

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

(1) APOTEX HOLDINGS INC.

(2) APOTEX INC.

Claimants

v.

UNITED STATES OF AMERICA

Respondent

**PROCEDURAL ORDER
DECIDING BIFURCATION AND NON-BIFURCATION**

The Tribunal:

J. William Rowley, Arbitrator;
John R. Crook, Arbitrator; and
V.V. Veeder, President.

The Secretary to the Tribunal:

Eloïse M. Obadia

Date: 25 January 2013

PROCEDURAL ORDER
DECIDING BIFURCATION AND NON-BIFURCATION

1. The Tribunal has considered the Parties' four submissions regarding the Respondent's application for bifurcation under the Tribunal's First Procedural Order (as revised): namely (i) the Respondent's Part IV of its Counter-Memorial dated 14 December 2012, paragraphs 391-402 (pp. 198-204); (ii) the Claimants' Opposition to Bifurcation dated 28 December 2012; (iii) the Respondent's Reply on Bifurcation dated 10 January 2013; and (iv) the Claimants' Rejoinder on Bifurcation dated 16 January 2013.

2. These written submissions exceeded 100 pages, without counting the appended materials, which were sufficient for the Tribunal to make a decision within the short time permitted under the existing procedural time-table under paragraph 14.2.6 of the First Procedural Order. Accordingly, the Tribunal decided that it was unnecessary to hear the Parties' legal representatives further on these bifurcation issues; and the Tribunal therefore cancelled the procedural meeting by telephone conference-call tentatively fixed for 22 January 2013.

3. In summary, the Respondent requests the Tribunal to decide its jurisdictional objections as a preliminary matter on grounds of economy, efficiency and fairness. In summary, the Claimants oppose that application on different grounds of efficiency, economy and fairness. By separate application, on similar grounds, the Claimants also request the Tribunal to re-consider its existing decision (by order of 29 October 2012 and the First Procedural Order), bifurcating the merits as to liability and damages, which is opposed by the Respondent.

4. The Tribunal notes the Parties' agreement on the existence of the Tribunal's procedural power, under Article 45 of the ICSID Arbitration (Additional Facility) Rules, to decide whether or not to order bifurcation as between jurisdiction and merits and, if ordered, to what extent – it being a matter for the Tribunal's discretion taking into account the relevant circumstances of the particular case. In the Tribunal's view, its discretion also includes a power under the Additional Facility Rules to decide in regard to the merits whether or not to bifurcate liability and damages as regards the written and oral procedures of these arbitration proceedings.

5. The Tribunal has considered the Claimants' application (opposed by the Respondent) to reverse the Tribunal's decision to the effect that the current written procedure would not address damages (i.e. even if the Respondent's application for bifurcation were rejected by the Tribunal).

6. Having re-considered its decision in the light of the Parties' submissions, the Tribunal has decided to reject the Claimants' application. As a continuing matter of procedural fairness (motivating its earlier orders) but also the possibility that the Tribunal's decisions as to the jurisdictional or liability issues may directly impact issues as to damages, the Tribunal here re-makes its decision that these latter issues shall not be addressed in the written and oral procedures up to and including the oral hearing currently fixed for 18-26 November 2013 (the "November Hearing"). Accordingly, issues as to damages are not an immediate factor regarding the Respondent's application for bifurcation as between jurisdiction and merits (limited to liability).

7. As to the Respondent's application (opposed by the Claimants), the Tribunal takes much into account the submission forcefully made by the Respondent that bifurcation (as between jurisdiction and merits) ensures that an arbitration tribunal decides the merits of a

dispute only when both disputing parties have expressed their consent to arbitration, particularly so in the field of investment arbitration (such as these proceedings).

8. In this case, however, the Claimants submit that bifurcation cannot advance the resolution of this particular dispute because the Respondent's jurisdictional objections will not necessarily provide a complete answer to the Claimants' case; and if a single objection were to fail, the dispute would then necessarily proceed to the merits (against one or both Claimants), albeit after much unnecessary delay and expense. Further, the Claimants submit that there is a substantial overlap between jurisdictional issues and liability issues in this case; and, accordingly, that procedural fairness and efficiency require these issues to be addressed and decided at the same time, without the risk of a decision on jurisdiction compromising any later decision as to liability.

9. These factors are all denied by the Respondent, in some detail; and its denials are in turn rebutted by the Claimants, in equivalent detail. At this early stage of these proceedings, however, it is not easy for the Tribunal to decide with confidence any of these factors. More significantly, the Tribunal also concludes that, even if this exercise were possible, it would be inappropriate and potentially prejudicial to one or both sides to do so at this early stage of these arbitration proceedings.

10. The Tribunal must take in this case a difficult but not a complicated decision, weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice. There is no bright dividing-line as to where that decision now lies, rightly or wrongly. Moreover, the Tribunal must decide the Respondent's application in the particular circumstances of this case. It serves no purpose for this Tribunal to follow blindly what other tribunals have or have not done in other circumstances, particularly with hindsight.

11. In the Tribunal's view, as a matter of overall procedural fairness these proceedings could better proceed without bifurcation as between jurisdiction and liability: there would be less risk of substantial delay given the ability to make full use of the November Hearing; there would be less risk of wasted expense for the Parties given that overlapping jurisdictional and liability issues need not be addressed twice (should the jurisdictional objections fail); and there would be no risk of inconsistent submissions by the Parties or prejudicial decisions by the Tribunal.

12. As to additional costs borne by the Respondent in addressing liability issues (when it could succeed on the jurisdictional issues), the Tribunal here confirms that it would be minded to apply in this case the "loser pays" principle in allocating legal and arbitration costs to reflect that event and not leave costs where they lay under Article 58 of the ICSID Arbitration (Additional Facility) Rules. It is also assumed that the Claimants would honour such an award for costs in favour of the Respondent pursuant to Article 52(4) of the ICSID Arbitration (Additional Facility) Rules.

13. In short, in the circumstances of this case, the Tribunal concludes that the balance of procedural fairness bears less heavily on the Respondent without bifurcation than on the Claimants with bifurcation.

14. For these reasons, the Tribunal dismisses the Respondent's application for bifurcation and fixes jurisdictional and liability issues (but not issues as to damages) to be addressed in the remaining written procedure and heard during the oral procedure at the November Hearing. To the extent necessary, the Tribunal may address at a later date the schedule for written pleadings regarding issues as to damages, including the Claimants' pending offer to submit further materials regarding damages and the amount of their respective claims for damages.

15. Accordingly, the procedural timetable shall be as follows for the future, as set out in paragraph 14 of the First Procedural Order:

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;

(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);

(vi) The Tribunal shall decide on any objections to document requests within two weeks (that is, by 29 March 2013);

(vii) The Claimants and the Respondent shall produce any documents so ordered by the Tribunal within three weeks (that is, by 19 April 2013);

(viii) The Claimants shall file a Reply on the merits and Counter-Memorial on jurisdiction by 24 May 2013 (112 days / 16 weeks from decision on bifurcation and 161 days / 23 weeks from the Counter-Memorial);

(ix) The Respondent shall file a Rejoinder on the merits and Reply on jurisdiction by 20 September 2013 (119 days / 17 weeks from Reply); and

(x) The Claimants shall file a Rejoinder on jurisdiction by 11 October 2013 (3 weeks from Reply on jurisdiction).

(xi) The Claimants and Respondent shall provide notification of any witnesses and experts to be cross-examined at the hearing by 25 October 2013 (5 weeks from Rejoinder on the merits and 2 weeks from Rejoinder on jurisdiction).

(xii) A pre-hearing telephone conference shall be held on 31 October 2013 (six days from notification of any witnesses and experts) at a time to be determined by the Tribunal.

(xiii) The hearing shall be held from 18 to 26 November 2013, including if necessary on Saturday 23 November 2013.

16. For the avoidance of doubt, the Tribunal confirms that it has in no way even begun to decide any of the Respondent's jurisdictional objections, nor any of the issues relating to the merits of the Parties' dispute. Accordingly, nothing more should be read into this decision beyond its terms limited to decisions as to bifurcation and non-bifurcation.

Dated: 25 January 2013

Signed for the Tribunal:

[Signed]

V.V.Veeder (President of the Tribunal)