IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA") AND THE 1976 UNCITRAL ARBITRATION RULES

between

RESOLUTE FOREST PRODUCTS INC.

Claimant

and

GOVERNMENT OF CANADA

Respondent

(PCA CASE NO. 2016-13)

PROCEDURAL ORDER NO. 3

ON SCHEDULING ISSUES

ARBITRAL TRIBUNAL:

Judge James R. Crawford, AC (President)

Dean Ronald A. Cass

Dean Céline Lévesque

3 NOVEMBER 2016

Contents

1. BACKGROUND

1.1 This third procedural order sets out a schedule for submissions on Respondent's motion for bifurcation and the subsequent pleadings, taking into account different scenarios for bifurcated and non-bifurcated proceedings.

1.2 The schedule was the subject of discussion amongst Claimant and Respondent (the "Disputing Parties") reflected in correspondence to the Tribunal dated July 27, 2016, August 8, 2016, and August 11, 2016.

1.3 Under the terms of Procedural Order 1 dated June 29, 2016 and by agreement of the Disputing Parties, Respondent filed its Statement of Defence on September 1, 2016 in which, among other things, it outlined its objections to jurisdiction and its arguments in favour of bifurcation. In accordance with the timetable agreed by the Disputing Parties, on September 15, 2016, Claimant indicated that it does not consent to bifurcation.

1.4 The Disputing Parties agreed that Respondent would file a motion to bifurcate on September 29, 2016 and that Claimant would file its response to the motion to bifurcate on October 13, 2016. They proposed that a teleconference oral hearing on bifurcation be held on or around October 31, 2016. Beyond that, no other steps have been agreed between the Disputing Parties with respect to schedule. Respondent is content to wait until the Tribunal's decision on bifurcation before fixing dates for next steps; whereas Claimant would prefer to set a schedule in advance for the steps subsequent to the Tribunal's decision on bifurcation.

1.5 The Disputing Parties provisionally agreed that, had Claimant consented to bifurcation, one month would be sufficient for Respondent to file a Memorial on Jurisdiction and a period of one to two months would suffice for the Counter-Memorial from Claimant. The Disputing Parties then reported being at an "impasse" over the appropriate timing of submissions by Non-Disputing Parties under Article 1128 of the NAFTA. The issue of document requests in any jurisdictional phase also remained unresolved in the Disputing Parties' correspondence.

2. CLAIMANT'S POSITION

2.1 Claimant submits that the appropriate time for Article 1128 submissions would be after the exchange of the first round of written pleadings on jurisdiction. The Disputing Parties could then include responses to any Article 1128 submissions in their second round of written pleadings on jurisdiction.

2.2 Claimant does not accept Respondent's suggestion that there is a "well-established practice" whereby third parties have a month, after all other briefing is finished, to make Article 1128 submissions, and then disputing parties are allowed another month to respond. Claimant has expressed concern about the delays resulting from such a practice and points to commentaries which "indicate that Article 1128 submissions are intended to address interpretation, not facts, and therefore do not need to follow all briefing." Claimant submits that the timing is to be decided by each individual tribunal. It points to a number of cases where (contrary to the suggestions of Respondent), NAFTA tribunals have accepted Article 1128 submissions after the Counter-Memorial and before the Reply and Rejoinder.

2.3 Claimant notes that "Article 1128 submissions appear to Claimant to be analogous to *amicus* briefs in American practice, where briefs are filed supporting or opposing parties simultaneously with the parties' submissions and are not permitted to disrupt the normal briefing schedule."

2.4 Claimant adds that, in the event of contested bifurcation, it would prefer to establish now the schedule for the steps after the Tribunal's decision on bifurcation ("not necessarily specific dates, but time intervals").

3. RESPONDENT'S POSITION

3.1 With respect to NAFTA Article 1128 submissions, Respondent considers Claimant's proposal to be inefficient and unfair. Its preferred approach is for the submissions by the Non-Disputing NAFTA Parties to come after the Reply and Rejoinder Memorials have been filed.

3.2 Respondent observes that the Disputing Parties agree that Article 1128 submissions "provide the Non-Disputing NAFTA Parties with the opportunity to make submissions on the interpretation of NAFTA provisions, not on the facts of the dispute." The disagreement between the Disputing Parties is based on the appropriate timing for submissions and which procedure best balances procedural fairness for the Disputing Parties and a reasonable opportunity for the Non-Disputing Parties under NAFTA to exercise their rights.

3.3 First, Respondent submits that its proposal "will ensure that the disputing parties have fully briefed their respective interpretations of NAFTA Chapter Eleven prior to the Article 1128 submissions", thereby avoiding a costly and time consuming scenario where a Non-Disputing NAFTA Party seeks leave to file an additional submission in response to new or supplemental arguments made by Canada or Claimant in second round pleadings.

3.4 Second, Respondent submits that it is unrealistic to presume the Disputing Parties will have nothing substantive to argue with respect to the interpretation of NAFTA in their second round submissions. It argues that "to avoid unnecessary prejudice to the right of a Non-Disputing NAFTA Party to make a comprehensive submission, it is prudent to organize the schedule so that they make their submissions once the disputing parties have fully set out their positions and then to provide a single opportunity" to the Disputing Parties to make simultaneous responsive observations thereto.

3.5 Third, Respondent submits that Claimant's proposal gives Canada much less time to reply to the Article 1128 submissions than Claimant, and that it unfairly gives Claimant an opportunity to comment on Canada's responses to the Article 1128 submissions, whereas Canada would not have the same opportunity to comment on Claimant's reactions to the Article 1128 submissions. This unfairness would be avoided by adopting Canada's proposed simultaneous submissions.

3.6 Fourth, Respondent considers that Claimant's proposal for the Non-Disputing Parties to comment between December 16, 2016 and January 3, 2017 is unrealistic and prejudicial to Mexico and the United States, given it falls over the holiday period and is shorter than periods typically allowed in recent NAFTA cases (ranging from 3 weeks to 3 months).

3.7 Respondent cites other NAFTA arbitrations in support of its view that its "proposed order of pleadings has become the typical practice in NAFTA Chapter Eleven arbitrations."

3.8 Respondent adds, with respect to document production, that it wishes to include in any schedule a notation that "Canada reserves the right to request that the Tribunal adjust this proposed procedural calendar in order to allow for limited document requests after the filing of the Claimant's Counter-Memorial." Respondent does not expect this will be necessary in the jurisdictional phase, unless the Counter-Memorial raises arguments which make limited discovery necessary and appropriate. Respondent also acknowledges that the Tribunal has the authority to make such an order at any stage of the proceedings. Nevertheless, Respondent requests that the Tribunal take note of the possibility and give it due consideration if the scenario arises.

3.9 Finally, Respondent states that in the event of contested bifurcation, it would prefer to wait for the Tribunal's decision on whether to bifurcate before setting the pleading schedule. This, according to Respondent, "would allow the Tribunal to account for potential conflict with competing commitments." However, Respondent would "not object if the Tribunal prefers at this stage to set out time intervals (as opposed to specific dates) for briefing in the event of a decision to hold a preliminary phase on jurisdiction and admissibility" for the remainder of the jurisdictional phase.

4. THE TRIBUNAL'S CONSIDERATIONS

A. Schedule for Decision on Bifurcation

4.1 The Tribunal confirms the Disputing Parties' agreement on dates for exchanging written submissions for bifurcation and considers one round sufficient.

4.2 As notified to the Parties on October 19, 2016, the Tribunal is available for a teleconference oral hearing on bifurcation on Monday **November 7, 2016** at **1PM in Ottawa/Montreal/Washington DC** (7PM in The Hague). The Tribunal will allow each party 30 minutes for argument, starting with Respondent, and a 5 minute reply. The Tribunal may ask questions at any point. The hearing will be recorded and transcribed.

4.3 The Tribunal will aim to issue its reasoned decision on bifurcation by November 21, 2016.

4.4 To enable planning for the remainder of the proceedings, the Tribunal addresses now the disputed procedural issues and has prepared two alternative procedural schedules: Schedule A (in the event that proceedings are bifurcated); and Schedule B (in the event that proceedings are not bifurcated). Following the Tribunal's decision on bifurcation, the Disputing Parties may wish to consult and agree upon adjustments to the calendar.

B. Timing of Non-Disputing Party Submissions and Amici Submissions

4.5 Article 1128 provides that NAFTA Parties who are not a disputing party to a Chapter 11 arbitration proceeding have a right to make submissions to the Tribunal on questions of interpretation. It reads as follows:

> **Article 1128: Participation by a Party**
>
> On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation to this Agreement.

4.6 This Article has to be read together with the following one, which provides that non-disputing parties have a right to receive evidence and submissions made by the disputing parties. Article 1129 states:

> **Article 1129: Documents**
>
> 1. A Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party a copy of:
>
> (a) the evidence that has been tendered to the Tribunal; and
>
> (b) the written argument of the disputing parties.
>
> 2. A Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.

4.7 The Tribunal first notes that NAFTA Parties have provided for themselves *a right* to communicate their views to tribunals on treaty interpretation, while in the practice of NAFTA other non-disputing parties (or *amici*) can only make submissions once granted permission (or leave) by the tribunal (see Statement of the Free Trade Commission on non-disputing party participation, 7 October 2003). Second, the NAFTA Parties made sure they were entitled access to documents, including all evidence and written arguments, and committed to treating such information "as if it were" a disputing party.

4.8 These remarks have an impact on the timing of Article 1128 submissions. Although tribunals have discretion to adopt different schedules for accepting submissions of non-disputing Parties, the Tribunal considers it appropriate in the present case to provide that opportunity following the last round of written arguments by the disputing parties. The Tribunal believes that this approach gives effect to Article 1129, as it provides a full basis on which non-disputing Parties may decide what questions of interpretation merit intervention. Requiring 1128 submissions to be filed "simultaneously with the parties' submissions" (as in American practice according to Claimant) is not in the Tribunal's opinion the preferable approach.[1]

4.9 The general, although not the uniform, practice of NAFTA tribunals confirms this approach. Of the thirteen NAFTA Chapter 11 cases submitted in argument by the Disputing Parties, in only four were Article 1128 submissions received after the Counter-Memorial but before the Reply and Rejoinder. Generally, tribunals have also afforded a period of at least one month for non-disputing Parties to make submissions (while two cases afforded three weeks). This practice also reflects the fact that governments are complex organisations and require a certain amount of time to provide official views on treaty interpretation. As to the disputing parties' comments on Article 1128 submissions, with one exception they appear to have been done simultaneously.

4.10 Yet, the Tribunal is aware of the additional delay that can be imposed by Article 1128 submissions, in addition to potential *amicus* submissions. In the present case, the Tribunal believes that the concerns about delay can be sufficiently addressed by limiting the time for Article 1128 submissions to one month. The Tribunal concludes that this period, following final written submissions of disputing parties, is fair and efficient for making Article 1128 submissions.

[1] Dean Cass agrees with the Tribunal's understanding of NAFTA and of prior practice; he accepts the conclusion respecting the timing for submissions by non-disputing NAFTA Parties and for responses by parties to the arbitration as an appropriate disposition of the matter, but also finds that the alternative suggested by Claimant would have been similarly suitable for this proceeding.

C. Other Scheduling Issues

4.11 The Tribunal has taken note of Respondent's suggestion to make provision for the possibility of a round of document requests in any jurisdictional phase and reflected this in the schedules below.

5. SCHEDULE

5.1 Based on the considerations outlined above, the Tribunal sets the following schedule for a decision on **bifurcation**:

November 7, 2016 at 1PM (EST)	Oral Hearing on Bifurcation, held via conference call (PCA to circulate dial-in details and time breakdown)
November 21, 2016	Tribunal shall issue its reasoned Decision on Bifurcation

5.2 The Tribunal sets the following subsequent schedule, assuming Respondent's request for bifurcation is granted, for a separate **preliminary jurisdictional phase**:

Schedule A – Bifurcation

December 16, 2016	Respondent's Memorial on Jurisdiction
February 16, 2017	Claimant's Counter-Memorial on Jurisdiction
[TBD if necessary]	*[Document Requests relevant to Jurisdiction]*
March 16, 2017	Respondent's Reply Memorial on Jurisdiction
April 13, 2017	Claimant's Rejoinder Memorial on Jurisdiction
May 11, 2017	Third Parties' NAFTA Article 1128 Submissions and Amici Applications/Submissions

June 8, 2017	Disputing Parties' comments in response to Article 1128 Submissions and to Amici Applications/Submissions
June 26, 2017	Prehearing Conference and List of Issues to Disputing Parties per Art. 22 of PO1
July 24, 2017 – July 27, 2017	Hearing on Jurisdiction in *[North American venue to be agreed]*
[TBD]	*Award on Jurisdiction and any subsequent next steps to be determined after consultation with the Disputing Parties after issuance of the Award on Jurisdiction.*

5.3 The Tribunal sets the following subsequent schedule, assuming Respondent's request for bifurcation is rejected, with no separate preliminary jurisdictional phase:

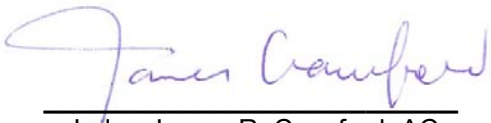
Schedule B – No Bifurcation

February 16, 2016	Claimant's Memorial on Jurisdiction and Merits
May 16, 2017	Respondent's Counter-Memorial on Jurisdiction and Merits
May 26, 2017	*[Exchange of Document Requests]*
June 9, 2017	*[Production of Documents in response to Document Requests and/or reasoned objections to requests]*
June 16, 2017	*[Replies to Objections, followed by discussion amongst Disputing Parties on compilation of joint Redfern Schedule request for Tribunal Rulings]*

June 20, 2017	*[Disputing Parties to send Tribunal Redfern Schedule with Reasoned Requests]*
July 6, 2017	*[Tribunal to issue Decisions on Document Requests]*
July 13, 2017	*[Disputing Parties to comply with Tribunal Document Production Orders]*
August 11, 2017	Claimant's Reply Memorial on Jurisdiction, and Merits
September 18, 2017	Respondent's Rejoinder Memorial on Jurisdiction, and Merits
October 16, 2017	Third Parties' NAFTA Article 1128 Submissions and Amici Applications/Submissions
November 13, 2017	Disputing Parties' comments in response to Article 1128 Submissions and to Amici Applications/Submissions per PO1 para 15 and 16
November 17, 2017	Prehearing Conference and List of Issues to Disputing Parties per Art. 22 of PO1
December 11-15, 2017	Hearing on Jurisdiction and Merits in *[North American venue to be agreed]*

Date: November 3, 2016

For the Arbitral Tribunal



Judge James R. Crawford, AC