

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976**

BETWEEN:

ELI LILLY AND COMPANY

Claimant

AND

THE GOVERNMENT OF CANADA

Respondent

CASE NO. UNCT/14/2

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* SUBMISSION

BY THE NATIONAL ASSOCIATION OF MANUFACTURERS

February 12, 2016

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I. Introduction and Overview

1. The National Association of Manufacturers (the NAM) makes this application as a non-disputing party for leave to file the enclosed *amicus curiae* brief. Formed in 1895, the NAM is the largest manufacturing association in the United States, with a diverse membership of more than 14,000 manufacturing companies, small and large, across every industry. The NAM regularly files *amicus curiae* briefs in cases involving issues of concern to the U.S. manufacturing community.

2. Canada is one of the largest investment and trading partners for manufacturers in the United States. U.S. manufacturers of all sizes and across all sectors owe a large measure of their success in Canada—and elsewhere globally—to innovation and protection of intellectual property rights. Intellectual property rights, particularly in the form of patents, are some of the most important investments for manufacturers affecting all aspects of their businesses, from research and development to production facilities to sales and distribution channels. The NAM’s proposed *amicus* submission addresses the disputed issue of whether patents, although considered intangible property, are nonetheless assets capable of expropriation, due in part to the extraordinary value of patents and other intellectual property to manufacturers in today’s global economy.

3. Canada’s disputed actions also call into question the nature and stability of property rights in patents and the reasonableness of investment-backed expectations. Thus, the NAM’s submission (a) emphasizes the importance of stable and predictable intellectual property rules, and (b) explains why Canada’s actions are inconsistent with longstanding patent practices and expectations of manufacturers that maintain international patent portfolios.

II. The NAM’s Interest in This Arbitration

4. U.S. manufacturers invested nearly \$110 billion (USD) in Canada in 2014, a figure representing nearly one-sixth of the total international manufacturing investment by American

companies.¹ The NAM's members, across all manufacturing sectors, were collectively responsible for a substantial portion of that investment activity. The matters at issue in this arbitration implicate the interests and reasonable expectations of those investors regarding Canada's protection of intellectual property under the NAFTA. All patents are subject to utility requirements, and the NAM's membership is concerned that the promise utility doctrine could be used to expropriate the patents of manufacturers in other sectors if Canada's actions are left unchecked.²

5. Protection for intellectual property rights has long been a top priority of the NAM and its members. The NAM's formal policy positions, approved by the NAM Board of Directors, specifically identify international intellectual property protection as a top issue.³ The NAM and its members are similarly active on global investment policy, agreements, and enforcement. The NAM's Board-approved policies also address foreign direct investment and the agreements and rules that govern the flow of investment across borders.⁴ The NAM strongly supports free trade agreements that benefit manufacturers and remains a staunch advocate of the benefits of the NAFTA, including provisions for protecting intellectual property and IP investments in a uniform and predictable manner.⁵

¹ See Derrick T. Jenniges and James J. Fetzer, Direct Investment Positions for 2014: Country and Industry Detail, 95 SURV. CURRENT BUS. 7, July 2015, at 13, available at http://www.bea.gov/scb/pdf/2015/07%20July/0715_direct_investment_positions.pdf.

² Additionally, the NAM's membership includes many pharmaceutical companies that are also concerned about the discriminatory effects of the promise utility doctrine to their industry. At least 35 pharmaceutical companies are NAM members, and approximately 85% of those member companies have pharmaceutical products sold in Canada.

³ NAM Policy Positions (approved Mar. 15-16, 2012), Int'l Econ. Affairs Policy ¶ 1.03, available at http://www.nam.org/uploadedFiles/NAM/Site_Content/Issues/FINAL%20Policy%20Langage%20Approved%20Winter%202012.pdf.

⁴ *Id.* at Int'l Investment and Fin. Policy ¶¶ 2.01-2.03.

⁵ See Pre-Hearing Statement of Linda Dempsey, Vice President Int'l Econ. Affairs, NAM, *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2016 Report* (2015), USITC Inv. No. 322-555, available at <http://documents.nam.org/IEA/NAM%20Pre-hearing%20statement%20to%20ITC%20November%202015-FINAL.pdf>; *Trading Up with TPA* (Feb. 2015), available at [http://www.nam.org/Data-and-Reports/Reports/Trading-Up-With-TPA-\(Full-Report\).pdf](http://www.nam.org/Data-and-Reports/Reports/Trading-Up-With-TPA-(Full-Report).pdf).

III. The NAM Should Be Granted Leave to Participate as *Amicus Curiae*⁶

A. Assistance to the Tribunal

6. The NAM's submission will assist the Tribunal by providing expertise and knowledge not provided by the parties. As the leading advocate for manufacturers, the NAM can provide perspective to the Tribunal about customs and norms for protecting intellectual property and how developments in investor protections afforded by the NAFTA treaty affect manufacturers.

7. The NAM and its members have particular experience with the challenge of ensuring fair enforcement of intellectual property rights and that governments provide equal competitive opportunities to foreign and domestic investors. The NAM can provide real-world perspective on the nature of property rights in patents, through the experiences of its members, across a broader range of industries than the disputing parties. The NAM can also provide insight into reasonable expectations of companies investing across borders in intellectual property, thus informing the disputed issue of the reasonableness of Lilly's investment-backed expectations.

8. The NAM's proposed submission illustrates how manufacturers measure their assets in terms of intellectual property and accordingly how the development by one NAFTA party of heightened patentability requirements distorts international trade and investment flows. The NAM's submission demonstrates how (a) Canada's conduct is inconsistent with longstanding practices and customs in international patent filings, and (b) the manner in which Canada developed and invoked the promise utility doctrine upsets settled expectations of manufacturers and clashes with established and widespread notions of utility that existed at (and long before) the NAFTA entered into force.

⁶ The October 7, 2003 Statement of the Free Trade Commission provides the following guidelines for proposed non-party submissions: (a) will the submissions assist the Tribunal by providing perspective, knowledge, expertise, insight or material not provided by the parties; (b) will the submissions address matters within the scope of the dispute; (c) does the applicant have a significant interest in the arbitration; and (d) is there a public interest in the subject-matter of the arbitration? These factors are balanced against undue burden or unfair prejudice to the parties or disruption to the

B. Scope of Dispute

9. The NAM will address issues concerning Canada's self-defined and heightened patentability requirements and the importance of ensuring that Canada meets its international treaty obligations under NAFTA to provide equal competitive opportunities and to protect intellectual property rights from unlawful expropriation and unfair and inequitable treatment. The NAM's submission is thus within the parameters of this claim, which concerns Canada's discriminatory conduct in enforcing patent rights and the NAFTA obligations of the Government of Canada.

C. Direct & Significant Interest

10. The NAM and its members have a direct interest in ensuring that the investment and trading partners of the United States, and particularly Canada, abide by their international commitments. U.S. manufacturers rely on patents in the Canadian market to ensure competitiveness, so the NAM has an interest in ensuring the fair, consistent, and predictable administration of Canada's patent regime. The NAM thus has a direct interest in ensuring that Canada's discriminatory, unfair, and unpredictable conduct is halted and redressed, in accordance with Canada's obligations under NAFTA and international law.

11. The NAM is also interested in the international trade and investment implications of this claim and thus provides legal analysis of fair and equitable treatment and judicial expropriation issues that are before this Tribunal. As discussed above and in the proposed amicus brief, the NAM's members have made significant investments in Canada, thus the scope of investment protections under NAFTA Chapter 11 are of significant importance to NAM members.

D. Public Interest

12. There is a public interest in the subject matter of this arbitration. Thousands of

Tribunal process.

companies across the NAFTA territory depend on patent rights in order to grow their businesses, both at home and abroad. Patent law is fundamentally concerned with providing for the public good by inducing investors to disclose their methods and inventions, spurring advancement and understanding across a wide variety of scientific and technical disciplines. Fair and predictable enforcement of patent laws across the NAFTA territory is thus a public concern.

E. Undue Burden

13. There is no undue burden on either of the disputing parties. The NAM's submissions provide relevant insights on factual and legal issues in dispute and will provide the unique perspective of manufacturers.

IV. Corporate Disclosure Statement

14. The NAM is a non-profit corporation with no parent or subsidiary corporations. Eli Lilly, Inc. is a member of the NAM but provided no financial or other assistance with the preparation of this brief and was not part of the decision-making process for filing this submission. Given the size and breadth of NAM's membership, nearly every case of interest to the U.S manufacturing community involves NAM members. In such cases, the NAM is not precluded from representing the interests of its entire membership by filing *amicus curiae* submissions.

V. Conclusion

15. For all of the foregoing reasons, the NAM respectfully requests that this Tribunal exercise its discretion to allow the NAM to participate in this arbitration as *amicus curiae*.

Respectfully submitted,

/s/

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Enclosure (Proposed *Amicus Curiae* Submission)