

**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. 2

ARBITRAL TRIBUNAL:

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

SECRETARY OF THE ARBITRAL TRIBUNAL:

Ms. Lindsay Gastrell

6 April 2015

I. INTRODUCTION

1. On 24 March 2015, in accordance with Annex B of Procedural Order No. 1, each Disputing Party submitted to the Arbitral Tribunal its requests for the production of documents in the form of a Redfern Schedule (including objections to the requests and responses to such objections), together with a cover letter and supplemental legal authorities (Claimant's CL-123 to CL-145 and Respondent's RL-079 to RL-087).
2. On 27 March 2015, Respondent submitted a letter to the Arbitral Tribunal setting forth its views on the process by which determinations on the application and scope of legal privilege are to be made. Claimant provided a response to Respondent's letter on the same day.
3. In reference to the Disputing Parties' letters of 27 March 2015, the Arbitral Tribunal wrote to the Disputing Parties on 1 April 2015, stating *inter alia*:

The Arbitral Tribunal notes the views expressed by both Parties, consistent with the Arbitral Tribunal's understanding, that issues of privilege shall be finally resolved in light of actual assertions of privilege over specific documents or categories of documents, and following the methodology set out in Procedural Order No. 1. The Arbitral Tribunal's decisions on document requests therefore will not definitively rule on the privileged nature of any specific document.

4. This Order and the annexed Redfern Schedules contain the Arbitral Tribunal's decisions on the Disputing Parties' requests for the production of documents. Any assertions of legal impediment or privilege shall be made and decided in accordance with Section 12.6 of Procedural Order No. 1 and the Arbitral Tribunal's decision in Section III of this Order.

II. APPLICABLE RULES AND DISCUSSION

5. Section 7 of Procedural Order No. 1 identifies the procedural rules that govern this arbitration; it provides:

7.1 The procedure in this arbitration shall be governed by the *UNCITRAL Arbitration Rules (1976)* except as modified by the provisions of Section B of Chapter 11 of the NAFTA (*per* Article 1120(2) of the NAFTA).

7.2 If these provisions and rules do not address a specific procedural issue, the Arbitral Tribunal shall, after consultation with the Disputing Parties, determine the applicable procedure. In addition, the Arbitral Tribunal may seek guidance from, but shall not be bound by, the *2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration* [(the “IBA Rules”)];

6. With respect to the UNCITRAL Rules (1976), Article 24(3) provides that the Arbitral Tribunal may order the production of documents:

[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such period of time as the arbitral tribunal shall determine.

7. Further and more generally, Article 15(1) of the UNCITRAL Rules embodies the principle that the Arbitral Tribunal has broad discretion with respect to the arbitral procedure so long as it preserves the parties’ fundamental procedural rights, stating:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

8. Section B of Chapter 11 of the NAFTA, which concerns the procedural framework governing an arbitration between a NAFTA State and an Investor of another NAFTA State, does not provide any rules that modify the UNCITRAL Rules’ general provisions on the production of documents.

9. Thus, in the absence of a specific procedural framework for the production of documents, the Arbitral Tribunal, in consultation with the Disputing Parties, has determined the procedural rules applicable to the production of documents, which are set forth in Section 12 of Procedural Order No. 1. The Arbitral Tribunal has adhered to these rules in deciding upon the Disputing Parties’ document requests.

10. In addition, and in accordance with Section 1 of Procedural Order No. 1, the Arbitral Tribunal has been guided by Article 9 of the IBA Rules in evaluating individual document requests.

11. Finally, where appropriate, the Arbitral Tribunal has weighed a Disputing Party’s document request against the legitimate interests of the other Disputing Party, including any unreasonable burden likely to be caused to such Disputing Party, taking into account all the surrounding circumstances, including the breadth and relevance of the request.

12. The Arbitral Tribunal's decision on each document request is stated in the completed versions of the Disputing Parties' Redfern Schedules, which are attached to this Order as Annex A for Claimant's requests and Annex B for Respondent's requests.
13. The Arbitral Tribunal notes that, in setting forth its decisions on the document requests, it has not explicitly addressed every argument raised by the Disputing Parties in their submissions of 25 March 2015; doing so would be unnecessary and indeed repetitive. Instead, the Arbitral Tribunal's statements in the Redfern Schedules address only what the Arbitral Tribunal views as the most important reasons for its decisions. Yet, the Arbitral Tribunal emphasizes that in reaching these decisions, it has considered all of the Disputing Parties' arguments and objections.

III. DECISION

14. On the basis of the above, the Arbitral Tribunal hereby decides as follows:
 - a. The annexed Redfern Schedules, including the Arbitral Tribunal's decisions set forth in the last columns, form an integral part of this Order;
 - b. In accordance with Section 12.1(e) and Annex B of Procedural Order No. 1, the Disputing Parties shall produce all documents for which no objection has been sustained by 22 June 2015;
 - c. Documents shall be produced in accordance with Section 12.3 of Procedural Order No. 1, and documents so disclosed shall not be considered to be part of the record unless and until one of the Disputing Parties subsequently submits them in evidence; and
 - d. If a Disputing Party withholds documents which it considers not subject to production based on a legal impediment or privilege, or special political or institutional sensitivity, it shall follow the procedure set forth in Section 12.6 of Procedural Order No. 1. Either Disputing Party may submit any disputes regarding withholding on these bases to the Arbitral Tribunal for resolution in accordance with Sections 12.7 and 12.8 of Procedural Order No. 1.

Eli Lilly and Company v. Government of Canada
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Date: 6 April 2015

For the Arbitral Tribunal

[signed]

Professor Albert Jan van den Berg