

**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. 6

ARBITRAL TRIBUNAL:

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

27 May 2016

CONSIDERING:

- (A) The October 7, 2003 Statement of the NAFTA Free Trade Commission on non-disputing party participation (the “FTC Statement”);
- (B) Section 18 of Procedural Order No. 1, dated 26 May 2014 (“*Amici*”);
- (C) The Tribunal’s 5 November 2016 press release posted on the ICSID website, inviting non-disputing parties to apply to the Tribunal for permission to file a written submission as an *amicus curiae*. The Tribunal specified that, in accordance with the FTC Statement, *amicus curiae* submissions should “be concise, and in no case longer than 20 typed pages, including any appendices”;
- (D) Procedural Order No. 4, dated 23 February 2016, by which the Tribunal granted, in whole or in part, six applications for permission to file an *amicus curiae* submission;
- (E) The six *amicus curiae* submissions admitted into the record on 23 February 2016. Each submission complied with the page limitation set forth in the Tribunal’s 5 November 2016 press release. In addition, each submission referenced documents in support of the amicus’ asserted position. Some of the *amici* included internet links to certain of the referenced documents, while just one of the *amici* provided electronic copies of its referenced documents to the Tribunal and ICSID (which were later transmitted to the Parties);
- (F) The Parties’ observations on the *amicus curiae* submissions, filed on 22 April 2016;
- (G) Respondent’s letter of 25 May 2016, requesting “that the Tribunal clarify for the Parties that the documents referenced by the non-disputing parties in their *amicus curiae* submissions are, in fact, considered part of the record in this arbitration”. Respondent argues, *inter alia*, that:
 - (i) Neither Party has objected to the fact that the *amici* referenced documents in their submissions, despite the opportunity to do so in their observations of 22 April 2016;
 - (ii) If the Tribunal is unable to access the documents referenced by the *amici*, its ability to assess the weight of the *amicus curiae* submissions would be impeded, thus reducing the value of such submissions; and
 - (iii) Not admitting the referenced documents into the record would “make the Tribunal’s acceptance of the *amicus curiae* submissions seem to be nothing more than pretence, endangering the legitimacy of the process in the eyes of the public”;
- (H) Claimant’s letter of 26 May 2016, opposing “Canada’s attempt to introduce hundreds of new exhibits into the record five days before the beginning of the hearing”. Claimant argues, *inter alia*, that:

- (i) Admitting the referenced documents into the record would allow *amici* to circumvent the page limitation on their submissions, contrary to the guidance offered in the FTC Statement;
- (ii) The Parties had an opportunity to address the documents referenced in the *amicus curiae* submissions by exhibiting and discussing them in their observations of 22 April 2016; and
- (iii) Respondent's attempt to have the referenced documents admitted into the record at this late stage "would be disruptive to the proceeding and prejudicial to Claimant as it prepares for the hearing".

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:

1. The word "appendices" as used in Section B(3)(b) of the FTC Statement, and as used by the Tribunal in its 5 November 2016 press release, does not encompass exhibits or legal authorities. Rather, the term is intended to limit the amount of detailed information or technical data that a non-disputing party can produce and append to its *amicus curiae* submission in support of its position. An alternative interpretation would unreasonably restrict non-disputing parties from relying on public information; for example, a reference to a single voluminous document (such as a court or arbitral decision) would violate the page limitation.
2. Such a restrictive approach would, in the Tribunal's view, run counter to the purpose of *amicus curiae* submissions, which is to 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.
3. At the same time, the Tribunal is mindful of the practical difficulties of introducing every document referenced in any *amicus curiae* submission into the record in an orderly, predictable way.
4. Therefore, to avoid the risk of disrupting the proceeding while also ensuring that the Tribunal can take full advantage of the *amicus curiae* submissions in this case, the Tribunal instructs the Parties as follows:
 - (i) If either Party intends to rely for any reason on a document referenced in an *amicus curiae* submission which is not already part of the record, that Party must notify the other Party and the Tribunal at least 24 hours in advance;
 - (ii) The notice shall specify the reference number to be given to the document (the R- or C- number);

- (iii) If the notice is provided by email, an electronic copy of the relevant document shall be attached to the email, and a hard copy of the document shall be submitted in advance of its use at the hearing;
- (iv) If the notice is provided during the hearing, a hard copy of the relevant document shall be submitted at that time, and an electronic copy shall be submitted in advance of the use of the document at the hearing.

For the Arbitral Tribunal

[signed]

Professor Albert Jan van den Berg

Date: 27 May 2016