IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 1976 UNCITRAL ARBITRATION RULES
BETWEEN

ELI LILLY AND COMPANY,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

(Case No. UNCT/14/2)

SUPPLEMENTAL SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this supplemental submission on questions of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 1131(1)

2. This Article requires the Tribunal to apply international law both in interpreting the provisions of Chapter Eleven, Section A, and as a rule of decision for claims of breach of Chapter Eleven, Section A. Article 1131(1) does not give the Tribunal jurisdiction to hear claims of breach of any obligations other than the obligations listed in Chapter Eleven, Section A. For example, Article 1131(1) does not expand the obligations listed in Article 1105 beyond any protections recognized as a part of the minimum standard of treatment under customary international law. We also note that Article 1110(1) reflects customary international law with respect to expropriation.

Article 1105(1), the customary international law minimum standard of treatment, and "denial of justice"

3. The United States refers to paragraphs 10 through 16 of its first 1128 submission explaining that customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation, and that these twin requirements must both be identified to support a finding that a rule of customary international law has emerged.

4. States may decide to extend protections under the rubric of "fair and equitable treatment" beyond what is required by customary international law. States may do so as a matter of policy

and not because of any sense of legal obligation. A state's decision to adopt autonomous fair and equitable treatment provisions that lack reference to international law or the minimum standard of treatment has no bearing on the content of Article 1105, which is expressly tied to the customary international law minimum standard of treatment of aliens. We note in this context that a majority of fair and equitable treatment provisions do not include any reference to international law. Moreover, there are significant textual differences among autonomous fair and equitable treatment provisions found in many investment treaties and their meanings are not in any manner uniform. As we have explained previously, the "existence of thousands of BITs calling for fair and equitable treatment does not by itself provide any basis" for claims made under Article 1105.[1]

5. The United States also refers to paragraph 21 of our first 1128 submission, and the authorities there cited, explaining that a denial of justice may occur where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment." A manifestly unjust judgment is one that amounts to a travesty of justice or is grotesquely unjust. As the United States explained in the *Mondev* proceedings, to be manifestly unjust a court decision must amount "to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man[.]"[2] Erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law. Neither the evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication may provide the basis for claiming a State has committed a denial of justice.

The relationship between Chapter 11 and Chapter 17 and alleged inconsistencies with Chapter 17

6. The United States observes that paragraph B.3 of the FTC Interpretation confirmed that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

7. With respect to NAFTA Article 1110, the United States refers the Tribunal to paragraphs 31 through 38 of our first 1128 submission. In addition, the United States offers the following supplemental points.

8. *First*, as it is one of limited jurisdiction, the Tribunal's mandate is to assess an investor's claims of a NAFTA Party's breach of the obligations set forth in Chapter 11, Section A. It is beyond the Tribunal's mandate to assess alleged breaches of obligations outside of Chapter 11, Section A.

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[1] *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America (Mar. 15, 2007), at 142.

[2] *Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID, Case No. ARB(AF)/99/2, Counter-Memorial on Competence and Liability of Respondent United States of America (June 1, 2001), at 45 (citing from *Chattin*, 4 R.I.A.A. 282 (Mex.-U.S. Gen. Cl. Comm'n 1927)).

9. *Second*, the NAFTA Parties drafted Article 1110(7) as an exclusion or a safe-harbor provision to be invoked by the host State. The NAFTA Parties drafted the provision mindful of a situation that could arise if a party were to allege that certain measures taken by patent authorities rise to the level of an expropriation under Article 1110. Where such measures are consistent with Chapter 17, the NAFTA Parties decided to exclude claims for expropriation under Article 1110.

10. If the provision were intended to be invoked by a claimant as an element of its expropriation claim or as a basis for jurisdiction for review of the host State's conduct under Chapter 17, the NAFTA Parties would have drafted Article 1110(7) in a positive form, as an inclusion. For example, the Parties could have drafted Article 1110(7) to provide that the listed measures presumptively constitute an expropriation where taken *inconsistently* with Chapter 17. The NAFTA Parties did not draft 1110(7) as an inclusion. The NAFTA Parties expressly sought to avoid the mischief of Chapter 11 claims arising from, for example, routine patent revocations or other actions otherwise consistent with Chapter 17.

11. *Third*, an inconsistency with Chapter 17 does not make a measure expropriatory under Article 1110.

12. The sequencing of the Tribunal's analysis matters here. An investor should first demonstrate to a Chapter 11 tribunal's satisfaction that an expropriation has occurred under Article 1110(1). Then, a host State may invoke Article 1110(7) as a safe harbor, provided that the challenged measures are consistent with Chapter 17. If a host State invokes Article 1110(7), a Chapter 11 tribunal may analyze whether the measure is consistent with the provisions of Chapter 17 once that defense is raised and the issue is properly before it. This sequence ensures the appropriately narrow role for Chapter 11 tribunals that is consistent with the text and does not expand your jurisdiction beyond the intent of the NAFTA Parties.

Respectfully submitted,

[signed]

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June 8, 2016