

**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)

PROCEDURAL ORDER NO. 3

ARBITRAL TRIBUNAL:

Professor Albert Jan van den Berg (President)
Sir Daniel Bethlehem QC
Mr. Gary Born

15 January 2016

CONSIDERING:

- (A) The Procedural Calendar contained in Annex B to Procedural Order No. 1;
- (B) Section III of the Respondent's Rejoinder Memorial of 8 December 2015, titled "Claimant's Challenge to the Canadian Law on Utility is Outside the Tribunal's Jurisdiction *rationae temporis*";
- (C) The Claimant's letter of 5 January 2016, by which the Claimant submits that the Respondent's objection to jurisdiction *ratione temporis* is "procedurally improper" and requests an opportunity to respond in writing to this objection on 22 January 2016, noting that it does not consider two rounds of briefing on this issue to be necessary;
- (D) The Respondent's letter of 8 January 2016 stating that "Canada does not object to Claimant submitting a response to Canada's jurisdictional arguments by January 22, 2016, provided that Canada is allowed a written response", and proposing that that the deadline for Article 1128 submissions and applications for leave to file *amicus* submissions be postponed to at least 30 days after the Disputing Parties' final written submissions;
- (E) The letter of 8 January 2016 from the United States proposing "to make any submission pursuant to NAFTA Article 1128 two weeks after the final submission by the disputing parties or by March 18, 2016, whichever date is later", and noting that this proposal was discussed with counsel for the Disputing Parties and no objection was raised;
- (F) The Letter of 8 January 2016 from Mexico making the same proposal as the United States in respect of the deadline for Article 1128 submissions;
- (G) The Claimant's letter of 8 January 2016, by which the Claimant (i) agrees to an extension of the deadline for Article 1128 submissions to 18 March 2016, (ii) proposes that the Disputing Parties submit their comments on these submissions within four weeks, i.e., by 15 April 2016, and (ii) objects to the Respondent's proposal to also extend the deadline for applications for leave to file *amicus* submissions;
- (H) The Respondent's letter of 12 January 2016, by which the Respondent (i) objects to the Claimants' proposal to shorten the period for the Disputing Parties to submit comments on the Article 1128 submissions from seven to four weeks, (ii) proposes that the deadline for such comments be set on 11 May 2016, and (iii) argues that extending the deadline for applications for leave to file *amicus* submissions will not disrupt the proceedings if the Disputing Parties are given until 11 May 2016 to comment on any *amicus* submissions;
- (I) The Claimant's letter of 13 January 2016, by which the Claimant (ii) argues that the Respondent has proposed a procedural calendar that is not workable and has not raised any issue in its 12 January 2016 letter meriting an adjustment to the Claimant's proposed calendar, (ii) confirms that "in its opposition brief Lilly will only respond to the discrete

issues raised by Canada's jurisdictional objection; Lilly will not be submitting new issues for the Tribunal's consideration", and (iii) sets out an "Illustrative Calendar" to support its position.

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:

1. It is undisputed that the Respondent's objection to jurisdiction *ratione temporis* has been raised for the first time in the Respondent's Rejoinder Memorial (although the Disputing Parties disagree as to the impetus for this objection). Procedural fairness demands that the Claimant be given an opportunity to respond to this objection in writing, and the Tribunal accordingly invites the Claimant to submit its Opposition to the Respondent's Objection to Jurisdiction *ratione temporis* by Friday, 22 January 2016.
2. The Tribunal has noted the Claimant's statement that this submission "will only respond to the discrete issues raised by Canada's jurisdictional objection" and not raise any new issues. In light of this undertaking, the Tribunal does not consider that further written submissions on the Respondent's objection to jurisdiction *ratione temporis* are required at this stage. If the issue is addressed by the United States and/or Mexico in Article 1128 submissions, the Disputing Parties will have an opportunity to respond. In any event, the Disputing Parties will have ample opportunity to present their positions on this objection to the Tribunal during the Hearing.
3. Regarding the deadline for Article 1128 submissions, the Tribunal understands that both Disputing Parties accept the proposal of the United States and Mexico. Therefore, any Article 1128 submissions shall be submitted by the revised deadline of Friday, 18 March 2016. The Secretary of the Tribunal will inform the United States and Mexico accordingly.
4. In respect of the deadline for applications for leave to file *amicus* submissions, the Tribunal agrees with the Respondent's position that this deadline should not precede publication of the Disputing Parties' written submissions, as potential *amici* should have the opportunity to review all such submissions. At the same time, the Tribunal shares the Claimant's view that there is no intrinsic reason why such applications must be submitted on the same date as Article 1128 submissions, particularly if decoupling these procedural steps results in a more efficient procedure.
5. In light of these considerations, and taking into account the importance of reserving sufficient time for preparation in advance of the Hearing, the Tribunal adopts the following revised procedural calendar. In preparing this calendar, the Tribunal has carefully considered each Disputing Party's proposals and arguments in support thereof, and has determined that this approach best preserves the fairness and efficiency of the proceeding.

Description	By	Date	PO1 §
Opposition to the Respondent's Objection to Jurisdiction <i>ratione temporis</i>	Claimant	Fri 22-Jan-2016	
Deadline for applications for leave to file non-disputing party (<i>amicus</i>) submissions, if any	TBD	Fri 12-Feb-2016	
Comments on applications for leave to file non-disputing party (<i>amicus</i>) submissions, if any	Claimant and Respondent	Fri 19-Feb-2016	18.2
Decision on applications for leave to file non-disputing party (<i>amicus</i>) submissions, if any	Tribunal	Fri 11-Mar-2016	18.1
Deadline for NAFTA Article 1128 submissions, if any	TBD	Fri 18-Mar-2016	17.1, 18.1
Comments on non-disputing party (<i>amicus</i>) submissions and NAFTA Article 1128 submissions on non-disputing party (<i>amicus</i>) submissions, if any	Claimant and Respondent; TBD	Fri 22-Apr-2016	17.2, 18.2
Notification of Witnesses and Experts	Claimant and Respondent	TBD	13.5, 14.1
Notification of Witnesses and Experts not Called	Tribunal	TBD	13.5, 14.1
Pre-Hearing Telephone Conference	All	TBD	23
Hearing Commencement	All	Mon 30-May-2016	24
Hearing Ends	All	Thu 09-Jun-2016	24
Simultaneous Post-Hearing Submissions, if any	Claimant and Respondent	TBD	25.1
Simultaneous Reply Post-Hearing Submissions, if any	Claimant and Respondent	TBD	25.1
Simultaneous Cost Submissions	Claimant and Respondent	TBD	25.2

Description	By	Date	PO1 §
Partial Award on Liability	Tribunal	TBD	27
[Organizational Conference to Determine the Procedural Calendar for the Quantum Phase]	All	TBD	

For the Arbitral Tribunal

[signed]

Professor Albert Jan van den Berg

Date: 15 January 2016