

**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. 4

ARBITRAL TRIBUNAL:

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

23 February 2016

CONSIDERING:

- (A) Section 18.1 of Procedural Order No. 1, according to which the Tribunal shall give appropriate directions in relation to any *amicus curiae* briefs filed in this matter, in exercise of its powers under Article 15 of the UNCITRAL Arbitration Rules (1976), taking into consideration the recommendation of the North American Free Trade Commission on non-disputing party participation of 7 October 2003 (“the FTC Statement”);
- (B) Section A.1 of the FTC Statement, according to which “[n]o provision of the North American Free Trade Agreement (“NAFTA”) limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party (a “non-disputing party”);
- (C) As regards standing, that Section B.1 of the FTC Statement refers to “a person of a Party, or that has a significant presence in the territory of a Party”. A Party is Canada, Mexico or the United States. Accordingly, applications by non-disputing parties who are not a person of, or have no significant presence in the territory of, Canada, Mexico or the United States cannot be entertained;
- (D) As regards independence, that it is to be inferred from (i) Section B.2(c) of the FTC Statement, which requires the application to describe the applicant, together with (ii) Section B.2(d) of the FTC Statement, which requires the application to disclose whether or not the applicant has any direct or indirect affiliation with any disputing party, that an *amicus* needs to be independent from the disputing parties;
- (E) That, however, membership of a disputing party in an applicant does not mean a lack of independence of the applicant *per se*. Rather, such membership is to be viewed in relation to Section B.6(a) of the FTC Statement, which directs the Tribunal to consider “the extent to which ... the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties”;
- (F) The nine applications for leave to file an *amicus curiae* brief submitted on 12 February 2016 (“the Applications”), from:
 - (i) a group of academics from the US, UK, Switzerland, South Africa and Nepal;
 - (ii) the Canadian Chamber of Commerce;
 - (iii) the Canadian Generic Pharmaceutical Association (“CGPA”);
 - (iv) the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) and the Centre for Intellectual Property Policy (“CIPP”);
 - (v) Dr Henning Grosse Ruse-Khan, Dr Kathleen Liddell and Dr Michael Waibel of the University of Cambridge (“University of Cambridge”);

- (vi) Innovative Medicines Canada (“IMC”) and BIOTECanada (“BTC”);
 - (vii) intellectual property law professors from universities in the United States (“The Seven IP Professors”);
 - (viii) the National Association of Manufacturers (“NAM”); and
 - (ix) Pharmaceutical Research and Manufacturers of America (“PhRMA”), Mexican Association of the Research Based Pharmaceutical Industry (“AMIIF”), and Biotechnology Innovation Organization (“BIO”);
- (G) The disputing parties’ comments on the Applications, filed on 19 February 2016;
- (H) That the Tribunal finds that all the Applications meet the criteria in Sections B.6(b) through (d) of the FTC Statement (“(b) the non-disputing party submission would address matters within the scope of the dispute; (c) the non-disputing party has a significant interest in the arbitration; and (d) there is a public interest in the subject-matter of the arbitration”);
- (I) That the relevant criterion, therefore, concerns Section B.6(a) of the FTC Statement (“the extent to which ... the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties”);
- (J) That, furthermore, the Tribunal is to ensure that (i) any non-disputing party submission avoids disrupting the proceedings, and (ii) neither disputing party is unduly burdened or unfairly prejudiced by such submissions;

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS ON THE APPLICATIONS:

1. Academics from the US, UK, Switzerland, South Africa and Nepal: granted with respect to Dr. Burcu Kilic (Washington DC, United States), Professor Brook K. Baker (Boston, United States), Professor Cynthia Ho (Chicago, United States), and Mr. Yaniv Heled J.S.D. (Atlanta, United States), denied with respect to the other academics for lack of standing.
2. Canadian Chamber of Commerce: granted.
3. CGPA: granted.
4. CIPPIC and CIPP: granted.
5. University of Cambridge: denied for lack of standing.

6. IMC and BTC: denied as the submission would not assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.
7. The Seven IP Professors: granted.
8. NAM: granted.
9. PhRMA, AMIIF and BIO: denied as the submission would not assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

For the Arbitral Tribunal

[signed]

Professor Albert Jan van den Berg

Date: 23 February 2016