

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ICSID Case No. ARB(AF)/12/1)**

(1) APOTEX HOLDINGS INC.

(2) APOTEX INC.

Claimants

v.

UNITED STATES OF AMERICA

Respondent

FIRST PROCEDURAL ORDER

The Tribunal:

J. William Rowley, Arbitrator;
John R. Crook, Arbitrator; and
V.V. Veeder, President.

The Secretary to the Tribunal:

Eloise M. Obadia

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Introduction

The first session of the Arbitral Tribunal was held on Tuesday 24 July 2012 at ICSID, the World Bank, Washington DC, USA.

Present at the session were:

Members of the Tribunal

J. William Rowley,	Arbitrator;
John R. Crook,	Arbitrator; and
V.V. Veeder,	President.

ICSID Secretariat

Eloïse M. Obadia,	Secretary to the Tribunal; and
Louis-Philippe Coulombe,	Intern.

Attending on behalf of the Claimants

Barton Legum,	Salans LLP Paris;
John J. Hay	Salans LLP New York;
Anne-Sophie Dufêtre	Salans LLP Paris; and
Jeremy Desai	President and Chief Operating Officer, Apotex Inc.

Attending on behalf of the Respondent

Lisa J. Grosh	Assistant Legal Adviser, U.S. Department of State;
Jeremy K. Sharpe	Chief, Investment Arbitration, U.S. Department of State;
Neale H. Bergman	Attorney-Adviser, U.S. Department of State;
David M. Bigge	Attorney-Adviser, U.S. Department of State;
Alicia L. Cate	Attorney-Adviser, U.S. Department of State;
Nicole C. Thornton	Attorney-Adviser, U.S. Department of State; and
Abby L. Lounsberry	Attorney-Adviser, U.S. Department of State.

The President of the Tribunal (President) opened the session at 1000 Hours and welcomed the participants. The President introduced the Tribunal and the members of the Secretariat and invited the Parties to introduce their respective representatives.

The Tribunal and the Parties considered the following:

- The Draft Agenda (Annex 1) and Draft Procedural Order (Annex 2) sent to the Parties by the Tribunal on 3 July 2012; and

- The Parties' agreed proposed revision of the Draft Procedural Order sent to the Tribunal on 17 July 2012, (Annex 3).

The Tribunal and the Parties adopted the draft Agenda for this first session, as listed below.

The Parties' agreements and the Tribunal's decisions are recorded in the First Procedural Order below.

The first session was adjourned at 1120 Hours.

A verbatim transcript and an audio recording of the session were made and deposited in the archives of ICSID. The recording was subsequently uploaded to the FTP server established for the case for access by the Members of the Tribunal and the Parties.

First Procedural Order

Pursuant to Article 27 of the ICSID Arbitration (Additional Facility) Rules, this first Procedural Order sets out the Procedural Rules that the Claimants and the Respondent have agreed and the Arbitral Tribunal has determined shall govern this arbitration.

1. **Applicable Arbitration Rules**
Additional Facility Rules, Article 6; Arbitration (AF) Rules, Articles 1, 28(2) and 35; NAFTA, Article 1120
 - 1.1. These proceedings are conducted in accordance with the ICSID Arbitration (Additional Facility) Rules in force as of April 2006 (Arbitration (AF) Rules), except to the extent that they are modified by Section B of NAFTA Chapter 11.
2. **Constitution of the Tribunal and the Tribunal Members' Declarations**
Arbitration (AF) Rules, Article 13; NAFTA, Articles 1123 and 1125
 - 2.1. The Tribunal was constituted on 11 June 2012 in accordance with Chapter 11 of the NAFTA and the Arbitration (AF) Rules. The Parties confirmed that the Tribunal was properly constituted and that no Party had any objection to the appointment of any Member of the Tribunal.
 - 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with Article 13(2) of the Arbitration (AF) Rules. Copies of these declarations were distributed to the Parties by the Secretary on 11 June 2012.

3. Fees and Expenses of the Tribunal Members

Additional Facility Rules, Article 5; Administrative and Financial Regulation 14; ICSID Schedule of Fees; Memorandum on the Fees and Expenses of ICSID Arbitrators

3.1. The fees and expenses of each arbitrator shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.

3.2. Under the current Schedule of Fees, each arbitrator receives:

3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and

3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to Regulation 14 of the ICSID Administrative and Financial Regulations.

3.3. The Members of the Tribunal shall endeavour to submit their claims for fees and expenses to the ICSID Secretariat on a quarterly basis.

3.4. The fees and expenses of the Members of the Tribunal shall be stated separately in its award.

4. Presence and Quorum

Arbitration (AF) Rules, Articles 22(2) and 28(1)(a)

4.1. Pursuant to Article 22(2) of the Arbitration (AF) Rules, the presence of two Members of the Tribunal constitutes a quorum for its sittings.

4.2. For all other purposes the quorum shall be determined by the *lex loci arbitri* if applicable.

5. Decisions of the Tribunal

Arbitration (AF) Rules, Article 24

5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.

5.2. Article 24(2) of the Arbitration (AF) Rules applies to decisions taken by correspondence except that where the matter is urgent, the President may issue procedural decisions without consulting the other Members, subject to possible reconsideration of each such decision by the full Tribunal.

6. Delegation of Power to Fix Time Limits
Arbitration (AF) Rules, Article 33

- 6.1. The President has the power to fix and extend time limits for the completion of the various steps in the proceeding.
- 6.2. In exercising this power, the President shall consult with all Members of the Tribunal except that where the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.

7. Representation of the Parties
Arbitration (AF) Rules, Article 26

- 7.1. Each Party shall be represented by its respective counsel listed below; and each Party may designate additional agents, counsel, or advocates by notifying the Tribunal and the ICSID Secretariat promptly of such intended designation, subject to the approval of the Tribunal.

For the Claimants

Barton Legum
Anne-Sophie Dufêtre
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Assistant Legal Adviser
Jeremy K. Sharpe
Chief of Investment Arbitration
Neale H. Bergman
David M. Bigge
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Nicole C. Thornton
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Fax: +1 212 307 3303

Emails:

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ubardyn@salans.com

8. Apportionment of Costs and Advance Payments to the Centre
Additional Facility Rules, Article 5; Administrative and Financial Regulation 14; Arbitration (AF) Rules, Articles 28(1)(f) and 58
 - 8.1. The Parties shall defray the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.
 - 8.2. By letter of 11 June 2012, ICSID requested that each Party pay US\$100,000 to defray the initial costs of the proceeding. ICSID received the Claimants' payment on 13 June 2012 and the Respondent's payment on 5 July 2012.
 - 8.3. ICSID may request further advances as needed. Such requests shall be accompanied by an interim statement of account providing details of the direct costs of the proceeding, including the total fees and expenses of all arbitrators. At the end of the case, the financial statement will include a breakdown of each arbitrator's fees and expenses.

9. Place of Arbitration
Arbitration (AF) Rules, Articles 19 and 20; NAFTA, Article 1130
 - 9.1. In its written decision dated 6 November 2012, the Tribunal, after considering the Parties' several written submissions, confirmed to the Parties that the geographical venue for hearings is ICSID (the World Bank, Washington, DC) and indicated that it had decided that New York, NY (USA) is the legal place of the arbitration.
 - 9.2. The Tribunal can hold hearings at any other geographical venue that it considers appropriate after consulting with the Parties. The Tribunal may deliberate at any venue it considers convenient.
 - 9.3. All decisions and the award shall be treated as having been made at the legal place of arbitration, regardless of the geographical place or places where the decision or award is signed.

10. Procedural Language(s)

Additional Facility Rules, Article 5; Administrative and Financial Regulation 30(3) and (4); Arbitration (AF) Rules, Articles 28(1)(b) and 30

10.1. English is the procedural language of the arbitration. Documents filed in any other language must be accompanied by a translation into English. If the document is lengthy and relevant only in part, it is sufficient if only the relevant parts are translated, provided that the Tribunal may require a fuller or a complete translation at the request of any Party or upon its own initiative. Translations need not be certified, unless there is a dispute as to the content of a translation provided and the Party disputing the translation specifically requests a certified version.

10.2. A witness may testify in a language other than the procedural language with simultaneous interpretation into the procedural language.

10.3. Simultaneous interpretation shall be arranged by the ICSID Secretariat and charged to the case account, without prejudice to the Tribunal's final allocation of costs. The Parties shall inform the ICSID Secretariat of interpretation requirements at least four weeks in advance of the hearing.

11. Confidentiality

FTC Note of July 31, 2001

11.1. The Parties and the Tribunal have adopted and signed a Confidentiality Agreement and Order dated 24 July 2012.

12. Means of Communication and Copies of Instruments

Additional Facility Rules, Article 5; Administrative and Financial Regulations 24 and 30; Arbitration (AF) Rules, Articles 28(1)(d) and 31

a) Communications:

12.1. Written communications in the case shall be transmitted by email or other electronic means to the Parties, the ICSID Secretariat, and the Tribunal. Electronic versions of communications ordered by the Tribunal to be filed simultaneously shall be transmitted to the ICSID Secretariat only, which shall send them to the Tribunal and to the Parties. The Secretary shall not be copied on direct communications between the Parties when such communications are not intended to be transmitted to the Tribunal.

12.2. The email addresses of the Members of the Tribunal are:

V.V. Veeder

vvveeder@londonarbitrators.net

J. William Rowley

wrowley@20essexst.com

John R. Crook

jrc1648@yahoo.com

b) Instruments/Submissions:

12.3. The Parties shall:

12.3.1. by the relevant filing date, submit by email to the ICSID Secretariat, the opposing Party, and the Tribunal an electronic version without exhibits of pleadings, witness statements, and expert reports¹;

12.3.2. courier to the ICSID Secretariat by the following business day:

12.3.2.1. one unbound hard copy in A4/Letter format of the submission, including signed originals of the pleading, witness statements, and expert reports (but not including legal authorities);

12.3.2.2. one hard copy in A4/Letter format of any expert reports and witness statements accompanying the submission; and

12.3.2.3. two USB drives, or CD-ROMs or DVDs, with full copies of the entire submission, including the pleading, witness statements, expert reports, exhibits and legal authorities.

12.3.3. at the same time, courier to the opposing Party (at the addresses indicated under paragraph 7.1) and each Member of the Tribunal (at the addresses indicated under paragraph 12.4):

12.3.3.1. one USB drive, or CD-ROM or DVD, with a full copy of the entire submission, including the pleading, witness statements, expert reports, exhibits and legal authorities; and

12.3.3.2. one hard copy in A4/Letter format of any expert reports and witness statements accompanying the submission.

12.4. The Members of the Tribunal's addresses are as follows:

V.V. Veeder

Essex Court Chambers
24 Lincoln's Inn Fields
London
WC2A 3EG
United Kingdom
Tel. +44 (0)20 7813 8000

J. William Rowley QC

20 Essex Street Chambers
20 Essex Street
London,
WC2R 3AL
United Kingdom
Tel. +44 0(20) 7842 6702
and
Brookfield Place
181 Bay Street

John R. Crook

10610 Belfast Place
Potomac, MD 20854
USA
Tel. +1 301 765 0333

¹ Please note that the World Bank server does not accept emails larger than 10 MB.

Suite 4400
Toronto, Ontario
Canada M5J 2T3
Tel. +1 416 865 7008

- 12.5. For email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Eloïse Obadia
ICSID
MSN U3-301
3301 Pennsy Drive
Landover, MD 20785-1606
USA
Tel.: +1 202 458 4109
Fax: +1 202 522 2615
Email: eobadia@worldbank.org

- 12.6. For local messenger deliveries, the contact details are:

Eloïse Obadia
1800 G Street, NW (“U Building”)
3rd Floor
Washington, DC 20006
Tel.: +1 202 458 4109

- 12.7. The Tribunal may request hard copies of any document submitted electronically at any time.
- 12.8. Legal authorities shall be submitted in electronic version only, unless specifically requested by the Tribunal.
- 12.9. Electronic versions of pleadings and exhibits shall be text-searchable (*i.e.*, OCR PDF or Word).
- 12.10. Pleadings shall be accompanied by an index hyperlinked to the exhibits and legal authorities.
- 12.11. The official date of receipt of a pleading or communication shall be the day on which the electronic version is sent to ICSID.
- 12.12. A filing shall be deemed timely if sent by a Party by midnight (Washington, DC) on the relevant date.
- 12.13. The Tribunal’s decisions on procedural matters may be communicated to the Parties through the Secretariat.

13. Written and Oral Procedures

Arbitration (AF) Rules, Articles 28(1)(e) and 36

13.1. The proceeding shall consist of a written phase followed by an oral phase.

14. Schedule for Submission of Pleadings

Arbitration (AF) Rules, Articles 28(1)(c) and 38

a) Filings without Jurisdictional Objections

14.1. The schedule shall be as follows:

14.1.1. The Claimants shall file a Memorial by 30 July 2012 (152 days from Notice of Arbitration);

14.1.2. Subject to the Procedural Order contained in the Tribunal's letter of 29 October 2012, the Respondent shall file a Counter-Memorial by 14 December 2012 (137 days / 19.5 weeks from Memorial);

14.1.3. The Claimants and Respondent shall file document requests by 4 January 2013 (3 weeks from Counter-Memorial).

14.1.4. Canada and Mexico shall file submissions under NAFTA Article 1128, if any, and any intending Amicus shall file Amicus Applications for Leave to File by 11 January 2013 (4 weeks from Counter-Memorial).

14.1.5. The Claimants and Respondent shall make submissions, if any, on the Amicus Applications for Leave to File by 18 January 2013 (1 week from Amicus deadline).

14.1.6. The Claimants and Respondent shall submit a response and any objections to the document requests by 25 January 2013 (3 weeks from document requests).

14.1.7. The Tribunal shall decide on any Amicus Applications for Leave to File within two weeks from receiving submissions from the Claimants and Respondent, if any (that is, by 1 February 2013).

14.1.8. The Claimants and Respondent shall submit any responses to objections to the document requests and produce any documents to which they do not object by 8 February 2013 (2 weeks from objections to document requests).

14.1.9. The Tribunal shall decide on any objections to document requests within two weeks (that is, by 22 February 2013).

14.1.10. The Claimants and Respondent shall produce any documents so

ordered by the Tribunal within three weeks (that is, by 15 March 2013).

- 14.1.11. The Claimants shall file a Reply by 17 May 2013 (154 days / 22 weeks from Counter-Memorial); and
- 14.1.12. The Respondent shall file a Rejoinder by 13 September 2013 (119 days / 17 weeks from Reply).
- 14.1.13. The Claimants and Respondent shall provide notification of any witnesses and experts to be cross-examined at the hearing by 18 October 2013 (5 weeks from Rejoinder).
- 14.1.14. The Parties are encouraged to request their respective Party-appointed experts to “meet and confer” in accordance with Article 5(4) of the IBA Rules on the Taking of Evidence in International Arbitration (2010), at all appropriate times. The Tribunal may provide additional guidance as required.
- 14.1.15. A pre-hearing telephone conference shall be held on October 25, 2013 (1 week from notification of any witnesses and experts) at a time to be determined by the Tribunal.
- 14.1.16. The hearing shall be held from 18 to 26 November 2013, including if necessary on Saturday 23 November 2013.

b) Filings with Jurisdictional Objections

14.2. The schedule shall be as follows:

- 14.2.1. The Claimants shall file a Memorial on 30 July 2012 (152 days from Notice of Arbitration);
- 14.2.2. Subject to the Procedural Order contained in the Tribunal’s letter of 29 October 2012, the Respondent shall file a Counter-Memorial and any objections to jurisdiction by 14 December 2012 (137 days / 19.5 weeks from Memorial). It shall also state in the submission whether it requests the bifurcation of the proceeding into jurisdiction and merits phases.
- 14.2.3. The Claimants shall reply to the request for bifurcation by no later than 28 December 2012 (2 weeks from Counter-Memorial and Request for Bifurcation).
- 14.2.4. The Respondent may file a Reply on Bifurcation by 10 January 2013 (13 days from Claimants’ Reply to Request for Bifurcation).
- 14.2.5. The Claimants may file a Rejoinder on Bifurcation by 16 January 2013 (six days from Respondent’s Reply on Bifurcation, if any).

14.2.6. The Tribunal shall decide on bifurcation within sixteen days (that is, by 1 February 2013).

14.2.7. If the Tribunal decides not to bifurcate and therefore to join the objections to jurisdiction to the merits (“scenario 1”), the schedule shall be as follows:

- (i) The Claimants and Respondent shall file document requests by 8 February 2013 (1 week from decision on bifurcation). By this date, Canada and Mexico shall file submissions under NAFTA Article 1128, if any, and any intending Amicus shall file Amicus Applications for Leave to File;
- (ii) The Claimants and Respondent shall make submissions, if any, on the Amicus Applications for Leave to File by 15 February 2013 (1 week from Amicus deadline);
- (iii) The Claimants and Respondent shall submit a response and any objections to the document requests by 1 March 2013 (3 weeks from document requests);
- (iv) The Tribunal shall decide on any Amicus Applications for Leave to File within two weeks from receiving submissions from the Claimants and Respondent, if any (that is, by 1 March 2013);
- (v) The Claimants and Respondent shall submit any responses to objections to the document requests and produce any documents to which they do not object by 15 March 2013 (2 weeks from objections to document requests);
- (vi) The Tribunal shall decide on any objections to document requests within two weeks (that is, by 29 March 2013);
- (vii) The Claimants and the Respondent shall produce any documents so ordered by the Tribunal within three weeks (that is, by 19 April 2013);
- (viii) The Claimants shall file a Reply on the merits and Counter-Memorial on jurisdiction by 24 May 2013 (112 days / 16 weeks from decision on bifurcation and 161 days / 23 weeks from the Counter-Memorial);
- (ix) The Respondent shall file a Rejoinder on the merits and Reply on jurisdiction by 20 September 2013 (119 days / 17 weeks from Reply); and

- (x) The Claimants shall file a Rejoinder on jurisdiction by 11 October 2013 (3 weeks from Reply on jurisdiction).
- (xi) The Claimants and Respondent shall provide notification of any witnesses and experts to be cross-examined at the hearing by 25 October 2013 (5 weeks from Rejoinder on the merits and 2 weeks from Rejoinder on jurisdiction).
- (xii) A pre-hearing telephone conference shall be held on 31 October 2013 (six days from notification of any witnesses and experts) at a time to be determined by the Tribunal.
- (xiii) The hearing shall be held from 18 to 26 November 2013, including if necessary on Saturday 23 November 2013.

14.2.8. If the Tribunal decides to bifurcate (“scenario 2”), the schedule shall be as follows:

- (i) Canada and Mexico shall file submissions under NAFTA Article 1128, if any, and any intending Amicus shall file Amicus Applications for Leave to File by 15 February 2013 (2 weeks from decision on bifurcation).
- (ii) The Claimants and Respondent shall make submissions, if any, on the Amicus Applications for Leave to File by 22 February 2013 (1 week from Amicus deadline).
- (iii) The Tribunal shall decide on any Amicus Applications for Leave to File within two weeks from receiving submissions from the Claimants and Respondent, if any (that is, by 8 March 2013).
- (iv) The Claimants shall file a Counter-Memorial on jurisdiction by 29 April 2013 (13 weeks from decision on bifurcation);
- (v) The Respondent shall file a Reply on jurisdiction by 26 July 2013 (12.5 weeks from Counter-Memorial); and
- (vi) The Claimants shall file a Rejoinder on jurisdiction by 11 October 2013 (11 weeks from Reply).
- (vii) The Claimants and Respondent shall provide notification of any witnesses and experts to be cross-examined at the hearing by 25 October 2013 (2 weeks from Rejoinder).
- (viii) A pre-hearing telephone conference shall be held on 31 October 2013 (six days from notification of any witnesses and experts) at a time to be determined by the Tribunal.

- (ix) The hearing on jurisdiction shall be held from 18 to 26 November 2013, including if necessary on Saturday 23 November 2013.

15. Document Production

(Arbitration (AF) Rules, Article 41)

- 15.1. As an additional general guide to the exercise of its discretion on requests for document production by the Parties, the Tribunal may take account of Articles 3 and 9 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010).
- 15.2. The Parties shall exchange requests for production of documents simultaneously, if any, by the applicable date set out in paragraph 14. Every request for production of documents shall identify with precision each document or category of documents sought and establish its relevance. The requests shall be recorded in a joint schedule (populating columns 1 through 4) in the form below. Such requests shall not be sent to the Tribunal or the ICSID Secretariat.
- 15.3. Each Party shall produce those documents requested that are in its possession, custody or control and to which it does not object by the applicable date set forth in paragraph 14.
- 15.4. Each Party shall state its response to each request and any objections to any request by the applicable date set forth in paragraph 14. Such responses and objections shall be recorded in column 5 of the joint schedule following the format below:

1	2	3	4		5	6	7
No.	Requesting Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses / Objections to Document Request	Reply to Objections to Document Request	Tribunal's Decisions
			Ref. to Submissions	Comments			

- 15.5. Each Party shall respond to these objections by the applicable date set forth in paragraph 14. Such responses shall be recorded in column 6 of the table above. Each Party shall provide the other Party and the Tribunal with the completed table (in both Word and PDF formats).

- 15.6. The Tribunal will make its best efforts to rule on the objections by the applicable date set forth in paragraph 14.
 - 15.7. A Party shall produce those documents for which no objection is sustained by the Tribunal by the applicable date set forth in paragraph 14.
 - 15.8. The failure to produce as ordered may result in adverse inferences drawn by the Tribunal as regards the merits of the defaulting Party's case.
 - 15.9. Further requests for the production of documents sought by either Party, if any, shall be permitted only at the discretion of the Tribunal. The request must be substantiated with reasons.
 - 15.10. Introduction by a Party of evidentiary materials following the filing of the last written submission will be permitted only in exceptional circumstances at the discretion of the Tribunal upon a reasoned written request followed by observations from the other Party. Any such request shall not attach the new evidentiary materials. If the Tribunal admits the new evidentiary materials, it may allow the opposing Party to submit evidence in rebuttal.
 - 15.11. For the avoidance of doubt, Power Point slides, demonstrative exhibits and charts or other similar materials in aid of argument may be used by any Party during any oral hearing, subject to the direction of the Tribunal and provided always that such slides or materials reflect evidence on the record (with citations to such evidence) and do not constitute or introduce any new evidence, whether directly or indirectly.
 - 15.12. The Tribunal may call upon the Parties to produce documents or other evidence in accordance with Article 41(2) of the Arbitration (AF) Rules.
16. Evidence: Witnesses and Experts, Written Statements and Reports, Supporting Documentation
Arbitration (AF) Rules, Articles 32 and 40-43
- 16.1. The Parties shall include all of the evidence on which they intend to rely, including written witness statements, expert opinions or reports, and other evidence in whatever form, with their written submissions.
 - 16.2. Duly certified copies of documents are not required unless the authenticity of the copy is contested and the Tribunal considers the certification necessary.
 - 16.3. Each Party shall number the accompanying documentation consecutively throughout the entire proceeding (C-001 or R-001 for documentary evidence and CLA-001 or RLA-001 for legal sources) and shall number the paragraphs of each of their written pleadings. Any documents previously submitted to which the Parties wish to refer shall not be refiled but use the earlier reference.

- 16.4. In their second written submissions, the Parties shall include only additional written witness testimony, expert opinion testimony, documents or other evidence that responds to or rebuts matters raised by the opposing Party's prior written submission.
- 16.5. The Tribunal shall not admit any testimony or other evidence that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist.
- 16.6. All witness statements or expert reports shall include the information contemplated by Articles 4(5) and 5(2) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) and be signed and dated by the submitting factual witness or expert witness.
- 16.7. By the applicable date set forth in paragraph 14, a Party may be called upon by the opposing Party to produce at the hearing for cross-examination any factual or expert witness whose written testimony has been advanced with the written submissions. Shortly after the Parties' notifications, the Tribunal will indicate the witnesses or experts not called by the Parties that it wishes to question, if any.
- 16.8. Examination by video-conference may be permitted for justified reasons at the discretion of the Tribunal.
- 16.9. The Tribunal may disregard the testimony of a witness or expert called to testify at the hearing who fails to appear at the hearing without justified reasons.
- 16.10. Witnesses and experts shall be examined by each Party under the control of the Tribunal. The Tribunal may examine the witness or expert at any time during the oral procedure.
- 16.11. The direct examination is given in the form of witness statements and expert reports. However, the Party presenting the witness may conduct a brief direct examination, to be limited as the Tribunal may hereafter order. Subject to the direction of the Tribunal as to relevance and fairness, there shall be no limitation on the scope of the cross-examination to the contents of the witness statement or expert report. Re-direct examination shall be limited to the subject of cross-examination.
- 16.12. Subject to the Confidentiality Agreement and Order, witnesses of fact shall be allowed in the hearing room for the opening statements and after having given their oral evidence and experts shall be allowed in the hearing room at any time, and during the examination of other experts.
- 16.13. Other matters regarding hearings shall be agreed upon by the Parties or decided by the Tribunal at a later stage.

17. Hearings (including Pre-Hearing Organisational Meetings)
Arbitration (AF) Rules, Article 21(2)

Hearing

17.1. The hearing shall be held on the date set forth in paragraph 14.

17.2. The Parties shall provide one week before the start of the hearing hard copies in A4/Letter format of a joint core-bundle of the most relevant factual exhibits, cross-referenced to the underlying exhibits, to each Member of the Tribunal and the Secretary. The core-bundle shall include no more than 100 exhibits in total. The Parties shall also provide at the start of the hearing USB drives containing an electronic copy of the core-bundle which can be updated with any presentations made during the hearing.

Pre-Hearing Organisational Meeting

17.3. There shall be a pre-hearing telephone conference between the Tribunal and the Parties on the applicable date set forth in paragraph 14 at a time to be determined by the Tribunal.

18. Records of Hearings
Arbitration (AF) Rules, Article 28(1)(g)

18.1. Sound recordings shall be made of all sessions. The sound recordings shall be provided to the Parties and the Tribunal Members.

18.2. The Secretary may prepare summary minutes of hearings or sessions upon request, under the direction of the Tribunal.

18.3. Verbatim transcript(s) in the procedural language shall be made of any sessions other than sessions on procedural issues. Unless otherwise agreed by the Parties or ordered by the Tribunal, the verbatim transcripts shall be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the Parties and the Tribunal on a same-day basis.

18.4. The Parties shall attempt to agree on any proposed corrections to the transcripts within 15 days of the later of the dates of receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter in the transcripts (“revised transcripts”). In case of disagreement between the Parties, the Tribunal shall decide upon such disagreement and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.

19. Access to Hearings

Arbitration (AF) Rules, Article 39(2); FTC Statement of 16 July 2004

19.1. All substantive hearings shall be broadcast to the public, via closed-circuit television broadcast to a public viewing room or an alternative form of broadcast to be agreed upon by the parties.

19.2. The Tribunal shall establish procedures for the protection of proprietary and confidential information.

20. Submission of Non-Disputing Parties

Arbitration (AF) Rules, Article 41(3); NAFTA Article 1128; FTC Statement of 7 October 2003

20.1. Pursuant to NAFTA Article 1128, non-disputing Parties may make submissions on questions of NAFTA treaty interpretation by the applicable date set forth in paragraph 14.

20.2. The Tribunal shall consider any application for permission to file a submission in this arbitration by an intending Amicus, in consultation with the Parties. Any Amicus application shall adhere to the requirements set forth in the recommendations of the FTC on non-disputing party participation, issued on 7 October 2003.

20.3. The Parties shall have a reasonable opportunity to make submissions on any application for leave to file a submission in this arbitration by an intending Amicus.

20.4. The Tribunal shall issue a ruling on any Amicus application for leave to file a submission, taking into account the recommendations of the FTC on non-disputing party participation.

20.5. If an application for permission to file a submission is granted, the Parties shall have the opportunity to present their observations on such submission.

21. Publication

Additional Facility Rules, Article 5; Administrative and Financial Regulation 22; Arbitration (AF) Rules, Article 53(3); FTC Note of 31 July 2001.

21.1. In accordance with the FTC Note of Interpretation of 31 July 2001, Annex 1137.4 of the NAFTA, and the Parties' Confidentiality Agreement and Order dated 24 July 2012, ICSID shall publish all procedural orders, decisions and award related to the proceeding.

21.2. In the event that any decision, order, or award of the Tribunal contains or refers to information designated as confidential in accordance with the Parties' Confidentiality Agreement and Order, the Tribunal shall prepare, or direct the disputing Party or Parties who designated the information in question as confidential to prepare for its approval upon consultation with the other Parties, if any, a redacted copy of the decision. Unless otherwise directed by the Tribunal, such redacted version shall be furnished to the Tribunal for approval within 45 days. As regards the award, the Tribunal shall be competent to approve the same without prejudice to Articles 55 to 57 of the Arbitration (AF) Rules.

22. Immunity from Suit

22.1. The arbitrators shall have immunity from suit consistent with the *lex loci arbitri* and any other applicable law (including, without limitation, immunity from any judicial process and liability).

22.2. After the award has been made and all possibilities for any interpretation, correction or supplemental decision have lapsed or been exhausted, no Member of the Tribunal shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration, save and to the extent required by any applicable law or court of competent jurisdiction.

23. Other Matter

23.1. Either Party may request an update from the Tribunal as to the timing of the award in the event that a reasonable period of time has gone by from the hearing on the merits and the award has not been issued.

[Signed]

V.V. Veeder
President of the Tribunal
Date: 29 November 2012