

APPENDIX A

Reference for Tribunal Questions

TRIBUNAL QUESTIONS FOR THE PARTIES' OPENING STATEMENTS (MAY 6, 2016)	
Tribunal Questions	Paragraph Reference to Answer in Post- Hearing Brief
JURISDICTION	
1. What is the significance, if any, of the patent for raloxifene in these proceedings?	77, 89-105
2. Is Respondent's objection to jurisdiction <i>ratione temporis</i> untimely, as Claimant submits? If so, what are the implications?	78-88
3. According to Respondent, what is the meaning of the United States' statement that the "time limitations period in Articles 1116(2) and 1117(2) ... relate to the particular investment for which the investor seeks a remedy for the breach and loss"? (see U.S. Article 1128 Submission ¶ 3 and Claimant's Observations on Article 1128 Submissions ¶ 9)	97-105
CANADIAN PATENT LAW	
4. Is "promise utility" a doctrine, as submitted by Claimant? Why or why not?	108-110, 239
5. What are the implications, if any, of the contents of Canada's Manual of Patent Office Practice for the determination of Claimant's claims?	133-136, 140, 271
6. In what way, if any, is the identification of the "promise" of a patent by a judge "subjective", as submitted by Claimant? (see Memorial ¶ 60)	125-130, 241-251

7. Is the classification of Claimant's patents as secondary patents relevant to Claimant's claims? If so, how?	167, 229, 246
NAFTA	
8. What is the meaning of "shall make patents available" in Article 1709(1) of NAFTA?	185-193
9. According to Claimant, as of what date was Respondent in breach of its obligations under NAFTA Chapter Seventeen, and what was the basis of such breach?	77, 185
a. In this context, what is the relevance, if any, of the 2002 decision of the Canadian Supreme Court in the case of <i>Apotex Inc. v. Wellcome Foundation Ltd.</i> , 2002 SCC 77 (Exh. C-213, also referred to as "AZT")?	137-150, 162, 170, 173,185-193, 217-221
10. What is the relevance, if any, of the utility standards in the other NAFTA jurisdictions with respect to Claimant's claims?	196-207
11. If one were to accept Respondent's factual submission that the promise utility doctrine is "several distinct patent law rules, all of which were part of Canadian law when Claimant filed its patents", what implication would this have on Claimant's claims? (see, e.g., Counter-Memorial ¶ 86)	106-110, 185-193, 238
12. What is the relevance, if any, of the Patent Cooperation Treaty, for the purposes of determining Claimant's claims?	39, 172, 174, 209-210, 272
MINIMUM STANDARD OF TREATMENT	
13. Is denial of justice the only basis of liability in international law for the judgments of domestic courts interpreting domestic law, as argued by Respondent (see Counter-Memorial ¶ 213)?	60-65
14. What are the implications, if any, of paragraph B.3 of the FTC Notes of Interpretation regarding Article 1105 for Claimant's claims? ("A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)")	50-53
15. Does Article 1105(1) of NAFTA protect an investor's legitimate expectations?	59

16. Should the Tribunal find that Article 1105(1) does protect an investor’s legitimate expectations, is it required that such expectations are based on specific representations to the investor, as argued by Respondent (Counter-Memorial ¶ 279)?	59
17. Do Respondent’s grants of Claimant’s patents constitute specific representations to Claimant in the context of determining Claimant’s legitimate expectations?	267-268
18. Please elaborate upon the alleged discriminatory intent, which according to Claimant “can be inferred from the objective characteristics of the promise utility doctrine” (Memorial ¶ 223).	226-229
EXPROPRIATION	
19. Do Claimant’s patents constitute “property” capable of expropriation within the meaning of Article 1110(1) of NAFTA?	24-25, 177-178
a. Is Respondent’s argument that “the property interests alleged to have been taken were not valid property interests under domestic law” an “untimely jurisdictional objection” as submitted by Claimant? (Counter-Memorial ¶ 326; Reply ¶ 230).	178
b. What, if any, are the implications of the invalidation of Claimant’s patents <i>ab initio</i> for the purposes of determining whether an expropriation has taken place under Article 1110(1)?	24-25, 177-178
20. What are the implications of Article 1110(7) of NAFTA for Claimant’s claims? (“[t]his Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property)”).	28-36, 42, 176
a. In this context, according to Respondent, if one were to accept Claimant’s allegation that Respondent’s actions were inconsistent with Chapter 17, what effect would this have on Claimant’s claim under Article 1110?	28-41, 233
b. According to Claimant, if one were to accept Respondent’s submission that that its actions were consistent with Chapter 17, what effect would this have on Claimant’s claim under Article 1110?	32, 42, 176

21. What are the implications, if any, of Respondent’s argument that Claimant has not been substantially deprived of its investment because Respondent’s measures did not prevent Claimant from continuing to produce and sell its atomoxetine and olanzapine based products, and Claimant still holds a valid Notice of Compliance permitting it to sell these products (Counter-Memorial ¶ 411).	234-235
22. What are the criteria to establish the alleged direct expropriation in this case?	26
a. In particular, is it necessary for Claimant to prove that its property rights were transferred to the State or to a third party, as argued by Respondent (Counter-Memorial ¶ 405)? Can destruction of an investment also constitute expropriation, as argued by Claimant (Reply ¶ 311)?	26, 178
23. On what basis does Claimant argue that its alleged investment has been indirectly expropriated?	26-41
a. In particular, is denial of justice a prerequisite for a finding of expropriation based on a judicial measure?	26-41
24. In relation to Claimant’s position that Article 1110 prohibits “measures that substantially deprive investments of value while violating a rule of international law”, is it significant that the alleged violation of international law in this case is NAFTA Chapter 17? Would a breach of an international obligation found outside of NAFTA have the same result? (see, <i>e.g.</i> , Memorial Section VII.A.1)	28-41
TRIBUNAL QUESTIONS FOR THE PARTIES’ CLOSING STATEMENTS (JUNE 6, 2016)	
APPLICABLE LAW AND BURDEN OF PROOF	
25. What are the “applicable rules of international law” referred to in Articles 102(2) and 1131(1) of NAFTA that are applicable in this case?	17-19
26. Are there circumstances in the present case where the burden of proof may shift and, if so, what are they?	4-5, 55, 179, 237

GENERAL	
27. The Claimant is invited to clarify whether, having regard to the invalidity decisions concerning Zyprexa and Strattera, it is alleging a violation Articles 1105 and/or 1110 of NAFTA as a consequence of the cumulative effect of the judicial development of the alleged Canadian “promise utility” doctrine by the <i>AZT</i> decision in 2002, the <i>Aventis, Pfizer</i> and <i>Bristol-Myers</i> decisions of 2005, and the <i>Raloxofine</i> decision of 2008, or whether the alleged breach of NAFTA can be traced back to any one of these decisions individually?	109, 193, 239-240
28. In response to a question from the Tribunal, counsel for Respondent, referring to Jan Paulsson’s views, appeared to accept that “a decision by a court that is so fundamentally baffling and no reasonable judge could ever come to that conclusion” could amount to a denial of justice. Respondent is invited to clarify whether it accepts that a court decision of this character could amount to a denial of justice.	67-70
CANADIAN PATENT LAW	
29. With respect to each of the three claimed elements of the alleged Canadian “promise utility” doctrine (namely, the <i>AZT</i> decision in 2002, the <i>Aventis, Pfizer</i> and <i>Bristol-Myers</i> decisions of 2005, and the <i>Raloxofine</i> decision of 2008), please identify the extent to which each such element was or was not a new development in Canadian law.	111-174
CHAPTER 17 OF NAFTA	
30. The Parties are invited to address to what extent the Tribunal’s competence under Chapter 11 allows it, or requires it, to address Chapter 17, in particular in relation to Articles 1110 and 1105 of NAFTA.	29-32, 50
31. The Parties are invited to address the consequences of a finding of either consistency with or breach of Chapter 17 for purposes of an assessment of whether Respondent is in breach of Article 1110 and/or Article 1105 of NAFTA.	29-36, 42-47, 50, 179
32. Does Article 1709(8)(a) of NAFTA apply to an actual refusal to grant a patent or does it apply to the situation in which the grant could have been refused?	230-232
33. The Parties are invited to comment on the meaning of Article 1709(1) of NAFTA and the extent to which it imposes substantive obligations (in terms of harmonization, baseline or otherwise).	183-221

MINIMUM STANDARD OF TREATMENT	
34. The Parties are invited to address the sources and current content of the customary international law principle of “minimum standard of treatment of aliens” and “denial of justice”, with particular reference to the FTC Note of 2001.	43-76
35. Has the minimum standard of treatment of aliens been evolved and shaped by the 3000 BITs, as contended by Claimant, and, if so, what is the content of the minimum standard?	43-47, 51-53
36. The Claimant is invited to summarise / clarify its allegations of a breach of NAFTA Article 1105 and in particular the extent to which its legitimate expectations, arbitrariness and discrimination allegations constitute separate heads of alleged breach or whether these elements constitute strands of a single allegation of breach.	43-59, 23-272
EXPROPRIATION	
37. The Parties are invited to elaborate their positions regarding NAFTA Article 1110(7).	29-36, 42, 179
38. The Parties are invited to address whether an alleged expropriation as a consequence of a judicial decision is or is not limited to a denial of justice and what, for purposes of this answer, they mean by denial of justice.	27-41, 67-76
39. What is the relationship between Article 1110 of NAFTA and expropriation in general international law, if any?	21-23, 26-27
40. What relevance, if any, does practice under the U.S. takings clause have for these proceedings?	27, 71-75
TRIBUNAL QUESTIONS FOR POST-HEARING SUBMISSIONS (JUNE 9, 2016)	
41. Can the time-bar issue in Article 1116(2) / 1117(2) NAFTA be waived by a respondent? If not, does Article 1116(2) / 1117(2) NAFTA prevail over Article 21(3) of the UNITRAL Rules? In light of this, what is the relevance, if any, of provision Article 1120(2) NAFTA (“The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section”)?	84-88
42. With respect to the cases of <i>Saipem v. Bangladesh</i> and similar authorities invoked by the Claimant, the Tribunal notes the discussion between the Parties as to whether or not this case stands for the proposition that a judicial expropriation	21-29, 37-41

<p>may occur. The Tribunal further notes that in para. 242 of the Memorial, the Claimant argues, “Second, even if Article 1110(7) NAFTA did not exist, cases such as <i>Saipem</i> stand for the proposition that Canada’s breach of its patent obligations under Chapter 17 means that its measures are not ‘non-compensable regulation[s].’” The Tribunal understands that the Claimant argues that the Tribunal is entitled to consider alleged violations of Chapter 17 in the alternative to Article 1110(7) NAFTA, on the basis of the <i>Saipem v. Bangladesh</i> case. The Parties are requested to elaborate on this alternative argument.</p>	
<p>43. With reference to Question 42, to what extent are alleged violations of Chapter 17 relevant to an application of Article 1105(1) NAFTA?</p>	<p>43-47, 50</p>