

Under the Arbitration Rules of the
United Nations Commission on International Trade Law and
the North American Free Trade Agreement
(Case No. UNCT/14/2)

ELI LILLY AND COMPANY

Claimant

v.

GOVERNMENT OF CANADA

Respondent

**CLAIMANT'S OBSERVATIONS ON OUTSTANDING ISSUES
FOR THE FIRST PROCEDURAL HEARING**

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TABLE OF CONTENTS

	Page
I. Introduction	1
II. Outstanding Issues Under the Procedural Order.....	2
A. The Tribunal Should Seat This Arbitration in New York	2
1. The Principle of Neutrality Favors New York Over Ottawa or Toronto.....	4
a) New York is a Neutral Forum.....	4
b) Ottawa and Toronto Are Not Neutral Fora.....	5
2. The Factors Set Forth in the UNCITRAL Notes Also Favor New York	9
a) Suitability of the Law on Arbitral Procedure.....	9
b) Convenience to the Parties and the Arbitrators.....	11
c) Existence of a Treaty on Enforcement of Arbitral Awards.....	11
d) Availability and Cost of Support Services.....	11
e) Location of the Subject-Matter in Dispute and Proximity of Evidence	12
B. The Tribunal Should Examine This Case as a Whole and Not Bifurcate Damages From Liability	12
1. Bifurcation of Damages Would Not Enhance Efficiency	14
2. Bifurcation Would Unfairly Prejudice Claimant	16
C. Other Outstanding Issues Under the Procedural Order	18
1. <i>Section 12.6: Procedure For Withholding Documents On The Basis of Privilege</i>	18
2. <i>Section 13.10: Procedure for Permitting a Fact Witness Designated as a Disputing Party Representative to Attend the Hearing(s)</i>	20

3.	Overall Timing For Written Submissions and Document Exchange	21
III.	Outstanding Issues Under the Confidentiality Order	22
A.	The Need for a “Restricted Access Information” Category of Documents (<i>Paragraphs 1, 2, 6, 7, 11</i>)	22
B.	The Supremacy of the Confidentiality Order Over Domestic Law in These Proceedings (<i>Paragraph 16</i>)	24
1.	Respondent’s Proposed Provision Precludes the Parties from Asserting That Domestic Law Does Not Apply.....	26
2.	The Provision Prejudices the Parties’ Ability to Avoid a Conflict by Claiming Exemptions from Disclosure Existing Under Domestic Law	27
3.	Canada’s Proposed Provision Undermines the Equality of the Parties, Canada’s Obligation to Take all Necessary Measures to Give Effect to the Provisions of NAFTA, and the Tribunal’s Authority to Determine Issues of Confidentiality.....	29
IV.	Access By Third Parties to this Arbitration	30
A.	The Hearing Should Be Held <i>In Camera</i> and Transcripts of the Hearings Should be Confidential.....	30
B.	Access of the United States and Mexico as Non-Disputing NAFTA Parties	32
V.	The Tribunal’s Inquiries of 28 April 2014	33
VI.	Conclusion.....	34

I. Introduction

1. Claimant Eli Lilly and Company (“Lilly”), on its own behalf and on behalf of its enterprise Eli Lilly Canada Inc. (“Lilly Canada”) submits the following observations regarding outstanding procedural and confidentiality issues in advance of the first meeting of the Parties.

2. As set forth in its Notice of Arbitration, Lilly is a U.S. pharmaceutical company based in Indianapolis, Indiana that relies on intellectual property protection as the cornerstone of its business model. Patent protection, quite simply, allows Lilly to bring innovative medicines to market.¹ The market exclusivity that accompanies a patent provides critical economic incentives to invest in new medicines.

3. This case concerns the Canadian patents for two such innovative medicines, Straterra and Zyprexa.² Straterra treats attention-deficit hyperactivity disorder (“ADHD”), and Zyprexa treats schizophrenia and related psychotic disorders.³ Both medicines have been approved by Health Canada as safe and effective, and they are used by hundreds of thousands of patients in Canada.⁴ In the case of Straterra, the patent application was filed on 4 January 1996.⁵ Health Canada approved the product for use in Canada in 2004,⁶ and the patent expiry date would have been 4 January 2016.⁷ In the case of Zyprexa, the patent application was filed on 24 April 1991.⁸ Health Canada approved the product for use in Canada in 1996, and the patent expiry date would have been 24 April 2011.⁹

¹ Notice of Arbitration, at ¶ 1.

² *Id.* at ¶ 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at ¶ 25.

⁶ *Id.* at ¶ 26.

⁷ *Id.* at ¶ 25.

⁸ *Id.* at ¶ 27.

⁹ *Id.*

Canada's application of the "promise utility doctrine" to these patents in September 2010 and November 2011, respectively, revoked these patents *ab initio*.¹⁰

4. The Canadian judiciary revoked the Straterra and Zyprexa patents through a unique promise utility doctrine that Lilly submits is inconsistent with Canada's treaty obligations to protect patent rights and has resulted in the unlawful expropriation of Lilly's investments and a breach of fair and equitable treatment under Chapter 11 of NAFTA.¹¹ Once Lilly lost patent protection through the judiciary's application of the promise utility doctrine to its investments, Lilly was deprived of its ability to prevent competitors from entering the market and selling copies of the very same medicines that had been deemed to lack utility by the courts, and of its ability to enforce its patent rights against infringers.

II. Outstanding Issues Under the Procedural Order

A. The Tribunal Should Seat This Arbitration in New York

5. In its Notice of Arbitration, Claimant proposed that the seat of arbitration be New York, New York.¹² Respondent counters that the arbitration be seated in either Ottawa or Toronto, Ontario. For the reasons set forth below, New York is a more appropriate legal seat than Respondent's proposed locations.¹³

¹⁰ *Id.* at ¶¶ 51, 62, 75.

¹¹ *Id.* at ¶ 4.

¹² Notice of Arbitration, at ¶ 87.

¹³ The Tribunal has the authority to select the seat of arbitration under Article 1130 of the North American Free Trade Agreement ("NAFTA") and Article 16(1) of the United Nations Commission on International Trade Law Arbitration Rules of 1976 ("UNCITRAL Rules"), which govern this proceeding. Article 1130 of NAFTA provides that: "Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a [NAFTA] Party that is a party to the New York Convention, selected in accordance with ... the UNCITRAL Arbitration Rules." Article 16 of the UNCITRAL Rules, in turn, provides, "Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration."

6. The seat of arbitration determines the legal framework that will govern the arbitral proceeding and the domestic court system that will have jurisdiction to support and control the arbitration, including by considering petitions to set aside any award.¹⁴ It is accordingly critical that the judicial system of the seat be neutral as between the Parties, both in appearance and in fact.

7. The main measure at issue in this dispute is the promise utility doctrine, a judicially-created doctrine under Canadian common law that was used to revoke the Straterra and Zyprexa patents. For this reason alone, the Canadian courts would be incapable of providing a neutral forum for these proceedings – including potential set-aside proceedings. NAFTA tribunals have repeatedly recognized that neutrality considerations weigh against seating an arbitration in the respondent State.¹⁵ These concerns are present *a fortiori* here because Lilly's claim is that the Canadian *judiciary* violated international law, and Canada is responsible for the acts of its judiciary. In other words, seating this arbitration in Canada, as Respondent has requested, would put the Canadian judiciary in a position to review the legality of its own conduct. This would undermine the fairness, legitimacy, and efficacy of the arbitral process.

8. Seating the arbitration in New York is appropriate for other reasons as well. The UNCITRAL Notes on Organizing Arbitral Proceedings (1996) (the "UNCITRAL Notes") identify five "prominent factors" that are frequently considered in determining the arbitral seat:

- (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of

¹⁴ See, e.g., *Mesa Power Group, LLC v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-17), Procedural Order No. 3, at ¶ 39 (28 March 2013) (CL-001).

¹⁵ See *Mesa Power Group, LLC v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-17), Procedural Order No. 3, at ¶ 51 (28 March 2013) (CL-001); *Detroit International Bridge Co. v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-25), Procedural Order No. 2, at ¶ 27 (2013) (CL-002).

support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.¹⁶

As discussed below, each of these factors is either neutral or favors New York. No factor favors Respondent's proposal of Ottawa or Toronto.

1. The Principle of Neutrality Favors New York Over Ottawa or Toronto

a) New York is a Neutral Forum

9. Claimant is headquartered in Indiana, in the Seventh Circuit of the U.S. Federal Courts. Claimant contemplated Indianapolis as a proposed seat, as well as Chicago, the closest major U.S. city, which is also located in the Seventh Circuit of the U.S. Federal Courts. Both would have been very convenient for Claimant and the UNCITRAL factors, including neutrality, would have supported such a choice. Instead, Claimant opted for a forum that it thought would be acceptable to Respondent, since Claimant is not based in New York (or in the Second Circuit, the federal appellate court with jurisdiction there), and New York is widely regarded as a hub for international arbitration. In *Methanex*, for example, the tribunal concluded that the requirements of neutrality are met if the place of arbitration lies outside of *inter alia*, the jurisdiction responsible for the measures at issue and the home *province* of the claimant.¹⁷ Seating the arbitration in New York would meet this standard because Lilly's home state (*i.e.*, its "province") is Indiana, not New York. No NAFTA tribunal has ever found that the fact that the claimant is a U.S. company means that U.S. courts would be partial to it.

¹⁶ UNCITRAL Notes on Organizing Arbitral Proceedings, ¶ 22 (1996) (CL-003) [hereinafter UNCITRAL Notes].

¹⁷ *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of the Arbitration, at ¶¶ 38-39 (21 December 2000) (CL-004).

b) Ottawa and Toronto Are Not Neutral Fora

10. NAFTA tribunals consider the principle of neutrality to be an important – even decisive – consideration when establishing the seat of arbitration. As the tribunal explained in *Mesa Power*, “neutrality is an important element when deciding where to fix the seat.”¹⁸ Considerations of neutrality are “plainly relevant given the broad reference to the ‘circumstances of the arbitration’ in Article 16(1) of the UNCITRAL Rules.”¹⁹ Article 16 of the UNCITRAL Rules vests the Tribunal with the authority to select a seat, taking into consideration the specific circumstances of the case at hand.

11. The principle of neutrality weighs heavily against seating this arbitration in Ottawa or Toronto, for two reasons. *First*, as a general matter, seating the arbitration in the territory of the host State in an investor-state arbitration creates a risk of partiality, both actual and perceived. This risk arises from the close connection between the courts of the host State and one of the disputing Parties – *i.e.*, the Respondent. For this reason, many NAFTA tribunals have decided to seat the arbitration outside the territory of the Respondent State.²⁰

¹⁸ *Mesa Power Group, LLC v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-17), Procedural Order No. 3, at ¶ 50 (28 March 2013) (CL-001); *see also Detroit International Bridge Co. v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-25), Procedural Order No. 2, at ¶ 27 (CL-002) (“[T]he balance is tipped by the fact that Claimant has specifically alleged that Canada has adopted legislation that discriminates against Claimant and its Ambassador Bridge because it is US-owned.”).

¹⁹ *United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL, Decision of the Tribunal on the Place of Arbitration, ¶¶ 16-18 (2001) (CL-005).

²⁰ *Mesa Power Group, LLC v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-17), Procedural Order No. 3, at ¶¶ 51, 55 (28 March 2013) (CL-001) (seating the arbitration at Miami, Florida, and noting that “it makes less sense to entrust jurisdiction over the arbitration and the award to the courts of the State the measures of which are at issue in the proceedings rather than to the other state”); *see also id.* (“Separating the reviewing court from the State whose actions are under review may better ensure a neutral procedural environment, or at least a procedural environment that is *perceived* as more neutral.”) (emphasis in original); *Detroit International Bridge Co. v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-25), Procedural Order No. 2, at ¶ 27 (CL-002) (seating the arbitration at Washington, D.C., and noting that, in light of allegations of discrimination against the US investor, “a cautious approach to the need to ensure that the seat is perceived as neutral tends to favor a US seat.”); *United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL, Decision of the Tribunal on the Place of Arbitration, at ¶ 18 (2001) (CL-005)

12. *Second*, the facts and circumstances of this case make the risk of partiality particularly acute. Canada's Federal Courts have a close connection not only to Respondent, *but also to the subject matter of the arbitration*. Claimant's contention is that the Canadian Federal Courts' treatment of Lilly has breached Canada's NAFTA obligations. To entrust those very same courts with "control of the arbitration"²¹ would imperil the integrity of the arbitral process.

13. Were this arbitration seated in Canada, the Canadian Federal Courts would have jurisdiction to entertain a request to set aside the award. In *S.D. Myers*, for example, Canada applied to the Canadian Federal Courts to set aside an arbitral award that had been rendered against it by a NAFTA Chapter 11 tribunal seated in Toronto.²² The application for judicial review was made pursuant to Article 34(2) of the Canadian Commercial Arbitration Code,²³ which vests the Canadian Federal Courts with jurisdiction to set aside arbitral awards.²⁴ The Arbitration Code was given the force of law by the Commercial Arbitration Act,

(seating the arbitration at Washington, D.C., and noting that it is "relevant that it is Canada's measures that are in issue....").

²¹ *Mesa Power Group, LLC v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-17), Procedural Order No. 3, at ¶ 39 (28 March 2013) (CL-001).

²² *Canada (Attorney General) v. S.D. Myers, Inc.*, 2004 FC 38, ¶¶ 1-3 (C-001); *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, Partial Award, at 81 (13 November 2000) (CL-006) (stating that the Award was "made at the City of Toronto, Ontario, Canada").

²³ *Canada (Attorney General) v. S.D. Myers, Inc.*, 2004 FC 38, ¶ 21 (C-001).

²⁴ See Commercial Arbitration Code (Can.), art. 34(2) (authorizing "the court specified in article 6" to set aside arbitral awards under certain circumstances) (C-002); *id.* art. 6 (providing that "[t]he functions referred to in article[] . . . 34(2) shall be performed by the Federal Court or any superior, county, or district court").

which expressly applies to NAFTA awards.²⁵ Accordingly, the court in *S.D. Myers* concluded that it had jurisdiction to consider the set-aside petition.²⁶

14. The fact that Canada could apply to the Canadian Federal Courts to set aside any award in this arbitration means that the Federal Courts would be in the position of reviewing an arbitral award concerning their own conduct. Indeed, the judge reviewing the award may have applied the promise utility doctrine him or herself. Even assuming that the judges involved in the underlying Canadian litigation regarding the Straterra and Zyprexa patents would recuse themselves from any set-aside proceedings, a conflict of interest could still manifest itself in a variety of ways: (i) perceived or actual deference to the Federal Court decisions (including to the Federal Court of Appeal) that applied the promise utility doctrine in the first instance; (ii) the perceived or actual institutional loyalty of Federal Court judges; (iii) the fact that they are appointed by the Respondent,²⁷ and (iv) their personal and professional relationships with each other.²⁸

15. No NAFTA tribunal has ever seated an arbitration in a host State where the challenged measure was taken by the host State's federal judiciary and there was a possibility of set aside proceedings before those federal courts. Two NAFTA arbitrations involving challenges to *local* judicial conduct have been seated in the host State, but those cases involved very different circumstances. In

²⁵ Commercial Arbitration Act (Can.), § 5(4)(a) (C-003) (stating that the Code applies to "a claim under Article 1116 or 1117 of the Agreement, as defined in subsection 2(1) of the North American Free Trade Agreement Implementation Act"); North American Free Trade Agreement Implementation Act § 2(1) (C-004) (defining "Agreement" as "the North American Free Trade Agreement entered into between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America and signed on December 17, 1992, and includes any rectifications thereto made prior to its ratification by Canada.").

²⁶ *Canada (Attorney General) v. S.D. Myers, Inc.*, 2004 FC 38, ¶ 76 (C-001) (the court ultimately dismissed Canada's application for set-aside on the merits).

²⁷ See Federal Courts Act, § 5.2 (Can.) (C-005).

²⁸ By law, all judges of the Federal Court must reside within 40 kilometers of the National Capital Region. See Federal Courts Act, § 7 (Can.) (C-005). In fact, all judges of the Federal Courts have their offices in the same building in Ottawa.

Mondev International Ltd. v. United States and *Loewen Group, Inc. v. United States*,²⁹ the challenged conduct was that of the state courts of Massachusetts and Mississippi, respectively,³⁰ and not that of the U.S. federal courts that would enforce the award. Under the U.S. Federal Arbitration Act, either party may elect to have federal courts consider a set-aside action.³¹

16. Even if the Ontario Superior Court of Justice and Court of Appeal for Ontario, rather than the Federal Courts, were to review the Award, the neutrality of the forum would still be compromised. The Canadian federal government appoints the judges of the Ontario Superior Court of Justice and the Court of Appeal for Ontario through Orders-in-Council.³² It would therefore still be the case that the Respondent appointed *both* the judges responsible for the challenged measures *and* those responsible for considering any petition to set aside the award. This was not the case in either *Mondev* or *Loewen*, where the U.S. federal government played no role in appointing the state-court judges whose conduct was challenged.

17. In short, Respondent asks this Tribunal to place responsibility for any set-aside proceedings in the hands of the same governmental actors whose conduct is at issue in the arbitration. This step would not only be unprecedented, it would also be unnecessary given that a neutral forum is readily available.

²⁹ *Mondev International Ltd. v. United States*, NAFTA/ICSID(AF) (Case No. ARB(AF)/99/2), Award, at ¶ 26 (11 October 2002) (seating the arbitration in Washington, D.C.) (CL-007); *Loewen Group, Inc. v. United States*, NAFTA/ICSID(AF) (Case No. ARB(AF)/98/3), Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ¶ 19 (5 January 2001) (CL-008) (same).

³⁰ *Mondev International Ltd. v. United States*, NAFTA/ICSID(AF) (Case No. ARB(AF)/99/2), Award, at ¶¶ 1-2 (11 October 2002) (CL-007); *Loewen Group, Inc. v. United States*, NAFTA/ICSID(AF) (Case No. ARB(AF)/98/3), Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ¶¶ 1-6 (5 January 2001) (CL-008).

³¹ See Federal Arbitration Act, 9 U.S.C. §§ 202, 203, 205 (C-006) (providing for original Federal jurisdiction and right of removal to Federal courts for actions relating to international arbitral awards); see also *Loewen v. United States*, No. Civ.A. 04-2151 (RWR), 2005 WL 3200885 (D.D.C. Oct. 31, 2005) (C-007) (federal court decision dismissing Loewen's petition to vacate NAFTA arbitration award).

³² See Constitution Act of 1867, § 96 (Can.) (C-008).

2. The Factors Set Forth in the UNCITRAL Notes Also Favor New York

18. The five “prominent factors” identified in the UNCITRAL notes confirm that New York is the appropriate place to seat this arbitration.³³

a) Suitability of the Law on Arbitral Procedure

19. In weighing the relative suitability of U.S. and Canadian arbitral laws, tribunals have examined the extent to which the respective laws “insist[] on principled restraint in establishing grounds for reviewing and setting aside international arbitration awards.”³⁴ This factor tilts in favor of seating the arbitration in New York, because the federal courts located in New York have demonstrated “principled restraint” in the set aside of international arbitral awards. In contrast, Canada has publicly advocated a position hostile to arbitration.

20. In a challenge to the *Metalclad* award before the British Columbia Supreme Court, the Canadian Government intervened to argue that the deferential standard of review applied in commercial arbitration cases was inapplicable in NAFTA Chapter 11 disputes.³⁵ Canada argued that “it is clear that in interpreting NAFTA, Chapter Eleven tribunals *should not attract extensive judicial deference and should not be protected by a high standard of judicial review.*”³⁶ If accepted, this position would effectively allow for appeals of arbitral awards to the Canadian domestic courts. While the British Columbia Supreme Court did not

³³ As noted above, these factors invite tribunals to consider: “(a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the States or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.”

³⁴ *ADF Group Inc. v. United States*, NAFTA/ICSID(AF) (Case No. ARB(AF)/00/1), Procedural Order No. 2, at ¶ 10 (1 July 2010) (CL-009).

³⁵ See *United Mexican States v. Metalclad Corp.*, British Columbia Supreme Court Case No. L002904, Outline of Argument of Intervenor Attorney General of Canada, ¶¶ 23-29 (16 February 2001) (C-009).

³⁶ *Id.* at ¶ 30 (emphasis added).

accept the Canadian Government's argument in *Metalclad*, a future court could decide differently, particularly where it is a Canadian measure, rather than a Mexican one, at issue.

21. Based on *Metalclad*, previous NAFTA tribunals have found that Canada's legal climate is less hospitable to arbitration than that of the United States. The tribunal in *UPS*, for example, noted that it was "troubled" by Canada's position in *Metalclad* and found that this factor weighed in favor of seating the arbitration in the United States.³⁷ Similarly, in *Pope & Talbot, Inc. v. Canada*, the investor moved to change the seat mid-arbitration, after Canada made its troubling submission to the British Columbia Supreme Court in *Metalclad*.³⁸ While the tribunal did not grant the request, it noted that if the Canadian Government's submission had been made before the arbitration commenced, then this factor would have weighed against seating the arbitration in Canada.³⁹

22. Claimant is not aware of any NAFTA tribunals that have found the U.S. arbitration laws to be less suitable than those of Canada.⁴⁰ This factor, accordingly, weighs in favor of seating the arbitration in New York.⁴¹

³⁷ *United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL, Decision of the Tribunal on the Place of Arbitration, at ¶ 11 (2001) (CL-005).

³⁸ *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Ruling Concerning the Investor's Motion to Change the Place of Arbitration, at ¶ 20 (14 March 2002) (CL-010).

³⁹ *Id.*

⁴⁰ To the extent that tribunals have disagreed with the tribunals in *UPS* and *Pope & Talbot* regarding the suitability of the Canadian arbitration laws, those tribunals have found that the arbitration laws of Canada and the United States are equally suitable. See, e.g., *Mesa Power Group, LLC v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-17), Procedural Order No. 3, at ¶ 47 (28 March 2013) (CL-001).

⁴¹ The federal courts based in New York has an established, pro-arbitration track record. See, e.g., *Thai-Lao Lignite (Thailand) Co., v. Government of the Lao People's Democratic Republic*, No. 10 Civ. 5256(KMW), 2011 WL 3516154, at *13 (S.D.N.Y. Aug. 3, 2011) (C-010) ("Under the [New York] Convention, [a] district court's role in reviewing a foreign arbitral award is strictly limited. A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. The high burden to oppose confirmation is imposed because the public policy in favor of international arbitration is strong.") (internal quotation marks and citations omitted), aff'd 492 Fed. Appx. 150 (2d Cir. 2012), cert. denied 133 S.Ct. 1473 (2013).

b) Convenience to the Parties and the Arbitrators

23. Considerations of cost and expense also weigh in favor of New York. It would be expensive and burdensome for Lilly's representatives, who are based in Indianapolis, to travel to Toronto or Ottawa. There are few non-stop flights from Indianapolis to Toronto, and our search of commercial airline flights revealed no non-stops between Indianapolis and Ottawa. By contrast, there are numerous non-stop flights to New York from Indianapolis. Claimant's counsel are based in Washington, D.C. and Ottawa, both of which are easily accessible from New York.

24. New York would also be a convenient location for Respondent and its counsel, who are based in Ottawa. Respondent maintains a consulate in New York. The flight time from Ottawa to New York is approximately the same as that from Ottawa to Toronto. As Respondent has already requested that the arbitration be seated in Toronto, there would be no incremental hardship in seating the arbitration in New York. New York would also be easily accessible to the arbitrators, who are based in Europe.

c) Existence of a Treaty on Enforcement of Arbitral Awards

25. Both the United States and Canada are parties to the New York Convention. This factor is therefore neutral.⁴²

d) Availability and Cost of Support Services

26. New York has numerous, experienced facilities that could host a hearing at a reasonable cost, such as the International Centre for Dispute Resolution, the International Institute for Conflict Prevention and Resolution, and the New York International Arbitration Center. ICSID can facilitate a hearing in New York as well as Washington, D.C.

⁴² See *Merrill & Ring Forestry L.P. v. Canada*, NAFTA/UNCITRAL, Decision on the Place of Arbitration, at ¶ 14 (12 December 2007) (CL-011).

e) Location of the Subject-Matter in Dispute and Proximity of Evidence

27. While relevant evidence is located in both the United States and Canada, the balance of efficiencies weighs in favor of seating the arbitration in the United States. The challenged measures are publicly available judicial decisions that can be accessed through the Internet. In contrast, other relevant evidence, such as evidence relating to the legitimate expectations of the investor at the time of the investment, is located primarily in the United States.

* * *

28. Because New York provides a neutral, convenient, and hospitable forum for this proceeding, and Respondent has offered no reasonable alternative, Claimant requests that the Tribunal designate New York as the seat of arbitration. Claimant's preference is that this arbitration be seated in New York for the reasons discussed above. Washington, D.C., however, would also be a satisfactory arbitral seat that has many of the benefits of New York and none of the deficiencies of a Canadian seat.

B. The Tribunal Should Examine This Case as a Whole and Not Bifurcate Damages From Liability

29. Respondent's request to bifurcate this proceeding into liability and damages phases is unwarranted and, if granted, would unfairly prejudice Claimant. Bifurcation of damages is the exception rather than the rule in NAFTA arbitrations, and it is appropriate *only* where the anticipated efficiency gains from bifurcation clearly outweigh the prejudice to the claimant caused by delaying its access to relief.

30. The UNCITRAL Rules do not specifically contemplate bifurcation of liability and damages.⁴³ The Tribunal's authority to order such bifurcation arises

⁴³ In contrast, Art. 21(4) of the Rules establishes a presumption that, "in general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question." "The presumption in Art. 21(4) would not apply to a request to bifurcate the proceedings between a

from its general discretion, under Article 15 of the Rules, to “conduct the arbitration in such manner as it considers appropriate.” In exercising its discretion, the Tribunal should be guided by three principles: (i) “due process,” (ii) “due dispatch,” and (iii) “cost effective procedure.”⁴⁴

31. In this case, little would be gained from bifurcation. Lilly expects that its damages claims will focus primarily on lost cash flows for two well-established medicines, Straterra and Zyprexa, after the Canadian courts revoked the patents for the two drugs under the promise utility doctrine. This analysis will benefit from robust and easily identified sets of data: sales and revenues for the two medicines and their generic equivalents. Furthermore, because Lilly’s patents on these medicines would—absent the challenged measures—have expired prior to the anticipated date of any award, the quantum analysis will not involve the usual dispute over the methodology for valuation of future cash flows, including the applicable discount rate.

32. All of this is in stark contrast to the typical expropriation case where more complex damages analysis is required. To Claimant’s knowledge there are only four NAFTA cases involving Canada where damages were bifurcated: *Clayton*, *UPS*, *Pope & Talbot*, and *S.D. Myers*.⁴⁵ As discussed below, each of these cases involved substantially more complicated quantum analyses than will be required in this case.

liability phase and a damages phase.” *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised), at ¶ 12(b) (31 May 2005) (CL-012).

⁴⁴ Albert Jan van den Berg, *Organizing an International Arbitration: Practice Pointers*, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 150-152 (Lawrence W. Newman and Richard D. Hill eds., 2d. ed. 2008) (CL-013) [hereinafter van den Berg]; see also UNCITRAL Notes, at ¶ 4 (CL-003) (noting that UNCITRAL Art. 15 was intended to permit arbitrators to “take into account ... the need for a just and cost-efficient resolution of the dispute”).

⁴⁵ *William Ralph Clayton and ors. v. Canada*, NAFTA/UNCITRAL, Procedural Order No. 3, at ¶ 1.2 (3 June 2009) (CL-014); *United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL, Procedural Directions and Order of the Tribunal, at part A (4 April 2003) (CL-015); *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Procedural Order No. 7, at ¶¶ 1-3 (19 January 2000) (CL-016); *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, Procedural Order No. 1, at ¶ 1 (28 May 1999) (CL-017). The scheduling orders for some NAFTA arbitrations involving Canada are not publicly available.

33. Rather than generate efficiencies, bifurcation will simply introduce delay. This delay would prejudice Claimant by further postponing its access to relief. Indeed, by definition, bifurcation would mean that delay would continue to accrue even after the Tribunal determines that Lilly has a meritorious claim and is entitled to a remedy.

1. Bifurcation of Damages Would Not Enhance Efficiency

34. Bifurcation of damages would not meaningfully enhance efficiency because the damages analysis in this case is likely to be relatively straight-forward. As mentioned in the Introduction, above, this case is about the expropriation of patent rights related to only two medicines: Straterra and Zyprexa. The following chart sets forth key dates in respect of these two medicines.⁴⁶

Medicine	Canadian Patent Filed	Anticipated Patent Expiration (Based on Filing Date)	Canadian Regulatory Approval (Proxy for Market Entry)	Patent Revoked <i>ab initio</i> Under Promise Utility Doctrine
Straterra	4 January 1996	4 January 2016	24 December 2004	14 September 2010
Zyprexa	24 April 1991	24 April 2011	28 October 1996	10 November 2011

35. This chart illustrates three reasons why the primary focus of the damages analysis in this case is likely to be relatively simple. *First*, Straterra and Zyprexa had both been on the market in Canada for a substantial period of time before Lilly's patent rights were revoked under the promise utility doctrine. Straterra had been sold in Canada since 2004; Zyprexa, since 1996. The damages analysis will accordingly be facilitated by a robust dataset of actual sales of the two drugs prior to the revocation of Lilly's patent rights through the promise utility doctrine.

⁴⁶ Notice of Arbitration, at ¶¶ 20, 25–27.

36. *Second*, a substantial amount of time also has passed since competitors entered the market. The Straterra patent was revoked in September 2010, and competitors entered the market shortly thereafter. The Zyprexa patent was revoked in November 2011. With regard to Zyprexa, Lilly's competitors had been "marketing at risk" since 2007, through administrative procedures unique to Canada (and not the subject of this arbitration) that allowed generic companies to market a generic version of Zyprexa during the patent term, while assuming the risk of getting sued for patent infringement by Lilly if the Zyprexa patent was ultimately upheld by the courts. This established track record of sales for both products absent the market exclusivity afforded to patent owners will greatly simplify the analysis of the effects of Canada's challenged measures, as actual market data is available.

37. *Third*, in the but-for world where Canada did not revoke the Straterra and Zyprexa patents under the promise utility doctrine, both patents would nevertheless have expired by the likely time of an award in this case. The Zyprexa patent would have expired on 24 April 2011, and the Straterra patent would have expired on 4 January 2016. In other words, all cash flows lost as a result of the revocation of the Straterra and Zyprexa patents would have been realized by Lilly before the likely date of an award in this case. This, in turn, means that there will be no need by the Parties' experts to discount future revenues to the date of award. With no need to calculate forward-looking damages, the Parties are well placed to avoid the typical disputes in investor-state arbitration over the appropriate discount rates and terminal values to be applied in reducing projected future cash flows to a lump sum award.

38. The relative simplicity of the quantum analysis in this case is confirmed by comparison to the few NAFTA cases involving Canada in which publicly-available documents establish that damages were bifurcated:

- In *Clayton*, the investors challenged measures that prevented them from opening a "proposed" basalt quarry and marine terminal.⁴⁷ The

⁴⁷ *William Ralph Clayton and ors. v. Canada*, NAFTA/UNCITRAL, Amended Statement of Claim, at ¶ 13 (3 December 2009) (CL-018).

claimed damages related to a planned, non-operational investment, and not, as here, a set of investments with a multi-year track record of proven revenues.

- In both *Pope & Talbot* and *S.D. Myers*, the investors claimed that the respective challenged measures affected their ability to export products from Canada.⁴⁸ The effect of export restrictions on the value of the respective enterprise involved complex questions of causation not present here. Moreover, in *Pope & Talbot* the investor claimed damages for its deprivation of the “ordinary ability to alienate its product to its traditional and natural market.”⁴⁹ Here, Claimant alleges no such novel and rarely-valued interest. Rather, Lilly’s damages arguments will primarily focus on the value of its patents: a type of asset that is routinely valued both in litigation and in the course of business transactions.
- In *UPS*, the claimed damages arose from the competitive harm caused by “the discriminatory terms upon which Canada Post’s courier services enjoy access to the Monopoly Infrastructure [i.e., access to Canada Post’s mail infrastructure].”⁵⁰ Here, by contrast, no analysis regarding the terms of access to infrastructure is required.

39. In short, there is more that is known about the market and less that will need to be forecasted than in the typical investment arbitration. The primary focus of the damages phase is, therefore, likely to be straightforward compared to the typical expropriation case. As a result, bifurcation of liability and quantum would not meaningfully promote efficiency.

2. Bifurcation Would Unfairly Prejudice Claimant

40. Bifurcation would delay the proceedings and prejudice the Claimant.⁵¹ In this case, bifurcation also would require duplicative briefing, as the

⁴⁸ See *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, Statement of Claim, at ¶ 33 (20 October 1998) (CL-019); *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Statement of Claim, at ¶ 21 (25 March 1999) (CL-020).

⁴⁹ *Id.* at ¶ 93.

⁵⁰ See *United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL, Investor’s Memorial (Merits Phase), at ¶ 575 (23 March 2005) (CL-021).

⁵¹ Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION, § 15.08[R] (2d ed., 2014) (CL-022) (“Bifurcation inevitably imposes delays, which are often significant, in the resolution of some

facts related to the marketplace for these products are an important part of Claimant's narrative related to its legitimate expectations and the failure of Canada to provide Lilly's investment with fair and equitable treatment. Leaving out these facts in the merits phase of a bifurcated proceeding would risk, as one commentator suggested, "the arbitral tribunal missing important links between the different elements that give rise to the dispute."⁵²

41. As discussed above, in this case there are no countervailing efficiency gains that would outweigh the substantial delay that bifurcation would entail even after it is determined that Claimant is entitled to relief.⁵³ It bears emphasis that Lilly has already spent more than *half a decade* seeking relief from the Canadian courts before it exhausted its domestic remedies and initiated this arbitration.⁵⁴ Particularly against this backdrop of protracted litigation, additional delay would unfairly prejudice Claimant.

issues, which can only be justified on the basis that expense would be wasted in litigating those issues, which might become moot or irrelevant following decisions on other issues."); *see also* Lucy Greenwood, *Does Bifurcation Really Promote Efficiency?*, 28 J. Int'l Arb. 105, 106-107 (2011) (CL-023) (concluding, on the basis of a survey of almost two hundred ICSID and ICSID/AF cases, that bifurcated cases took substantially longer, on average, to reach a final award when compared to consolidated cases).

⁵² Massimo V. Benedettelli, *To Bifurcate or Not To Bifurcate? That is the (Ambiguous) Question*, 29 Arb. Int'l 493, 499 (2013) (CL-024); *see also* van den Berg, at 169 (CL-013) ("In a number of cases I have seen that evidence that came up during the second phase would have had a material impact on (part of) the decisions made in the first phase.").

⁵³ In addition to the additional process inherent in a second stage of proceedings, bifurcated proceedings may invite an interim challenge to the award on liability. *See, e.g., S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, Canada's Application for a Stay of the Arbitral Proceedings Pending the Outcome of the Federal Court of Canada Application to Set Aside (15 February 2001) (seeking a stay of arbitral proceedings pending resolution of interim set aside proceedings before Canadian courts) (C-011).

⁵⁴ *See* Claimant's Notice of Arbitration at ¶¶ 20, 60.

C. Other Outstanding Issues Under the Procedural Order

1. *Section 12.6: Procedure For Withholding Documents On The Basis of Privilege*

42. The Parties have not reached agreement regarding Section 12.6 of the proposed Procedural Order addressing the withholding of documents based on privilege:

Each Disputing Party may [*Lilly*: claim its intention to] withhold from disclosure documents which it considers not subject to production based on [*Lilly*: specific grounds of privilege] [*Canada*: a legal impediment or privilege, or special political or institutional sensitivity]. [*Lilly*: If a Disputing Party does withhold documents based on specific grounds of privilege, it must submit a log to the other Disputing Party identifying the documents (or categories of documents) withheld and the grounds for withholding them.] Any disputes regarding the withholding of documents on the basis of [*Lilly*: privilege] [*Canada*: a legal impediment or privilege, or special political or institutional sensitivity] shall be resolved by the Arbitral Tribunal [*Lilly*: in its discretion]. In considering whether to exclude from production any documents on the grounds of [*Lilly*: privilege] [*Canada*: a legal impediment or privilege, or special political or institutional sensitivity], the Arbitral Tribunal may consider, but is not bound by, Article 9 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010).

43. Claimant's proposed text for Section 12.6 is intended to achieve two legitimate and well-recognized objectives: (i) to ensure that claims of privilege under municipal law are not self-judging, but rather are considered by the Tribunal in its discretion; and (ii) to require that the Parties specifically identify the bases upon which they are withholding documents from production.

44. *Claims of privilege should not be self-judging.* The IBA Rules on the Taking of Evidence in International Arbitration make clear that it is the arbitral tribunal, rather than the disputing parties, that should determine whether documents may be withheld on the basis of privilege or similar grounds. Article 9(2) provides that:

The *Arbitral Tribunal* shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: [...]

(b) legal impediment or privilege under the legal or ethical rules determined by the *Arbitral Tribunal* to be applicable; [...]

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the *Arbitral Tribunal* determines to be compelling[.]⁵⁵

45. Without Lilly's proposed language, the first sentence could be read to stand for the substantive principle that a *party*, rather than the *Tribunal*, may withhold documents in its discretion on the basis of privilege or other grounds: "Each Disputing Party may [Lilly: claim its intention to] withhold from disclosure documents which it considers not subject to production...." This result would contravene the IBA Guidelines and inappropriately interfere with the Tribunal's authority to manage this dispute.

46. *A privilege log is appropriate to ensure that each Party understands the nature of the privileges asserted by the other Party for withholding documents.* The IBA Rules provide that if a party objects to a document request, "it shall state the objection in writing to the Arbitral Tribunal and the other Parties."⁵⁶ It is well established that documents covered by the objection must be clearly identified, and that the objecting party must state, for each document or category of documents, the particular grounds relied upon to withhold production.⁵⁷ This rule is common sense: if a party were not required to identify

⁵⁵ IBA Rules on the Taking of Evidence in International Arbitration, art. 9 (2010) (CL-025) (emphasis added).

⁵⁶ *Id.*, art. 3(5).

⁵⁷ See *Merrill & Ring Forestry L.P. v. Canada*, NAFTA/UNCITRAL, Decision of the Tribunal on Production of Documents, at ¶ 19 (18 July 2008) (CL-026) ("The Tribunal is also persuaded, however, that the privilege . . . can only be asserted in respect of sufficiently identified documents together with a clear explanation about the reasons for claiming such privilege."); *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Decision by Tribunal, at ¶ 1.4 (6 September 2000) (CL-027) ("A determination by a tribunal that documents sufficiently identified deserve protection is a very

with specificity its asserted privileges, it would be impossible for the opposing party and, ultimately, the Tribunal, to meaningfully evaluate the claim of privilege.

47. In this case, however, the assertion of privilege may not end with the Tribunal's decision on production of documents. Once the Tribunal rules on Lilly's document requests in this case, it is possible that Canada will nevertheless assert that certain responsive documents cannot be disclosed based on a privilege of some kind. This is not a theoretical concern. Respondent has represented that it believes it may rely upon several potential privileges and other impediments and sensitivities to refuse disclosure of documents. In light of these representations, due process demands that Claimant be provided with a clear understanding of the basis for withholding during the document production phase of these proceedings.

48. Lilly's proposed language for Section 12.6 comports with due process and equality of arms with regard to document production by requiring each Party to submit a privilege log. Claimant appreciates that privilege logs can be a time-consuming and onerous undertaking. Claimant proposes to specifically address this concern by requiring that each Party submit a log "identifying the documents (*or categories of documents*) withheld and the grounds for withholding them" (emphasis added). By grouping similarly-situated documents into categories, and logging only the categories, the burden and expense of preparing a log in this case will be substantially reduced.

2. *Section 13.10: Procedure for Permitting a Fact Witness Designated as a Disputing Party Representative to Attend the Hearing(s)*

49. The Parties agree that Section 13.10 should provide that "[u]nless otherwise agreed, a fact witness shall not be present in the hearing room during

different matter from acquiescence to a simple assertion . . . that they deserve protection."); *id.* (requiring specific identification of documents where objection was grounded in "protection of state secrets").

the opening statement, the hearing of oral testimony, nor shall he or she read any transcript of any oral testimony, prior to his or her examination. This limitation does not apply to expert witnesses and to a single witness of fact if that witness has been designated as the Disputing Party representative.” Canada proposes to qualify this exception by adding that, “[i]n such cases, the single witness of fact so designated shall be examined in advance of all other witnesses of fact, unless this is impossible in the circumstances or the Arbitral Tribunal determines that no prejudice would arise from permitting the witness to testify after other witnesses.”

50. Claimant opposes this proposed addition because it is premature. It is possible that Lilly’s party representative at the hearing(s) will not be a fact witness at all. At the same time, it is possible that Lilly’s party representative will be a fact witness and that it would unfairly prejudice Claimant’s case to require that he or she be examined in advance of all other fact witnesses, or it may not be practical to enforce this requirement due to scheduling constraints. It is simply too early to tell. Claimant submits that Respondent’s proposed addition is more appropriately addressed at the pre-hearing conference, when the identities of all witnesses are finalized and the Tribunal is better positioned to decide on the appropriateness of such a required procedure.

3. Overall Timing For Written Submissions and Document Exchange

51. The Parties agree to several aspects of the calendar for this proceeding. The Parties agree to the submission of preliminary pleadings (*i.e.*, a Statement of Claim and a Statement of Defense). The Parties also agree that document production should follow the Memorial/Counter-Memorial phase. However, the Parties have not reached agreement on the overall timing for written submissions and document exchange. In general, Respondent seeks additional time to complete each step of the calendar. For example, Claimant submits that the Parties should each receive 75 days to prepare their initial memorials; Respondent seeks 120 days. Similarly, Claimant submits that the Parties should produce responsive documents within 45 days of the Tribunal’s production order; Respondent proposes that the Parties receive 90 days for this task.

52. Claimant's proposed calendar already reflects a meaningful attempt at compromise. Claimant's original proposal to Respondent was for a more expeditious proceeding than it now seeks from the Tribunal. For example, Claimant originally proposed that the Parties receive 45 days for their merits memorials, an amount of time Claimant believed was sufficient given the facts and circumstances of this case. Claimant's current proposal of 75 days was based on its good-faith accommodation of Respondent's stated need for additional time. Particularly in light of the compromises it has already made, Claimant respectfully submits that its proposed calendar fairly affords the Parties adequate time for their submissions while avoiding undue delay.

53. With respect to the Tribunal's observation in the Secretary's letter of 28 April 2014 regarding the appropriateness of preliminary pleadings (a Statement of Claim and a Statement of Defense), preliminary pleadings are appropriate for two reasons. First, as a general matter, such pleadings will crystallize the issues in dispute and result in more focused merits memorials, since Canada has not yet stated its defenses in this case. Second, as noted in its proposed calendar, Claimant understands that Respondent intends to raise a limited number of jurisdictional issues in its Counter-Memorial related to the scope of NAFTA Chapter 11. Under Article 21(3) of the UNCITRAL Rules, any plea relating to jurisdiction must be raised no later than the Statement of Defense. Without a pleading from the Respondent identifying its jurisdictional objections (to date there has been none), Claimant will be unable to meaningfully give due consideration to these objections in its Memorial.

III. Outstanding Issues Under the Confidentiality Order

A. The Need for a "Restricted Access Information" Category of Documents (*Paragraphs 1, 2, 6, 7, 11*)

54. Section 7(c) of the proposed Confidentiality Order contemplates that "Confidential Information" as defined in the Order may be disclosed, *inter alia*, to "officials or employees of the disputing parties to whom disclosure is reasonably

considered by the disputing party to be necessary in connection with preparation of the disputing party's case."

55. Lilly seeks to include in the Order a "restricted access information" category of Confidential Information that will not be disclosed to officials or employees of the other Party on grounds that the disclosure of the information to the other Party could result in a serious material gain or loss which could potentially prejudice the competitive position of the Party to whom the information relates. This restricted access information category is akin to a "counsel's eyes only" designation.⁵⁸

56. Lilly requires the restricted access information category in order to safeguard the confidentiality of highly sensitive commercial information that may be produced in the arbitration. Examples of the type of information that Lilly may designate as restricted access information include proprietary strategic business forecasts and plans for drug development and sales in Canada and globally, and highly sensitive financial data.

57. The sensitivity of the type of information that may be designated by Lilly as restricted access information is illustrated by [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

58. In the absence of a restricted access information category, Lilly's highly sensitive trade secrets and financial data will be distributed to potentially dozens of Government of Canada officials and employees within multiple government departments. The breadth of distribution poses an unacceptable risk of inadvertent disclosure. Some of the government departments with access to the information are mandated to consult with Lilly's direct competitors. Inadvertent

⁵⁸ See Proposed Confidentiality Order, ¶¶ 1(d) and 8.

disclosure by officials and employees within these government departments would result in serious competitive harm to Lilly.

59. The Respondent does not require officials and employees to have access to this narrow category of highly sensitive information to be able to instruct counsel. Counsel will be entitled to share sensitive financial data with their experts in order to adequately prepare their case.⁵⁹ “Counsel’s eyes only” designations are commonplace within litigation and instructions may be obtained without the need to disclose precise data and figures. Should the Respondent disagree with Lilly’s designation of specific information as restricted access, the appropriateness of the designation may be brought before this Tribunal for resolution.⁶⁰

60. The Respondent has agreed to the inclusion of a restricted access information category in several NAFTA Chapter 11 arbitrations.⁶¹ There is no basis to distinguish these previous NAFTA Chapter 11 arbitrations from this arbitration with respect to the need for a restricted access information category.

B. The Supremacy of the Confidentiality Order Over Domestic Law in These Proceedings (Paragraph 16)

61. Lilly objects to the Respondent’s proposal to include in the Confidentiality Order a provision that, notwithstanding the Confidentiality Order, requests for documents under Canadian law shall be wholly governed by the relevant domestic legislation.

62. Neither NAFTA Chapter 11 nor the *Notes of Interpretation of Certain Chapter 11 Provisions* (2001) require the Tribunal to include the proposed provision within the Confidentiality Order. NAFTA Article 1120(2) states that: “The

⁵⁹ See Proposed Confidentiality Order, ¶ 8(c).

⁶⁰ See Proposed Confidentiality Order, ¶ 6.

⁶¹ See *Windstream Energy LLC v. Canada*, NAFTA/UNCITRAL, Confidentiality Order, at ¶ 1(d) (16 September 2013) (CL-028); *William Ralph Clayton and ors. v. Canada*, NAFTA/UNCITRAL, Procedural Order No. 2 (Confidentiality Order), at ¶ 1(d) (4 May 2009) (CL-029); *Mercer International Inc. v. Canada*, NAFTA/ICSID(AF) (Case No. ARB(AF)/12/3), Confidentiality Order, at ¶ 1(d) (21 January 2013) (CL-030); *Merrill & Ring Forestry, L.P. v. Canada*, NAFTA/UNCITRAL, Confidentiality Order from Tribunal, at ¶ 11 (21 January 2008) (CL-031).

applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.” Article 15 of the UNCITRAL Rules accords to the Tribunal the authority to “conduct the arbitration in such manner as it considers appropriate,” which authority includes the making of a Confidentiality Order to govern the proceedings.⁶² There is no provision within Section B of NAFTA Chapter 11 that modifies the Tribunal’s authority to make a Confidentiality Order to require inclusion of a provision that makes the Confidentiality Order subordinate to domestic legislation.

63. Confidentiality orders in NAFTA Chapter 11 arbitrations against Canada do not uniformly include Canada’s proposed provision,⁶³ and NAFTA tribunals have disagreed as to its appropriateness.⁶⁴ In this case, the provision ought not to be included in the Confidentiality Order, in that it prematurely resolves a hypothetical conflict between the Confidentiality Order and domestic law disclosure requirements in favor of disclosure, and removes from the Tribunal its authority to appropriately determine issues of confidentiality in these proceedings. Specifically, the provision::

- precludes the Parties from asserting that domestic legislation does not apply in the specific circumstances of the domestic request;
- prejudices the Parties’ ability to avoid a conflict by claiming exemptions from disclosure that may exist under domestic law; and

⁶² See *Pope & Talbot, Inc. v Canada*, NAFTA/UNCITRAL, Decision and Order by the Arbitral Tribunal, at ¶ 16 (11 March 2002) (CL-032).

⁶³ See, e.g., *Detroit International Bridge Co. v. Canada*, NAFTA/UNCITRAL, Confidentiality Order (27 March 2013) (CL-033); *St. Mary’s VCNA, LLC v. Canada*, NAFTA/UNCITRAL, Confidentiality Order (24 October 2012) (CL-034); *Crompton (Chemtura) Corp. v. Canada*, NAFTA/UNCITRAL, Confidentiality Order (21 January 2008) (CL-035).

⁶⁴ Compare *Pope & Talbot, Inc. v Canada*, NAFTA/UNCITRAL, Decision and Order by the Arbitral Tribunal, at ¶ 12 (11 March 2002) (CL-032) (refusing to include a similar provision) with *United Parcel Service of America, Inc. (UPS) v. Canada*, NAFTA/UNCITRAL, Procedural Directions and Order, at ¶ 11 (4 April 2003) (CL-015) and *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL/NAFTA, Confidentiality Order (21 January 2008) (CL-031), at ¶ 15 (including a similar provision).

- undermines the equality of the Parties, Canada's obligation to take all necessary measures to give effect to the provisions of NAFTA, and the Tribunal's authority to conduct the arbitration as it considers appropriate, including by determining issues of confidentiality.

1. Respondent's Proposed Provision Precludes the Parties from Asserting That Domestic Law Does Not Apply

64. The proposed provision predetermines the outcome of a hypothetical conflict between the Tribunal's Confidentiality Order and domestic disclosure obligations by positively stating that requests under domestic legislation for documents to which the Confidentiality Order applies will be wholly governed by domestic law. The provision effectively precludes the Parties from asserting that Canada's obligations under the Confidentiality Order render domestic law inapplicable in the circumstances of a specific request or otherwise modify the application of domestic law to the specific request.

65. In *Appleton & Associates v. Canada*, a request was made under Canada's Access to Information Act for documents that were subject to the confidentiality order issued by the NAFTA Chapter 11 tribunal in *UPS*.⁶⁵ The access to information coordinator in Canada's Privy Council Office (to which the access to information request was made) determined that certain of the documents were subject to release. Counsel for the investor then sought judicial review of the Privy Council Office's decision by the Federal Court of Canada.

66. In opposition to disclosure, counsel argued, *inter alia*, that international law, not the Access to Information Act, governs the disclosure of documents in the context of an international arbitration. The Federal Court of Canada refused to consider this argument for the reason that, similar to what is being proposed by Canada in this arbitration, the confidentiality order in *UPS v. Canada* specifically contemplated the application of the Access to Information Act to issues of disclosure and stated that the act would govern disclosure.⁶⁶

⁶⁵ *Appleton & Associates v. Canada (Privy Council Office)*, 2007 FC 640 (CL-036).

⁶⁶ See *id.* at ¶¶ 12-21.

67. *Appleton & Associates* suggests that the provision proposed by Canada will have the effect of resolving any potential conflict between domestic law and the Tribunal's Confidentiality Order in favor of domestic law. While a hypothetical future conflict could be resolved by making the Confidentiality Order subject to domestic law now, it may also be appropriate in a given circumstance to resolve such conflict by determining that domestic law does not apply given Canada's international obligations. Canada's proposed provision precludes the ability of the Parties to advance this argument within the context of a specific *Access to Information Act* request.

2. The Provision Prejudices the Parties' Ability to Avoid a Conflict by Claiming Exemptions from Disclosure Existing Under Domestic Law

68. Canada's Access to Information Act is the domestic law pursuant to which requests for documents that are subject to the Confidentiality Order are most likely to be made. The act contains several exemptions from disclosure that the Parties may claim to protect the Confidential Information from disclosure. The provision proposed by Canada prejudices the ability of the Parties to claim these exemptions and therefore removes the ability of the Parties to avoid any potential conflict through use of the domestic law exemptions.

69. One of the primary exemptions from disclosure in the act is for third party business confidential information supplied in confidence to the government of Canada.⁶⁷ For the exemption to apply, the third party must establish that it had a "reasonable expectation of confidentiality" with respect to the information at issue.⁶⁸

70. In *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*,⁶⁹ the Federal Court of Canada considered whether CIBC Bank could claim the section 20(1)(b) exemption for an employment equity compliance

⁶⁷ See Access to Information Act (Can.), § 20(1)(b) (CL-037).

⁶⁸ See *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 27 FTR 194 (CL-038).

⁶⁹ 2006 FC 443, ¶¶ 83–84 (CL-039).

report submitted to the Canadian Human Rights Commission. The Federal Court of Canada held, *inter alia*, that CIBC Bank did not have a reasonable expectation of confidentiality because it knew or ought to have known that the Access to Information Act would supersede other confidentiality requirements. The Court specifically relied on the following statement in a Framework Document governing the audit pursuant to which the report was produced to the Human Rights Commission:

Section 34 of the Employment Equity Act requires information gathered as a result of compliance audits to be treated as confidential. Having said that, the Commission is also subject to the disclosure requirements of the Access to Information Act which take precedence over the stipulations of the Employment Equity Act.

[...]

Consequently, upon receiving a request under Access to Information, the Commission may be required to release any documents on file which do not contain personal information, trade secrets or other confidential business information. [...]

71. Similarly, the provision that Canada seeks to include in the Confidentiality Order similarly will be relied on by a party making an access to information request for the Confidential Information to assert that Lilly did not have a reasonable expectation of confidentiality regarding the requested documents, because the Confidentiality Order was specifically subordinated to requests for disclosure under domestic law. The proposed Confidentiality Order contemplates protection from disclosure for business confidential information, however, Lilly's ability to claim the corresponding exemption from disclosure found within the Access to Information Act will be prejudiced by inclusion of the clause proposed by Canada.

3. Canada’s Proposed Provision Undermines the Equality of the Parties, Canada’s Obligation to Take all Necessary Measures to Give Effect to the Provisions of NAFTA, and the Tribunal’s Authority to Determine Issues of Confidentiality.

72. Article 15 of the UNCITRAL Rules requires that the Parties be “treated with equality.” The provision proposed by the Respondent undermines this requirement by removing the Respondent from its confidentiality restraints in the event that Canada receives a request for access to the Confidential Information pursuant to domestic law.

73. The proposed provision in essence accords to Canada broad discretion to determine that Confidential Information ought to be disclosed pursuant to a domestic law request where Canada is of the opinion that the applicable domestic law mandates disclosure. The provision fundamentally conflicts with both the Tribunal’s authority to resolve issues of confidentiality and the Parties’ agreement to be bound by the Confidentiality Order.

74. Article 105 of NAFTA requires Canada to ensure that all necessary measures are taken to give effect to the provisions of the Agreement. NAFTA Article 1120 provides that a disputing investor may submit its claim to arbitration under, *inter alia*, the UNCITRAL Rules, and further provides that, “The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.” Nothing in Section B of Chapter 11 modifies the Tribunal’s authority to resolve issues of confidentiality so as to render such authority subject to domestic law. To the contrary, the Tribunal has clear authority to “conduct the arbitration in such manner as it considers appropriate,”⁷⁰ including with respect to issues of confidentiality.

75. The proposed provision would have a tangible effect on the Tribunal’s authority with respect to confidentiality of the proceedings. As an example, as explained in detail below, Claimant has proposed that the transcripts

⁷⁰ See Article 15 of the UNCITRAL Rules.

in these proceedings be confidential. Were the Tribunal to adopt Claimant's proposal but also accept Respondent's language that domestic law trumps the Tribunal's authority with regard to confidentiality, Canada could nevertheless release the transcripts under its domestic legislation, in direct contravention of the Confidentiality Order in this case.

76. The proposed Confidentiality Order contemplates that a Party may apply for an amendment to, or derogation from, the Order should compelling circumstances so require. In the event of an actual (versus hypothetical) conflict between the Confidentiality Order and domestic law obligations, Canada may request a derogation from the Confidentiality Order, providing the Tribunal an opportunity to consider the conflict in light of the specific attendant circumstances.

IV. Access By Third Parties to this Arbitration

A. The Hearing Should Be Held *In Camera* and Transcripts of the Hearings Should be Confidential

77. In Section 23.1 of the proposed Procedural Order, Lilly proposes to add that "[p]ursuant to Article 25(4) of the UNCITRAL Rules, the hearing shall be held *in camera*." This should be uncontroversial, given the clear language of Article 25(4) of the UNCITRAL Rules, which provides that "[h]earings shall be held *in camera* unless the parties agree otherwise." Lilly prefers that hearings be held *in camera*. Accordingly, under Article 25(4), the hearing must be held *in camera*. It is inappropriate for Canada to ignore this rule and insist on bringing the question of *in camera* hearings before the Tribunal.

78. As a natural corollary to Article 25(4) of the Rules, the transcripts of any hearings should be treated as confidential by the Parties. If transcripts of hearings could be publicly disclosed by the Parties without restriction, then Article 25(4) would be rendered largely meaningless. Accordingly, Claimant has proposed language in paragraphs 13(b), 15 and 16 of the proposed Confidentiality Order making clear that any such transcripts shall be treated as confidential.

79. Respondent objects to treating transcripts as confidential based on the NAFTA Free Trade Commission's Note of Interpretation of 31 July 2001, which states that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal."⁷¹ But Respondent has offered no reason why hearing transcripts should be construed as "documents submitted to, or issued by, a Chapter Eleven tribunal."⁷² Even if they were, in this instance the arbitral rules impose a duty of confidentiality with respect to the hearing, and releasing the transcripts would circumvent the *in camera* nature of the proceedings mandated by Article 25(4). Ultimately, however, it is not necessary for the Tribunal to reach this question because the Interpretative Note and Article 25 can be read in harmony, in accordance with their plain language, consistent with Claimant's position.

80. Respondent's position is further undermined by the fact that NAFTA tribunals have imposed confidentiality restrictions on hearing transcripts.⁷³ As the tribunal explained in *Gallo v. Canada*:

The Tribunal finds that, absent an express agreement to the contrary, there is a strong presumption that the choice for an *in camera* hearing also covers the content of the hearings, i.e. the transcripts. Otherwise, the *in camera* principle would be completely undermined: the public, excluded from the hearing, would nevertheless enjoy access (possibly even in real time) to a written transcript, in which every

⁷¹ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, at ¶ 1(a) (31 July 2001) (CL-041).

⁷² See *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Decision and Order by the Arbitral Tribunal, at ¶¶ 4, 15 (11 March 2002) (CL-032) (rejecting Canada's argument that hearing transcripts were "documents submitted to" the tribunal within the meaning of the Commission's Note of Interpretation).

⁷³ See, e.g., *Detroit International Bridge Co. v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-25), Confidentiality Order, at ¶ 16 (27 March 2013) (CL-033) (ordering that transcripts of the hearings shall be kept confidential at the request of the claimant pursuant to Article 28(3) of the 2010 UNCITRAL Rules, which is substantially the same as Article 25(4) of the 1976 Rules that apply here).

word said during the hearing would be faithfully recorded. The *in camera* hearing would cease to be *in camera*.⁷⁴

B. Access of the United States and Mexico as Non-Disputing NAFTA Parties

81. In Section 17.1 of the proposed Procedural Order, Canada has proposed only that “non-disputing NAFTA Parties shall be made aware of the Arbitral Tribunal’s Confidentiality Order,” not that such parties be bound by the Confidentiality Order. Canada proposes similar language in Section 18 of the proposed Confidentiality Order, requiring only that non-disputing NAFTA parties “be made aware of this Confidentiality Order.” Claimant’s proposed language for Section 18, in contrast, makes clear that non-disputing NAFTA parties “shall be made aware of this Confidentiality Order *and agree to abide by the Confidentiality Order.*” (emphasis added).

82. Canada’s position is inconsistent with the plain language of Article 1129(2) of NAFTA. Article 1129(2) specifically requires that a non-disputing NAFTA party receiving information from a Chapter 11 proceeding “shall treat the information as if it were a disputing [NAFTA] Party.” In other words, NAFTA expressly requires that Non-Disputing NAFTA parties abide by the same confidentiality obligations that bind the disputing Parties.

83. In accordance with the plain language of Article 1129, recent NAFTA tribunals have not incorporated any language suggesting, as Canada seeks to do here, that non-disputing NAFTA parties are exempt from the applicable confidentiality order.⁷⁵ As the tribunal in *Windstream Energy LLC v. Canada* put it,

⁷⁴ *Vito G. Gallo v. Canada*, NAFTA/UNCITRAL, Procedural Order No. 6, at ¶ 11 (30 August 2011) (CL-040); *see also id.* (noting that, as a general rule in international arbitration, “most hearings are confidential ... This means not only that the hearings themselves are confidential, but that also the transcripts of the hearings should be treated confidential as well” (quoting T.H. Webster, HANDBOOK OF UNCITRAL ARBITRATION, 410–411 (2010))).

⁷⁵ See *Detroit International Bridge Co. v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-25), Confidentiality Order, at ¶¶ 9, 11 (27 March 2013) (CL-033); *Mesa Power Group, LLC v. Canada*, NAFTA/UNCITRAL (PCA Case No. 2012-17), Confidentiality Order, at ¶¶ 12, 17 (21 November 2012) (CL-042).

“[a]ll persons receiving confidential information shall be bound by [the] Confidentiality Order.”⁷⁶ That same principle should apply to government officials of Mexico and the United States, an outcome entirely consistent with NAFTA Article 1129(2).

V. The Tribunal’s Inquiries of 28 April 2014

84. By letter of 28 April 2014, the Tribunal sought the Parties’ input on several issues relevant to the first procedural hearing.

85. With respect to the Tribunal’s inquiry regarding the filing of preliminary pleadings (a Statement of Claim and a Statement of Defense), Claimant submits that such pleadings are appropriate for the reasons discussed above, in paragraph 53.

86. With respect to the Tribunal’s proposal in Section 13.5 for witness notifications, Claimant is amenable to including this provision in the Procedural Order and applying it to both fact and expert witnesses.

⁷⁶ *Windstream Energy LLC v. Canada*, NAFTA/UNCITRAL, Confidentiality Order, at ¶¶ 12, 17 (16 September 2013) (CL-028).

VI. Conclusion

87. For the foregoing reasons, Claimant respectfully submits that the Tribunal should adopt Claimant's proposals in the final Procedural Order and Confidentiality Order governing this dispute.

Respectfully submitted,

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