

**AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA  
AND THE *UNCITRAL* ARBITRATION RULES, 1976**

between

**ELI LILLY AND COMPANY**

Claimant

and

**GOVERNMENT OF CANADA**

Respondent

**(CASE NO. UNCT/14/2)**

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**PROCEDURAL ORDER NO. 5**

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**ARBITRAL TRIBUNAL:**

Professor Albert Jan van den Berg (President)

Mr. Gary Born

Sir Daniel Bethlehem

*29 April 2016*

**A. Pre-Hearing Conference Call**

1. Pursuant to Section 23.1 of Procedural Order No. 1, the President of the Tribunal will hold a pre-hearing conference call with the Parties on **Wednesday, 27 April 2016** at 9:00 am EDT.

**B. Hearing Dates, Schedule and Location**

2. The hearing will be held for 10 full hearing days during the period from **Monday, 30 May 2016** to **Thursday, 9 June 2016**. The hearing will be adjourned on **Sunday, 5 June 2016**.
3. Daily Schedule:
  - Start: 9:00 a.m.
  - Breaks: mid-morning and mid-afternoon, each 15 minutes in duration
  - Lunch: around 12.30 p.m., 60 minutes in duration
  - End: no later than 6:00 p.m.
4. The Tribunal may extend the hearing hours if necessary.
5. The hearing will be held at the ICSID facilities at the World Bank Headquarters in Washington, D.C.

**C. Transparency**

6. Pursuant to Section 24.1 of Procedural Order No. 1, the “hearing shall be made accessible to the public in real time via closed-circuit television broadcast to a World Bank room other than the room in which the hearing is held, subject to a time delay and any other arrangements needed to safeguard confidential information.”
7. The video feed shall be broadcast to the public-access room on a 10-minute delay.
8. If either Party intends to use Confidential Information during the hearing, that Party should provide prior notice to the Secretary, who will have the video feed to the public-access room discontinued until that Party confirms that it does not intend to use further to use Confidential Information at that time.
9. If Confidential Information is inadvertently introduced during the hearing, either Party may immediately notify the President of the Tribunal. Upon such notice, the Secretary will immediately have the video feed discontinued. The Party making the notification will have the opportunity to identify the Confidential Information, and

the other Party will have the opportunity to respond. In case of disagreement between the Parties, the Tribunal will make a determination.

10. The same protocol shall apply to Restricted Access Information, except that in the event Restricted Access Information is introduced during the hearing, the Tribunal will, in accordance with Section 17 of the Confidentiality Order, restrict access of that portion of the hearing only to authorized persons in accordance with the terms of the Order.
11. In accordance with Section 21 of the Confidentiality Order, the non-disputing NAFTA Parties may attend the hearing in the hearing room.
12. *Amici* are to be treated like other members of the public and will not be given access to the hearing room. If *amici* wish to view proceedings, they may do so from the public-access room at the World Bank.

**D. Allocation of Time Between the Parties**

13. The Parties shall be allocated an equal amount of hearing time.
14. The duration of each hearing day will be 6.0 hours, excluding breaks, lunch, transition time and Tribunal questions. Accordingly, each Party shall have a total time allocation of 30 hours,<sup>1</sup> inclusive of Opening and Closing Statements.
15. The Secretary will maintain hearing time using the chess clock method. Time incurred by the Tribunal's questions shall be counted to the Tribunal and not to either Party.

**E. Opening Statements**

16. On the first day of the hearing, each Party will be accorded no more than 3 hours in which to make its Opening Statement.
17. On **Friday, 6 May 2016**, the Tribunal will provide the Parties with a series of questions that the Tribunal would like the Parties to address during their Opening Statements, without prejudice to the right of the Parties to structure their Opening Statements in the way that they so choose. The Tribunal may provide the Parties with additional questions after 6 May 2016, endeavouring to do so at least one week in advance of the hearing.

**F. Witness and Expert Examinations**

18. Pursuant to Section 13.5 of Procedural Order No. 1, each Party will notify the other Party, with a copy to the Tribunal and the Secretary, of the witnesses and experts

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<sup>1</sup> 10 Hearing Days x 6 hours of "Party Time" each day = 60 hours/2 = 30 hours each.

offered by the other Party which it intends to cross-examine at the hearing by no later than **29 April 2016**.

19. Neither Party shall add any witness or experts to this list after the exchange on April 29, 2016 without the agreement of the other Party or permission from the Tribunal.
20. Either Party can withdraw any witnesses or experts from their list for cross-examination after April 29, 2016, but shall do so as soon as possible.
21. Pursuant to Section 13.5 of Procedural Order No. 1, the Tribunal shall notify the Parties of any witness not scheduled to attend the hearing and provide oral testimony which the Tribunal wishes to examine by no later than **6 May 2016**. Any cross-examination or re-direct examination of any such witness called by the Tribunal will be limited to matters arising out of the Tribunal's questions.
22. Pursuant to Section 13.11 of Procedural Order No. 1, a Party may summon its own witness to briefly examine that witness for purposes of correcting, if necessary, any errors in the witness statement and addressing matters arising after the witness statement was given. Where a Party does so and the witness has not been called by the other Party for cross-examination or by the Tribunal, any cross-examination will be limited to matters arising out of the direct testimony given by the witness at the hearing. A Party who wishes to summon a witness for purposes of such a brief direct examination who is not already being called for cross-examination or at the request of the Tribunal must notify the other Party and the Tribunal by **13 May 2016**.
23. Pursuant to Section 13.12 of Procedural Order No. 1, the Parties shall agree on and inform the Tribunal of a tentative schedule for witness and expert examination, which shall include the anticipated length of time, by no later than **19 May 2016**, in the form of an Excel sheet (template to be provided by the Tribunal).
24. As a general rule, each witness/expert shall be available for examination half a day before and after the time at which his/her examination is scheduled.
25. Witnesses shall be grouped by subject matter, beginning with the Claimant's fact witnesses first (Armitage, Nobles, Postlethwait, and Stringer), followed by Mr. Brisebois, followed by the witnesses discussing Canadian law (Reddon, Siebrasse, Wilson, Barton, Dimock, and Gillen), followed by the witnesses discussing statistical evidence (Levin and Raven), and then followed by the witnesses offering opinions on U.S. law (Kunin, Merges, and Holbrook), then Mexican law (Gonzalez, Salazar, and Lindner) and finally more general international intellectual property law (Thomas, Erstling, Gervais, and Reed). Within each of these groups, the Claimant's witnesses will be examined first, followed by relevant responding witnesses from Canada. Each Party shall determine the order in which it presents its own witnesses within these groupings.

26. Pursuant to Section 13.12 of Procedural Order No. 1, Mr. Armitage, Ms. Nobles, Mr. Postlethwait, Mr. Stringer, Dr. Gillen, Mr. Wilson and Mr. Brisebois will be excluded from the hearing room until they have provided their testimony in full. All other witnesses shall be permitted to be in the hearing room throughout the proceedings.
27. The Tribunal shall administer ICSID's standard witness and expert admonitions.
28. The procedure for direct examination, cross-examination, re-direct examination and re-cross examination shall be governed by Section 13.11 of Procedural Order No. 1, which provides:

*At any hearing the examination of each witness shall proceed as follows:*

- a) *the Disputing Party summoning the witness may briefly examine the witness for the purpose of introducing the witness, correcting, if necessary, any errors in the witness statement and addressing matters arising after the witness statement was given, if any;*
  - b) *the adverse Disputing Party may then cross-examine the witness;*
  - c) *the Disputing Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination. At the discretion of the Arbitral Tribunal, the adverse Disputing Party may re-cross examine the witness, with the re-cross examination limited to the witness' testimony on re-examination; and*
  - d) *the Arbitral Tribunal may examine the witness at any time, either before, during or after examination by one of the Disputing Parties.*
29. In addition to the rules for the examination of witnesses and experts set out in Section 13.11 of Procedural Order No. 1, the witnesses designated by the Parties as experts and, in view of the specific circumstances, Mr. Gillen and Mr. Brisebois, may make a presentation as part of their direct examination summarizing their opinions and explaining their methodology and divergences with the opposing Party's expert(s), if any. This presentation shall not last more than 20 minutes.
  30. The scope of cross-examination should be limited to the witness's written statements/expert reports, direct testimony at the hearing, and matters affecting the witness's credibility.
  31. Cross-examination bundles (exhibits or legal authorities on the record to which the fact or expert witness is to be referred) are to be provided immediately before the cross-examination. The provision of a cross-examination bundle will not prevent taking the witness to any other exhibit or authority on the record. The Party examining the witness will provide a copy of the cross-examination bundle to the

witness or expert, to the other Party and to each arbitrator and Secretary. Neither Party may introduce a document during the examination or cross-examination of a witness that is not already on the record.

**G. Closing Statements**

32. Each Party shall be accorded no more than 3.5 hours in which to make its Closing Statement.
33. Each Party is free to reserve up to one half hour of its time allotment for the purposes of offering a rebuttal statement.
34. The Tribunal will provide the Parties with a series of questions that the Tribunal would like the Parties to address during their closing statements, without prejudice to the right of the Parties to structure their closing statements in the way that they so choose. Such questions are invited by the close of the hearing day on **Tuesday, 7 June 2016**.

**H. Hearing Materials**

35. The rules regarding additional documents and new evidence/exhibits are provided by Sections 11.7 and 11.8 of Procedural Order No. 1, which state:

*11.7 The Disputing Parties shall submit all exhibits together with written submissions expressly referring to them. As a general rule, the Arbitral Tribunal shall not receive any evidence that has not been introduced with the written submissions.*

*11.8 In exceptional cases, the Arbitral Tribunal may allow a Disputing Party upon requesting leave and after hearing the other Disputing Party, to submit additional exhibits at a later stage of the proceedings if appropriate in view of all the relevant circumstances. The requesting Disputing Party may not annex the documents that it seeks to file to its request.*

36. The rules regarding the use of PowerPoint and demonstrative exhibits are provided by Article 11.9 of Procedural Order No. 1, which states:

*11.9 The use of demonstrative exhibits in aid of argument (such as charts or tabulations) will be allowed at oral hearings, provided that no new evidence is contained therein, and that such exhibits include citations to the relevant record. A hard copy of any such demonstrative exhibit shall be simultaneously provided by the Disputing Party submitting such exhibit to the other Disputing Party, to the Secretary of the Arbitral Tribunal, and to each arbitrator.*

**I. Post-Hearing Procedural Steps**

37. The procedure and schedule for transcript corrections shall be determined by the Tribunal, in consultation with the Parties, at the conclusion of the hearing.
38. The Parties shall submit Post-Hearing Memorials. The scope, format and schedule shall be determined by the Tribunal, in consultation with the Parties, at the conclusion of the hearing.
39. The format and schedule for the Parties' Statements of Costs shall be determined by the Tribunal, in consultation with the Parties, at the conclusion of the hearing.

**J. Logistics**

40. The ICSID Secretariat, in consultation with the Parties and the Arbitral Tribunal, will make the necessary logistical arrangements, including the designation of the hearing and breakout rooms, set-up details, list of participants and access badges, transcription, recording, other technology, catering, etc.

For the Arbitral Tribunal

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Professor Albert Jan van den Berg

Date: 29 April 2016