IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA AND THE UNCITRAL ARBITRATION RULES (1976)

B E T W E E N:

APOTEX INC.

CLAIMANT

– AND –

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

RESPONDENT

PROCEDURAL ORDER NO.2

ON THE PARTICIPATION OF A NON-DISPUTING PARTY

11 October 2011

THE ARBITRAL TRIBUNAL:

Hon. Fern M. Smith
Mr. Clifford M. Davidson
Mr. Toby T. Landau QC *(Presiding Arbitrator)*

1. This Procedural Order is issued further to a letter to the Parties dated 15 September 2011, by which leave for the filing of a non-disputing party submission by the Study Center for Sustainable Finance was refused. In its letter, the Tribunal informed the Parties that detailed reasons of its decision would be set out in a forthcoming procedural order.

I. PROCEDURAL HISTORY

2. Section XVI of **Procedural Order No 1** dated 16 December 2010, entitled "NON-DISPUTING PARTIES / AMICI", set out the following directions:

> "58. Non-disputing Parties shall have the opportunity to make submissions on questions of NAFTA treaty interpretation, on written notice to the disputing parties, as required by NAFTA Article 1128.
>
> 59. The Arbitral Tribunal shall consider any application for leave to file a submission in this arbitration by an intending amicus. Any amicus application for leave to file and accompanying submission shall adhere to the requirements set forth in the recommendations of the FTC on amicus participation, issued on 7 October 2003.
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> 60. The parties shall have the opportunity to make submissions on any application for leave to file a submission in this arbitration by an intending amicus.
>
> 61. The Arbitral Tribunal shall issue a ruling on any amicus application for leave to file a submission, taking into account the recommendations of the FTC on amicus participation."

3. In accordance with these directions, notice was duly given by the Tribunal inviting any person or entity that is not a Disputing Party in these arbitration proceedings or a Contracting Party to the NAFTA to make a written application, by 1 September 2011, for permission to file submissions as an amicus curiae.

4. On 25 August 2011, the Secretariat of the International Centre for Settlement of Investment Disputes ("**ICSID**") received an "*Application For Leave To File A Non-Disputing Party Submission*" (the "**Application**"), submitted by the Study Center for Sustainable Finance,

which is described as "*the research and development arm of the Business Neatness Magnanimity BNM srl*" (referred to collectively as "**BNM**" or the "**Applicant**"). Attached to the Application was a "*Statement of Non-Disputing Party*" (the "**Statement**").

5. On 8 September 2011, in accordance with the agreed schedule, the Claimant ("**Apotex")** filed a "*Response Of Claimant Apotex Inc. In Opposition To The Application For Leave To File A Non-Disputing Party Submission By BNM Study Center For Sustainable Finance*" (the "**Response**").

6. The Respondent, in the meantime, indicated that it did not intend to provide comments on the Application.

7. On 15 September 2011, the Arbitral Tribunal informed the Parties and the Applicant of its decision to refuse the Application, on the basis that the proposed brief did not satisfy the relevant criteria as set out in the Statement of the Free Trade Commission on Non-Disputing Party Participation.

II. THE APPLICATION

8. BNM is a management consulting firm, which describes itself as a "*per profit non-governmental organisation*", incorporated on 20 July 2005 in Rome, Italy, with a "*significant presence in Mexico and several other countries in the world*" (Application, para. 1). It states that:

> "BNM on one hand share interests of hundreds of securities firms, banks, and asset managers, on another hand, and as it first priority is sharing interests of last users of the goods, and services of the projects in which take part. BNM members include leading professionals from universities, investment banks, broker-dealers, and mutual funds companies. BNM's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building not only trust and confidence in the financial markets, but also making a substantial difference in emerging and frontier countries as well as in poor areas in developed countries.
>
> BNM shareholders were donors and managers of trusts and foundations working in the South of world, since BNM incorporation, results show that the best way to help the poor is not through donations, but in helping them to get access to justice,

> credit, and information. All BNM work and venture capital is devoted to health, environment, safety and other scientific matters related to strategic sectors in the economy."
>
> (Application, page 1).

9. BNM's research and development arm, the Study Center for Sustainable Finance is said to be:

> "... an interdisciplinary working group of scholars and leading professionals in the fields of law, finance and development, including engineers with scientific background. The Study Center for Sustainable Finance develops new creative ways to improve public and private sectors' ability to invest money more efficiently in public goods, particularly increasing the overall number of public and private funds available for health, food, education, infrastructure, energy, and services."
>
> (Application, page 1).

10. The Applicant's Statement "*addresses whether or not an expectation is an entitlement to an intangible asset, and if so, if the venture capital used by claimant is an 'investment' as defined and protected by Chapter XI*" (Application, para. 5). According to its Summary of Argument, the Applicant seeks to put forward a position that "*the expenses (venture capital) of claimant cannot qualify as investment under NAFTA … and the Tribunal has no jurisdiction to enter into the merits of this case*" (Statement, page 1).

11. In its Application, BNM confirms that it does not have any affiliation, direct or indirect, with any disputing party or any pharmaceutical company anywhere in the world. It also states that it has not received any financial or other assistance from any government, person or organisation.

III. APOTEX's SUBMISSIONS

12. In its Response, Apotex objects to BNM's submission on the grounds that the Applicant has failed to satisfy the standards determined in the FTC Statement.

13. According to Apotex:

(a) BNM has not demonstrated that it would assist the Tribunal in the determination of factual or legal issues relating to this Arbitration, as it does not appear to have any knowledge or insight about any of the issues that are at the heart of the proceedings (*see* Response, paras. 5-9);

(b) BNM does not address matters within the scope of the dispute; nor does it have a significant interest in the Arbitration. In Apotex's words:

> "Applicant has *no recognizable interest in* NAFTA, *no recognizable interest in* Apotex's NAFTA claims, and *no recognizable interest in* the federal court cases that serve as the basis for Apotex's claims"
>
> (Response, para. 17);

(c) BNM does not seek to support the public's interest, as the:

> "Applicant's sole apparent interest in this Arbitration lies in advancing its own *private* interests in opening a litigation venture capital fund and making a profit for its investors—which could explain why Applicant failed to address this factor altogether"
>
> (Response, para. 20).

(d) BMN has mischaracterised Apotex's arguments, such that granting BNM the opportunity to file a submission would not only disrupt the proceedings, but also force the Disputing Parties and the Tribunal to address misstatements and thereby unduly burden, if not unfairly prejudice, Apotex (Response, paras. 22-24).

IV. THE ARBITRAL TRIBUNAL'S REASONS AND DECISION

(a) Jurisdiction to Accept *Amicus* Submissions and the Applicable Test

14. Pursuant to Articles 1120(1)(c) and 1120(2) of NAFTA, and Section VII of Procedural Order No. 1, this arbitration is conducted in accordance with the UNCITRAL Arbitration Rules 1976, except as modified by the provisions of Section B of NAFTA Chapter 11.

15. As noted in paragraph 2 above, agreed directions for submissions by non-disputing parties / amici were set out in Section XVI of **Procedural Order No 1**, by reference to the Statement of the Free Trade Commission on non-disputing party participation of 7 October 2003 (the "**FTC Statement**").

16. Adopting the words of the Arbitral Tribunal in ***Glamis v. United States of America*** (Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 9), a NAFTA Arbitration governed by the UNCITRAL Rules:

> "The Tribunal need not now decide whether the discretion to accept substantive materials from non-parties is within the discretion of the Tribunal under Article 15(1) of the UNCITRAL Rules. The Free Trade Commission's Statement on non-disputing party participation indicates that the three states [sic] in NAFTA accept such statements. More particularly, the parties in this proceeding do not object to such statements, at least where consideration of the material is in accordance with the Free Trade Commission's Statement."

17. The issue before this Tribunal is whether it should afford the Applicant a specific and defined opportunity to make a particular written submission, and not whether the Applicant should become a party to the arbitration as a "*non-disputing party*" (*See* ***Methanex Corporation v. United States of America***, Decision of the Tribunal on Petitions from Third Persons to intervene as "Amici Curiae" in a NAFTA Arbitration under the UNCITRAL Arbitration Rules, 15 January 2001, para. 30).

18. *The FTC Criteria:* Sections B(6) and (7) of the FTC Statement identify specific criteria for the grant of leave by NAFTA Chapter 11 tribunals for the filing of non-disputing party submissions. These sections 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.

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."

19. Given that these criteria are substantially similar to those set forth in Article 37(2) of the ICSID Arbitration Rules (as amended in 2006), some - albeit non-binding - guidance on the treatment of *amicus curiae* submissions can be gleaned from non-NAFTA ICSID decisions, as well as those of previous NAFTA tribunals.

(b) Application of the FTC Criteria

20. The burden is on the Applicant to demonstrate that it meets the requirements set forth in Section B(6) and (7) of the FTC Statement. The Tribunal considers each requirement in turn below.

21. *Assistance to the Tribunal:* In assessing whether BNM's submission could potentially assist the Tribunal in the determination of legal or factual issues, this Panel has considered *inter alia*, whether the Applicant's submission 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. As pointed out, for example, in ***Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. V. Argentine Republic***, ICSID Case No.ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, at para. 23:

> "The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise and perspectives that the parties may not have provided. The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case."

22. In matters of public interest, the Tribunal considers that the requirement of a different expertise, experience or perspective from that of the Disputing Parties ought to be construed broadly, so as to allow the Tribunal access to the widest possible range of views. By ensuring that all angles on, and all interests in, a given dispute are properly canvassed, the arbitral process itself is thereby strengthened.

23. Having said this, the Tribunal considers that BNM's intended submission falls short in this regard. As Apotex has noted (*e.g.* Response, para. 5), the Applicant has not pointed to any knowledge, experience or expertise with respect to the pharmaceutical industry, or the food and drug laws of the United States, or with Abbreviated New Drug Applications, or any other aspect of the United States legal and judicial system, or international law, or even NAFTA itself, or indeed any other basis which would give it any particular perspective or insight beyond that of the Disputing Parties. As such, there is nothing to suggest that BNM is able to provide any assistance to this Tribunal that might not otherwise be available to it. BNM's intended filing is no more than a legal analysis of the terms of the NAFTA, and previous arbitral decisions on the concept of "*investment*", undistinguished and uncoloured by any particular background or experience.

24. As noted by the Tribunal in ***Methanex Corporation v. United States of America*** (Decision of the Tribunal on Petitions from Third Persons to intervene as *Amici Curiae*, 15 January 2001, para. 48), the assessment as to the likely utility of a non-disputing party's submission should be made on the assumption that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute.

25. In this case, full written submissions have already been served on the Respondent's objections to jurisdiction, including the question whether Apotex has made an "*investment*" in the territory of another NAFTA Party for purposes of Article 1139 of the NAFTA.

Second round written submissions are still to be completed over the coming months, and the issue will then be the subject of further analysis at the forthcoming jurisdiction hearing. There is no reason to conclude that the Disputing Parties will not competently and comprehensively argue all issues regarding jurisdiction, and bring before the Tribunal all relevant perspectives on the meaning and scope of Article 1139 of the NAFTA.

26. To this end, the Tribunal concludes that there is nothing in BMN's intended submission that can properly be characterised as reflecting a distinct insight or perspective on the definition of "*investment*" that would otherwise be absent from this arbitral process, and that would therefore be of assistance to the Tribunal.

27. *Applicant's Significant Interest in the Arbitration:* In paragraph 4 of its Application, BNM identifies its interest in this matter as follows: "*Develop new financial alternative services in order to build a more ethical legal framework for the global pharmaceutical market*". It further states that "*BNM is considering the pros and cons of opening a 'litigation venture capital fund' in which the biotechnology, telecommunications, mining and energy sector may benefit.*" (Application, para. 4).

28. The Applicant has not defined any significant interest in this arbitration. It has not explained how the rights or principles it may represent or defend might be directly or indirectly affected by the specific jurisdictional issue on which it intends to make submissions, or indeed by the outcome of the overall proceedings. The fact that the Applicant is "*considering*" opening a venture capital fund does not amount to a concrete interest as contemplated by the FTC Statement. It is, at best, an aspiration, that has not in fact vested in any way at this juncture. The Tribunal therefore concludes that BNM has failed to satisfy this criterion.

29. *Public Interest in the Subject Matter of this Arbitration:* Further, BNM has failed to explain the particular public interest it would be seeking to address through its proposed submission. Whilst it may be said that investment-arbitration tribunals generally deal with matters of public importance, it remains for the Applicant to identify the specific public interest which it considers to be at stake, or which may be affected by any decision,

and which warrants submissions from individuals or entities or interest groups beyond those immediately involved as parties in the dispute.

30. As explained by the Tribunal in ***Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*** (ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, para. 19):

> "Courts have traditionally accepted the intervention of amicus curiae in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case".

(See also, ***Biwater Gauff (Tanzania) LTD. v. United Republic of Tanzania***, ICSID Case No.ARB/05/22, Procedural Order No. 5, 2 Feb. 2007, para. 52).

31. This is a further requirement that the Tribunal considers BNM has failed to meet.

32. *Addressing Matters Within the Scope of the Dispute:* One of the FTC criteria is a requirement that submissions of non-disputing parties address matters within the scope of the dispute. Previous NAFTA Tribunals rendering decisions under UNCITRAL Rules have considered that questions of jurisdiction are not among the matters on which it is appropriate to receive submissions from non-disputing parties (*e.g.*, ***United Parcel Service of America Inc v. Canada***, Decision of the Tribunal On Petitions for Intervention And Participation as *Amici Curiae*, 17 October, 2001, para. 71).

33. This Tribunal does not subscribe to any such hard and fast rule. It is perfectly conceivable that issues of jurisdiction might raise matters of public interest in themselves, on which non-disputing parties might be well-placed to provide assistance and perspectives or insights beyond those of the disputing parties. In this case, the Tribunal considers that the definition of "*investor*" and "*investment*" under NAFTA Chapter 11 is properly characterised as a "*matter within the scope of the dispute*" for purposes of the FTC Statement. However, this is of no significance, given that the Tribunal has already

concluded that BNM is not in a position to bring a perspective, particular knowledge or insight that is different from that of the Disputing Parties in this regard.

34. *Disruption, Burden and Prejudice to the Disputing Parties:* Any tribunal faced with an application by a non-disputing party to file a submission must take care in striking a balance between, on the one hand, safeguarding issues of public interest, and ensuring a transparent and legitimate dispute resolution process and, on the other hand, safeguarding the disputing parties' rights, including their entitlement to equal treatment, and the overall procedural integrity of the arbitration.

35. Apotex submits that granting the Applicant leave to file a non-disputing party submission would unduly disrupt these proceedings, and in particular place upon it an unfair burden as the party seeking to establish jurisdiction. Given the Tribunal's findings above, there is no need to address this further consideration.

V. THE TRIBUNAL'S ORDER

36. For the above reasons, the Arbitral Tribunal unanimously refuses the Application for Leave to File a Non-disputing Party Submission presented by BNM Study Center for Sustainable Finance dated 25 August 2011.

Mr. Toby T. Landau QC
on behalf of the Arbitral Tribunal

Dated: 11 October 2011