

COVINGTON & BURLING LLP

BEIJING BRUSSELS LONDON NEW YORK
SAN DIEGO SAN FRANCISCO SEOUL
SHANGHAI SILICON VALLEY WASHINGTON

MARNEY CHEEK

1201 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20004-2401

T 202.662.5267
mcheek@cov.com

14 April 2014

BY ELECTRONIC MAIL

Professor Albert Jan van den Berg
IT Tower, 9th Floor
Avenue Louise 480 B.9
1050 Brussels
Belgium

Mr. Gary Born
Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane
London, England W1K 1PS
United Kingdom

Sir Daniel Bethlehem
20 Essex Street
London, England WC2R 3AL
United Kingdom

**Re: Eli Lilly and Company v. Government of Canada
(NAFTA/UNCITRAL)**

Dear Members of the Tribunal:

I write on behalf of the parties in response to the President's electronic mail of 4 April 2014.

Regarding the scheduling of the first meeting of the parties within 60 days, each party will comment on its availability for a first meeting in a separate communication. The parties have agreed that they should be granted at least two weeks to produce written submissions on outstanding issues, and that such submissions should be exchanged simultaneously at least five days prior to the hearing at which they will be addressed.

The parties are enclosing drafts of a proposed procedural order and a proposed confidentiality order. All text has been agreed between the parties unless in brackets; the brackets reflect which party has proposed the text that is not agreed. In formulating these proposed orders, the parties have identified the following main outstanding issues:

14 April 2014

Page 2

- **Seat of arbitration.** Claimant submits the legal seat of arbitration should be in New York. Respondent submits that the legal seat should be in Ottawa or Toronto.
- **Bifurcation of liability and damages.** Claimant submits that liability and damages should be considered in a single phase. Respondent submits that liability and damages should be bifurcated.
- **Calendar.** The parties have not reached agreement regarding several aspects of the calendar for this proceeding. Each party is separately submitting its preferred calendar. The parties agree to the submission of preliminary pleadings (*i.e.*, a Statement of Claim and a Statement of Defense). The parties also agree that document production should follow the Memorial/Counter-Memorial phase. The parties have not reached agreement in general on the timing of written submissions. These differences on timing and sequencing are reflected in each party's respective calendar.
- **Confidentiality Order.** The parties have not reached agreement regarding several aspects of the Confidentiality Order:
 - Whether there is a need for an additional "Restricted Access Information" category of documents, in addition to a category of protected confidential information. Claimant submits that a Restricted Access Information category is warranted. Respondent submits that such a category is unnecessary;
 - Public access to oral hearings and the transcripts of those hearings. Claimant submits that hearings should be held *in camera*, pursuant to Article 25(4) of the UNCITRAL rules, and that the transcripts of those hearings should be confidential. Respondent seeks public access to hearings subject to the protection of confidential information, together with public access to redacted versions of the transcripts produced in such hearings;
 - Access of the United States and Mexico as non-disputing NAFTA parties to confidential materials filed in this arbitration. Claimant submits that such access should be granted on condition that the United States and Mexico agree to be bound by the Confidentiality Order. Respondent submits that United States and Mexico have access to all materials, including confidential materials, as of right; and
 - The relation between Canada's domestic legal obligations regarding the disclosure of information, and the provisions of the Confidentiality Order. Claimant submits that the Confidentiality Order should govern disclosure. Respondent submits that

14 April 2014

Page 3

it must respect its domestic legal obligations regarding document disclosure and seeks a statement to that effect in the Confidentiality Order.

The parties will separately provide their respective proposals for Annex B of the First Procedural Order (Arbitration Calendar).

Sincerely,

[Signed]

Marney L. Cheek

cc: Christophe Douaire de Bondy, counsel to the Government of Canada
Richard Dearden, co-counsel to Eli Lilly and Company
Lindsay Gastrell, Tribunal Secretary

Enclosures