention, Canada notes that it is only possible for a stranger to these proceedings to participate as a non-disputing party (ie. *amicus curiae*). Canada sets out below the appropriate test for non-disputing party intervention in NAFTA Chapter 11 arbitrations.

A. This Tribunal Has Discretion to Receive Written Non-Disputing party Submissions Based on Publicly Available Information

Pursuant to NAFTA Article 1128, only non-disputing NAFTA Parties (Mexico and the United States) can intervene as a matter of right in NAFTA Chapter 11 arbitrations. The NAFTA and the UNCITRAL Rules are otherwise silent on the participation of *amici*.

Article 15(1) of the UNCITRAL Rules grants the Tribunal procedural discretion over the conduct of this arbitration, provided the disputing parties are treated equally and that each disputing party is given a full opportunity to present its case at all stages of the proceedings. The Tribunal in *Methanex Corporation v. United States*, concluded that the receipt of written *amicus* briefs fell within its discretion under Article 15(1) of the UNCITRAL Rules.[1]

The *Methanex* Tribunal also stated:

> As *amici* have no rights under Chapter 11 of NAFTA to receive any materials generated within the arbitration (or indeed any right at all) they are to be treated by the Tribunal as any other members of the public.[2]

The *Methanex* Tribunal therefore concluded that materials may be disclosed to the non-disputing party only as permitted by the consent order on confidentiality or otherwise lawfully disclosed.[3]

Similarly, the Tribunal in *UPS v. Canada* found that it had the power to accept written *amicus* briefs from the Petitioners in that case:

> The Tribunal declares that it has power to accept written *amicus* briefs from the Petitioners. It will consider receiving them at the merits stage of the arbitration following consultation with the parties, exercising its discretion in the way indicated in this decision and in accordance with relevant international judicial practice.[4]

The *UPS* Tribunal concurred with the decision in *Methanex* and emphasized the importance of requiring equality between the disputing parties and their right to present their cases. Therefore, the Tribunal acknowledged that any *amicus* submissions would be limited and the disputing parties would be entitled to respond.

On considering submissions made by the disputing parties and the *amici curiae* on modalities for making written submissions, the *UPS* Tribunal set out the parameters for the *amicus* submissions. Further, the *UPS* Tribunal acknowledged that a governing

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[1] *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petition from Third Persons to Intervene as "Amici Curiae", January 15, 2001 ["*Methanex*"], at paragraphs 31-33. **[Tab 1]**

[2] *Id.*, para. 46. **[Tab 1]**

[3] *Id.*, para. 47. **[Tab 1]**

[4] *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, (17 October 2001), para. 73. **[Tab 2]**

consideration in accepting submissions will be whether the *amici* are likely to be able to provide assistance beyond that provided by the disputing parties.[5]

In particular, the *UPS* Tribunal held that the submissions would be limited to written briefs during the merits stage of the arbitration without adducing evidence.[6] It permitted submissions only on issues raised by the disputing parties. Therefore the *amici* were not permitted to stray beyond the scope of the case as defined by the disputing parties.[7]

The *UPS* Tribunal emphasized that its Confidentiality Order would continue to apply.[8] As a result, the *amici* would not have access to "Confidential" or "Restricted Access" information.

The Tribunal permitted the *amici* to apply, with notice to the disputing parties, for leave to file written submissions. The application for leave had to indicate the

> issue or issues on which the *amicus* wishes to make submissions, its position on those issues, and the way in which it will provide assistance beyond that provided by the disputing parties, and it is to provide other relevant information, including the relationship (if any) it has to the disputing parties or the other NAFTA parties.[9]

Upon hearing from the disputing parties, the Tribunal would rule on whether to grant leave and on what terms.[10] Furthermore, the Tribunal ensured that the disputing parties and the other Parties to the NAFTA would have the right to respond to any submissions by the *amici*.[11]

B. The FTC Statement Provides Appropriate Guidelines for Accepting Non-Disputing party Briefs in this Case

Just as the Tribunals determined in *Methanex* and *UPS*, Canada agrees that the Tribunal has discretion to receive non-disputing party briefs only where appropriate, and only under terms that ensures equality between the disputing parties, without disruption or

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[5] *UPS v. Canada*, Direction of the Tribunal on the Participation of *Amici Curiae*, (1 August 2003), para. 4. **[Tab 3]**

[6] *Id.*, para. 3.

[7] *Id.*, para. 5.

[8] *Id.*, para. 6.

[9] *Id.*, para. 7.

[10] *Id.*, paras. 8 and 9.

[11] *Id.*

adding unnecessary costs to the ongoing proceedings. Thus, Canada recommends the Tribunal apply the procedures set out in the Statement of the Free Trade Commission on Non-Disputing party Participation ("FTC Statement").[12]

The FTC Statement has been accepted and relied on by past NAFTA Chapter 11 Tribunals in their determination of non-disputing party participation.[13] These procedures take into account the factors considered by both the *Methanex* and *UPS* Tribunals and in particular acknowledge that "the interests of fairness and the orderly conduct of arbitrations under Chapter 11" must be maintained. A copy of the Statement is attached at Tab 4.

C. If the Tribunal Grants Leave for Non-Disputing party Participation, the Disputing parties Should Have the Right to Respond

In accordance with the procedures of the FTC Statement, if the Tribunal grants the petitioner leave to submit a non-disputing party brief, Canada respectfully requests that the disputing parties have an opportunity respond.[14]

To ensure that there is no prejudice to the disputing parties, Canada submits that non-disputing party participation should have minimal impact on the current arbitration schedule. An appropriate date for disputing party submissions on any non-disputing party petition should therefore be set after the Investor's Reply and Canada's Rejoinder are filed.

Yours sincerely,

PLC Meg Kinnear
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c.c. Barry Appleton, Appleton & Associates
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[12] Statement of the Free Trade Commission on Non-Disputing party Participation, October 7, 2003. **[Tab 4]**

[13] See e.g. *Glamis Gold, Ltd. v. United States* (UNCITRAL), "Decision on Application and Submission By Quechan Indian Nation, 16 September 2005 **[Tab 5]**. See also *Methanex Corp. v. United States*, (UNCITRAL) (Letter of Disputing Parties to Tribunal Concerning Non-party Participation), October 31, 2003. **[Tab 6]**

[14] FTC Statement, Article 8.**[Tab 4]**