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. 6

ON THE PARTICIPATION OF PROF. ROBERT HOWSE AND MR. BARRY APPLETON AS *AMICI CURIAE*

ARBITRAL TRIBUNAL:

Judge James R. Crawford, AC (President)

Dean Ronald A. Cass

Dean Céline Lévesque

JUNE 29, 2017

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1. BACKGROUND

1.1 This sixth Procedural Order sets out the Tribunal's decision with respect to an application to file an *amicus curiae* submission.

1.2 Paragraph 16 of the Tribunal's Procedural Order No. 1 of 29 June 2016 provides as follows under the heading "Amici":

> 1. *If a request for the submission of an amicus curiae brief were to be filed by the date indicated in the Procedural Calendar, the Tribunal would give the appropriate directions in the exercise of its powers under Article 15 of the UNCITRAL Rules and take into consideration the recommendation of the North American Free Trade Commission on non-disputing party participation of 7 October 2003.*
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> 2. *By the relevant dates to be indicated in the Procedural Calendar or as determined by the Tribunal, the Disputing Parties shall have the opportunity to: (1) make submissions on any request for the submission of an amicus curiae brief; and (2) file simultaneous observations on issues raised in any amicus curiae brief submitted pursuant to a decision of the Tribunal.*

1.3 On December 12, 2016, the Tribunal issued Procedural Order No. 5 setting a schedule for the jurisdictional phase that included May 31, 2017 as the date for Amici Applications / Submissions to be filed. Procedural Order No. 5 was published on the website of the Permanent Court of Arbitration ("**PCA**"), which serves as Registry in this case.

1.4 Following consultation with the Disputing Parties, the Tribunal published on the PCA website a Press Release on May 8, 2017 inviting the NAFTA Non-Disputing Parties and any potential *amici curiae* to provide their applications and submissions to the PCA by May 31, 2017, in accordance with Procedural Order No. 5. In the Press Release, the Tribunal recalled the Statement of the Free Trade Commission on Non-Disputing Party Participation (the "**FTC Statement**") and the guidelines set out therein for the submission of *amicus* applications and submissions.

1.5 On May 31, 2017, the Tribunal received from Prof. Robert Howse and Mr. Barry Appleton a joint application to participate as *amici curiae* and accompanying submission (the "**Application**").

1.6 On June 1, 2017, the PCA, on behalf of the Tribunal, provided the Application to the Disputing Parties and invited their comments by June 21, 2017.

1.7 By letter of June 21, 2017, the Respondent filed comments objecting to the Application. By e-mail of June 23, 2017, the Claimant confirmed that it "has no comments regarding the amicus application."

2. THE APPLICATION

2.1 As mentioned above, the Application is made jointly by Prof. Robert Howse and Mr. Barry Appleton (together, the "**Applicants**").

2.2 Prof. Howse is the Lloyd C. Nelson Professor of International Law at NYU School of Law.[1] The Application notes that:

> *Professor Howse has had a number of* amicus curiae *submissions accepted by panels and the Appellate Body of the World Trade Organization. One of his co-authored* amicus *submissions was relied on by the panel [in] the recent* EC-Seal Products *dispute.*[2]

2.3 Prof. Howse states that "he is a frequent consultant or advisor to government agencies and international organizations", "serves on the editorial boards" of various journals and has previously "held a variety of posts with the Canadian foreign ministry."[3]

2.4 Mr. Appleton describes himself as "a proponent of the rule of law" and a "longstanding practitioner of investor-state arbitration, particularly in the area of the resolution of disputes under Chapter Eleven of the [NAFTA]."[4] Mr. Appleton states that he is a national of a NAFTA Party, resident in Canada, and that he has acted "as lead counsel" in a number of investor-state arbitrations.[5] Mr. Appleton notes that "he is the author of two treatises on the North American Free Trade Agreement."[6]

2.5 The Applicants note that they "have no financial relationship with either disputing party and have received no financial contribution from anyone in the making of this submission."[7]

2.6 By reference to Part B, Paragraph 6 of the FTC Statement as well as criteria set out in the decisions on *amicus curiae* applications in *Methanex v. United States*, *United Parcel Service of America v. Canada*, and *Aguas Argentinas, S.A. et al. v. The Argentine Republic*,[8] the Applicants submit that the Application should be accepted in this case for the following reasons:

[1] Application, p. 1.
[2] Application, p. 2.
[3] Application, p. 2.
[4] Application, p. 1.
[5] Application, p. 1.
[6] Application, p. 1.
[7] Application, p. 2.
[8] Application, p. 3.

2.6.1 **Assistance to the Tribunal**. The Applicants submit that their submission "will assist the Tribunal by providing expertise and knowledge not likely to be provided by the parties."[9] The Applicants refer to Mr. Appleton's "scholarly examination of the travaux preparatoires of the treaty, which were published in his three volume 2007 collection of NAFTA Interpretative Materials and Legal Texts" as well as Prof. Howse's extensive writings "on systemic and structural dimensions of the international legal system." They submit that their expertise in this field, as well as their "particular experience with the challenge of providing fairness in regulatory conduct", allows them to "provide a view on the proper meaning that this Tribunal should take to the interpretation of the temporal jurisdiction limitations raised in relation to NAFTA Article 1116 and 1117."[10]

2.6.2 **Scope of the dispute.** The Applicants state that they will "address issues concerning the importance of jurisdiction of NAFTA Tribunals" and so "are clearly within the parameters of this claim."[11]

2.6.3 **Direct and significant interests**. The Applicants reiterate that they have "no direct or significant interests with any disputing party to this arbitration."[12] The Applicants identify their interest in this dispute as being a "public interest to maintain respect [for] the rule of law, international public law and the application of the principle of *pacta sunt servanda* within dispute resolution under the NAFTA."[13]

2.6.4 **Public interest**. The Applicants consider the "proper interpretation of the Treaty . . . the maintenance of the rule of law and in ensuring transparent procedures under NAFTA Chapter Eleven" as the relevant public interest in the subject-matter of the present arbitration.[14]

2.6.5 **Undue burden**. The Applicants do not consider an undue burden to be placed on the Disputing Parties should the Application be accepted and note they will not add to the evidentiary record, only assist in legal interpretation of the NAFTA Treaty.[15]

[9] Application, p. 3.
[10] Application, p. 3.
[11] Application, p. 4.
[12] Application, p. 4.
[13] Application, p. 4.
[14] Application, p. 4.
[15] Application, p. 4.

3. THE DISPUTING PARTIES' COMMENTS

3.1 By letter of June 21, 2017, the Respondent objected to the Application on the basis that it "does not fulfil the requirements of paragraph 6 of the [FTC Statement]."[16] Specifically, the Respondent submits that the Applicants' submission would not be of assistance to this Tribunal since the Applicants do not "[bring] a perspective, particular knowledge or insight that is different from that of the disputing parties."[17] In this regard, the Respondent states that "the applicants merely repeat arguments already advanced by the Claimant."[18] The Respondent submits that this Tribunal should therefore reject the Application for the same reasons that a similar application was rejected by the tribunal in *Apotex v. United States* ("***Apotex***"),[19] namely, that "Mr. Appleton and Professor Howse offer no knowledge, expertise or experience beyond the disputing parties' counsel."[20]

3.2 Additionally, the Respondent objects to the Applicant's submissions in respect of "the application of Articles 1116(2) and 1117(2) in cases of 'continuing breach,' including the 'continuous application of a statutory or regulatory scheme'" on the basis that "these are not issues in dispute between Canada and Resolute" and so do not fall within the bounds set by the FTC Statement.[21]

3.3 As mentioned above, the Claimant stated that it had no comments on the Application.

4. THE TRIBUNAL'S DECISION

4.1 According to Paragraph 16 of Procedural Order No. 1, when exercising its discretion under Article 15 of the UNCITRAL Rules in deciding whether to admit an *amicus* application, the Tribunal shall "take into consideration the recommendation of the North American Free Trade Commission on non-disputing party participation of 7 October 2003," i.e. the FTC Statement.

4.2 The FTC Statement provides the following relevant guidance in Section B:

> *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:*

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[16] Respondent's Objection dated June 21, 2017, p. 1.
[17] Respondent's Objection dated June 21, 2017, p. 1.
[18] Respondent's Objection dated June 21, 2017, p. 2.
[19] *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing Party, 4 March 2013 ("***Apotex***").
[20] Respondent's Objection dated June 21, 2017, p. 2.
[21] Respondent's Objection dated June 21, 2017, p. 2.

> *(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.*
>
> *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.*

4.3 The question for the Tribunal to examine here is whether the Applicants meet the four criteria set forth in Section B(6) of the FTC Statement and assess whether their participation would disrupt the proceedings or unduly burden either disputing party as set out in Section B(7) of the FTC Statement.

4.4 The Tribunal is not convinced that the Applicants fulfil the first of the criteria listed in Section B(6), namely that they would "assist the Tribunal in the determination of a factual or legal issue related to the arbitration." There is no suggestion by the Applicants that they could assist on factual issues. On legal issues, the Tribunal does not consider that the Applicants, experienced and knowledgeable as they no doubt are as individual practitioners and scholars, bring a "perspective, particular knowledge or insight different from that of the disputing parties" as specified in Section B(6)(a) of the FTC Statement.[22] This is particularly so in circumstances where both Disputing Parties are represented by experienced counsel who have extensively briefed the issues on the interpretation of NAFTA; the Tribunal is also in receipt of submissions from both the Non-Disputing Parties.[23] In this respect, the Tribunal agrees with the *Apotex* tribunal in dealing with a similar application, that it is "most unlikely" that the Applicants "would provide the Tribunal with any particular perspective or insight different from the Disputing Parties."[24]

4.5 The Tribunal notes that the Applicants are required to address issues that are within the scope of the dispute pursuant to the second criterion listed in Section B(6)(b). The Respondent has pointed out that certain of the arguments on the time bar in Articles 1116(2) and 1117(2) of NAFTA arguably reach beyond the scope of the issues

[22] *Apotex*, paras. 31-34.
[23] Submission of the United States of America Pursuant to NAFTA Article 1128 dated June 14, 2017; Submission of Mexico Pursuant to NAFTA Article 1128 dated June 14, 2017.
[24] *Apotex*, para. 34.

contested by the Disputing Parties in the present arbitration. In any event, even if the intention of the Applicants is to address exclusively issues within the scope of the dispute, if the other criteria in the FTC Statement are not met, the application should be denied.

4.6 The third criterion for an *amicus* applicant is that it has a "significant interest" in the arbitration as set out in Section (6) of the FTC Statement. The Tribunal agrees with the test articulated by the *Apotex* tribunal, that in order to establish a "significant interest" in the arbitration, the Applicants must demonstrate that they have "more than a 'general' interest in the proceeding."[25] While the Applicants have stated the admirable goal of "maintain[ing] respect [for] the rule of law, international public law and the application of the principle of *pacta sunt servanda* within dispute resolution under the NAFTA",[26] this does not prove a "significant interest" in this arbitration beyond "having the Tribunal adopt legal interpretations of NAFTA" that the Applicants favour. The Tribunal thus concludes, similarly to the conclusion of the *Apotex* tribunal, that the Applicants lack a "significant interest".[27]

4.7 The Tribunal now turns to the fourth consideration under Section 6(B) of the FTC Statement, which is whether there is a public interest in the subject-matter of the arbitration. The Tribunal accepts that its interpretation of the provisions of NAFTA in the jurisdictional phase of this dispute could impact upon individuals and entities beyond the Disputing Parties. However, it does not consider that the Applicants have shown any link between their Application and furtherance of the public interest.

4.8 Finally, given the Tribunal's determinations above, the Tribunal also considers that granting the Applicants status as *amici curiae* would unnecessarily burden the Disputing Parties by imposing further work, time and expense on them.[28] Accordingly, the Application also fails to satisfy Section 6(B)(7) of the FTC Statement. The Tribunal notes in this respect that the Application is not supported by either Disputing Party and that the Respondent actively opposes it.

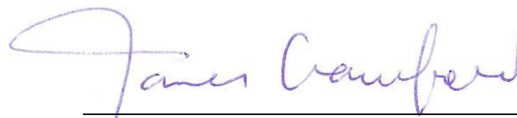
[25] *Apotex*, para. 38.
[26] Application, p. 4.
[27] *Apotex*, para. 40.
[28] *Apotex*, para. 44.

5. THE TRIBUNAL'S ORDER

5.1 For the foregoing reasons, the Tribunal denies the application by Prof. Howse and Mr Appleton to file a non-disputing party submission in these proceedings.

Date: June 29, 2017

For the Arbitral Tribunal



Judge James R. Crawford, AC