**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**
**(ICSID Case No. ARB(AF)/12/1)**

**(1) APOTEX HOLDINGS INC.**

**(2) APOTEX INC.**

***Claimants***

**v.**

**THE UNITED STATES OF AMERICA**

***Respondent***

# PROCEDURAL ORDER ON THE PARTICIPATION OF THE APPLICANT, MR BARRY APPLETON, AS A NON-DISPUTING PARTY

***The Tribunal:***
J. William Rowley, Arbitrator;
John R. Crook, Arbitrator; and
V.V. Veeder, President.

***The Secretary to the Tribunal:***
Eloïse M. Obadia

1. On 1 March 2013, the Tribunal informed Mr. Appleton that his application for leave to file a non-disputing party submission was denied. In its letter, the Tribunal indicated that detailed reasons for its decision would follow shortly. This procedural order sets out the Tribunal's reasons.

## I. Procedural Background

2. As agreed at the First Session of the Tribunal held with the Disputing Parties on 24 July 2012 and as contained in paragraph 20.2 of the First Procedural Order dated 29 November 2012:

> 20.2 The Tribunal shall consider any application for permission to file a submission in this arbitration by an intending Amicus, in consultation with the Parties. Any Amicus application shall adhere to the requirements set forth in the recommendations of the FTC on non-disputing party participation, issued on 7 October 2003.

3. Different schedules for such applications were fixed in Section 14 of the First Procedural Order taking into account the possibility of the United States of America ("Respondent") raising jurisdictional objections and requesting bifurcation of the proceeding between jurisdiction and the merits. The Respondent having raised such objections and requested bifurcation in its Counter-Memorial of 14 December 2012, the Tribunal decided in its Procedural Order of 25 January 2013 to join the objections to jurisdiction filed by the Respondent to the merits. Accordingly, the schedule of paragraph 14.2.7 of the First Procedural Order applied:

> 14.2.7. If the Tribunal decides not to bifurcate and therefore to join the objections to jurisdiction to the merits ("scenario 1"), the schedule shall be as follows:
>
> (i) The Claimants and Respondent shall file document requests by 8 February 2013 (1 week from decision on bifurcation). By this date, Canada and Mexico shall file submissions under NAFTA Article 1128, if any, and any intending Amicus shall file Amicus Applications for Leave to File;
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> (ii) The Claimants and Respondent shall make submissions, if any, on the Amicus Applications for Leave to File by 15 February 2013 (1 week from Amicus deadline);
>
> (iii) The Claimants and Respondent shall submit a response and any objections to the document requests by 1 March 2013 (3 weeks from document requests);

(iv) The Tribunal shall decide on any Amicus Applications for Leave to File within two weeks from receiving submissions from the Claimants and Respondent, if any (that is, by 1 March 2013);

(v) The Claimants and Respondent shall submit any responses to objections to the document requests and produce any documents to which they do not object by 15 March 2013 (2 weeks from objections to document requests);

4. On 31 January 2013, by an announcement posted on the website of the International Centre for Settlement of Investment Disputes ("ICSID"), the Tribunal "invite[d] any person or entity that is not a Disputing Party in this arbitration proceeding or a Contracting Party to the NAFTA to make a written application for permission to file submissions as an *amicus curiae*" by 8 February 2013. The Tribunal indicated that the application and submission should adhere to the requirements set forth in the recommendations of the Free Trade Commission on non-disputing party participation dated 7 October 2003 ("FTC Statement").

5. On 8 February 2013, the ICSID Secretariat received from the Applicant a "Petition for Leave to Submit Non Disputing Party (*Amicus Curiae*) Submission" from Mr. Barry Appleton dated 8 February 2013 ("Mr. Appleton's Application"). In accordance with Section B(1) of the FTC Statement, Mr. Appleton's Application was accompanied by a submission called "Non-Disputing Party (*Amicus Curiae*) Submission of Barry Appleton".

6. On 15 February 2013, the Respondent filed observations on Mr. Appleton's Application asking that the Tribunal take them into account when considering that application. By letter of the same date, Apotex Holdings Inc. and Apotex Inc. (collectively, "Apotex" or "Claimants") indicated that they were taking no position on Mr. Appleton's Application. However, by letter of 18 February 2013, Apotex clarified a question raised by the Respondent in its observations of 15 February 2013.

## II. The Application

7. In his application, Mr. Appleton describes himself as an international lawyer, member of the Bar of the State of New York, the District of Columbia and the Law Society of

Upper Canada, with extensive experience in investment-arbitration and in particular disputes under Chapter 11 of the NAFTA.[1] He also states that he is a national of a Party to the NAFTA.

8. Mr. Appleton has served as an advisor to sub-national governments during the negotiation of the NAFTA and as a lead counsel in a number of NAFTA investor-state arbitrations. He is also the author of two books on the NAFTA.[2]

9. The Applicant further confirms that he has no financial relationship with either Disputing Party and has received no financial contribution from anyone in the making of this submission.[3]

10. Regarding the criteria applicable to decide whether the Tribunal should grant leave, the Applicant makes the argument that those criteria are derived from sources of international law.[4]

11. With respect to the assistance to the Tribunal, Mr. Appleton advances that he can provide expertise and knowledge not provided by the Disputing Parties. More particularly, he "has particular experience with the challenge of providing fairness in regulatory conduct and with ensuring that governments provide equality of competitive opportunities to foreign and domestic investors alike. He can assist the Tribunal with the consequences of conduct that can distort international trade and investment flows and undermine market access benefits."[5]

12. The Applicant states that he intends to address issues within the scope of the claim in this arbitration: namely, "issues on the importance of ensuring that governments meet international treaty obligations with respect to the definitional scope in NAFTA Article

[1] Mr. Appleton's application, paras. 1 and 2.
[2] *Ibid*. at paras. 5-7.
[3] *Ibid.* at para.4.
[4] *Ibid*. at paras. 10-11.
[5] *Ibid.* at para. 14.

1139 and also to provide Most Favored Nation Treatment to investors and investments of another Party."[6]

13. With regards to the requirement of significant interests, Mr. Appleton states that he has a direct interest in ensuring that "the trading partners within the NAFTA abide by their international commitments […] [and] the signatory governments provide foreign and domestic investors with equality of competitive opportunities in accordance with their international treaty obligations […]."[7]

14. On public interest, the Applicant states that "this public interest is in the proper interpretation of the Treaty and in ensuring that NAFTA Chapter 11 process benefits from the perception of being more open and transparent."[8]

15. Finally, Mr. Appleton states that there is no risk of undue burden on the Disputing Parties as he will provide the unique perspective of a practitioner with expertise in the interpretation of the NAFTA.

## III. The Disputing Parties' Observations

16. In its letter of 15 February 2013, the Respondent did not make any observation on whether or not the Tribunal should grant Mr. Appleton's Application, but invited the Tribunal to consider two observations.

17. According to the Respondent, Mr. Appleton's Application does not satisfy the requirements that the applicant: (1) "specify the nature of the interest that the applicant has in the arbitration" (Section B(2)(f) of the FTC Statement); and (2) "disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party" (Section B(2)(d) of the FTC Statement).

18. With respect to the first requirement, the Respondent indicates that the Applicant fails to disclose that he currently represents claimants in three current cases under NAFTA

[6] *Ibid.* at para. 16.
[7] *Ibid.* at para. 17.
[8] *Ibid.* at para. 18.

Chapter 11.[9] In addition, the Respondent claims that Mr. Appleton's application addresses the same issues that Mr. Appleton is addressing in at least one other ongoing arbitration under Chapter 11.[10] The Respondent adds that "[p]ortions of the text of the proposed submission, in fact, appear to have been copied virtually verbatim from a submission Mr. Appleton has filed in a previous Chapter Eleven arbitration."[11]

19. The Respondent concludes that Mr. Appleton may have a financial interest in the disposition of the case.

20. With respect to the second requirement, the Respondent notes that Mr. Appleton previously submitted on behalf of Signa S.A. de C.V., a notice of intent to file a NAFTA Chapter 11 claim which identified Apotex Inc. as the claimant's "joint venture partner". The Respondent observes: "The application fails to state whether Mr. Appleton continues to maintain any such indirect relationship with Apotex Inc."

21. On this second requirement, the Claimants responded by letter dated 18 February 2013 that neither Apotex nor its counsel: "has had any communications with Mr. Appleton concerning this arbitration or his *amicus* application, neither provided any support to Mr. Appleton in connection with that application and a search of Apotex's accounting records revealed no instance in which Apotex has previously engaged Mr. Appleton."

22. Finally, the Respondent expressed doubts as to whether Mr. Appleton's Application meets the criteria of the FTC Statement, including whether he has a significant interest in this arbitration.

## IV. The Tribunal's Decision

23. Pursuant to Articles 1120(1)(b) and 1120(2) and as confirmed in the First Procedural Order, these arbitration proceedings are conducted in accordance with the ICSID Arbitration (Additional Facility) Rules in force as of April 2006 ("Arbitration (AF)

[9] The Respondent cites: *Bilcon et al. v. Canada*; *Mesa Power Group LLC v. Canada*; and *St. Marys VCNA, LLC v. Canada*.
[10] The Respondent refers to *Bilcon et al. v. Canada.*
[11] The Respondent refers to *Merrill & Ring Forestry L.P. v. Canada*, Investor's Reply Memorial at para. 289.

Rules"), except to the extent that these rules are modified by Section B of NAFTA Chapter 11.

24. Article 41(3) of the Arbitration (AF) Rules allows the Tribunal to accept submissions by non-disputing parties based on certain criteria. However, the Disputing Parties and the Tribunal chose to apply the FTC Statement both to potential non-disputing parties and to the Tribunal's ruling. The First Procedural Order provides that:

> 20.2 […] Any Amicus application shall adhere to the requirements set forth in the recommendations of the FTC on non-disputing party participation, issued on 7 October 2003.
>
> […]
>
> 20.4 The Tribunal shall issue a ruling on any Amicus application for leave to file a submission, taking into account the recommendations of the FTC on non-disputing party participation.

25. The Tribunal considers that this choice does not contradict the wording of Article 41(3) of the Arbitration (AF) Rules. This wording provides the following:

> (3) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

26. Article 41(3) does not contain an exhaustive list of criteria as it provides that the Tribunal shall consider those stated "among other things". Therefore the Tribunal is free to address "other things" for the purpose of arriving at its decision. In addition, all the criteria and conditions contained in Article 41(3) are also stated in Sections B(6), (7) and (8) of the FTC Statement. These provisions read as follows:

> 6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:
>
> > (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
> >
> > (b) the non-disputing party submission would address matters within the scope of the dispute;
> >
> > (c) the non-disputing party has a significant interest in the arbitration; and
> >
> > (d) there is a public interest in the subject-matter of the arbitration.
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> 7. The Tribunal will ensure that:
>
> > (a) any non-disputing party submission avoids disrupting the proceedings; and
> >
> > (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
>
> 8. The Tribunal will render a decision on whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the non-disputing party submission. By that date, non-disputing NAFTA Parties may, pursuant to Article 1128, address any issues of interpretation of the Agreement presented in the non-disputing party submission.

27. Therefore the application of the FTC Statement by the Tribunal in this arbitration complies with Article 41(3) of the Arbitration (AF) Rules.

28. The question to be examined here is whether the Applicant, Mr. Appleton, meets the criteria set forth in Sections B(6) and (7) of the FTC Statement and has complied with the requirements of Section B(2) (d) and (f). The Tribunal notes that the Applicant, instead, referred to various sources of international law to establish the applicable criteria.[12] The Tribunal considers that the Applicant should have relied directly on the FTC Statement; but it does not see any consequences in the approach chosen by the Applicant as he addressed criteria similar to those provided by Sections B(6) and (7) of the FTC Statement.

29. The Tribunal considers in turn below each of these criteria.

[12] Mr. Appleton's application at paras. 10-11, referring to the decisions on *amicus curiae* in *Methanex v. United States*; *United Parcel Service of America v. Canada*; and *Aguas Argentinas, S.A. et al. v. Argentine Republic*.

Assistance to the Tribunal

30. This criterion is set forth in Section B(6)(a) of the FTC Statement:

> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

31. The question is whether Mr. Appleton could provide a different perspective and a particular insight on the issues in dispute, on the basis of either substantive knowledge or relevant expertise or experience that go beyond, or differ in some respect from, that of the disputing parties themselves.

32. While the Tribunal has no doubt that Mr. Appleton has acquired the experience and expertise he states in the understanding of the meaning of investment treaty obligations and in the analysis of governments' regulatory conduct, the Tribunal does not consider that this knowledge and insight by one individual practitioner, however extensive, equals (still less surpasses) the very considerable experience and insights possessed by the Disputing Parties' several Counsel in this particular arbitration.

33. It is thus most unlikely that Mr. Appleton would provide the Tribunal with any particular perspective or insight different from the Disputing Parties.

34. Moreover, the Disputing Parties have already fully briefed the Tribunal in their memorials on the definitional scope of Article 1139 and the application of the most-favored-nation treatment clause, in some detail and at great length. It is not possible to imagine that anything more could assist the Tribunal in this arbitration.

Addressing Matters Within the Scope of the Dispute

35. This criterion is intended to avoid the unnatural broadening of the scope of the dispute by non-disputing parties, as contained in Section B(6)(b) of the FTC Statement:

> (b) the non-disputing party submission would address matters within the scope of the dispute;

36. Considering that Mr. Appleton intends to address issues related to the interpretation of Articles 1103, 1105 and 1139, these matters would be within the scope of the dispute. Whether Mr. Appleton approaches these issues from the point of view of a counsel defending other investors is another question to be addressed below.

Significant Interest in the Arbitration

37. This criterion is contained in Section B(6)(c) of the FTC Statement:

> (c) the non-disputing party has a significant interest in the arbitration;

38. To meet this requirement, the applicant needs to show that he has more than a "general" interest in the proceeding. For example, the applicant must demonstrate that the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends.

39. Although Mr. Appleton could well argue that the outcome of this arbitration will have a direct or indirect impact on the rights or principles he represents and defends, it should be noted that, as an applicant, he is not representing or defending his own rights but, rather, representing and defending the interests of his professional clients.

40. It seems that the Applicant's "significant interest" in this arbitration lies only in having this Tribunal adopt legal interpretations of NAFTA that he favours that could be advantageous to his clients in his pending and possible future NAFTA cases. Although it may be an interest, the Tribunal concludes that it is not a significant interest under Section B(6)(c). The contrary interpretation would lead to absurd results; and that cannot possibly be what was intended with the admission of *amicus curiae* briefs in NAFTA arbitrations.

Public Interest in the Subject Matter of this Arbitration

41. This is the last criterion in Section B(6) of the FTC Statement:

> (d) there is a public interest in the subject-matter of the arbitration.

42. The Tribunal considers that the subject-matter of an arbitration proceeding is to be considered of public interest when the decisions to be issued in that arbitration are likely to affect individuals or entities beyond the Disputing Parties.

43. The Tribunal therefore accepts that the interpretation of the provisions of NAFTA Chapter 11 in this arbitration can impact individuals and entities beyond the Disputing Parties. However, the Tribunal considers that what lies behind Mr. Appleton's asserted public interest is a particular and professional interest and not a "public interest" affecting him personally within the meaning of Section B(6).

Avoiding Disruption, Burden and Prejudice to the Disputing Parties

44. Given the Tribunal's findings above, the admission of Mr. Appleton's Application would require unnecessary additional work, time and expense for the Disputing Parties which would be unduly burdensome and potentially prejudicial to the Disputing Parties.

Disclosure Requirements Under Section B(2) of the FTC Statement

45. Given the clarification provided by the Claimants in their letter of 18 February 2013, the Tribunal considers that Mr. Appleton's omission to state from the outset whether he continued to maintain an indirect relationship with Apotex Inc, in relation to Signa S.A. de C.V.'s notice of intent, is inconsequential and plays no part in the Tribunal's decision.

46. With respect to the requirement to specify the nature of the interest that the applicant has in the arbitration, the Tribunal considers that from the outset Mr. Appleton should have disclosed his involvement in the pending NAFTA cases, even if this information is publicly available. In any event, the Tribunal has already drawn the consequences of the nature of Mr. Appleton's interest in this arbitration; and this non-disclosure (by itself) plays no part in the Tribunal's decision.

## V. The Tribunal's Order

47. For the above reasons, the Tribunal denies Mr. Appleton's Application for permission to file a non-disputing party submission.

*Date: 4 March 2013.*

*Signed for the Tribunal:*

*V.V. Veeder (President of the Tribunal)*