

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES (1976)**

BETWEEN:

ELI LILLY AND COMPANY

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

SUBMISSION ON PROCEDURAL ISSUES

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I. INTRODUCTION

A. Preliminary Statement

1. This submission addresses outstanding procedural issues in anticipation of the Arbitral Tribunal's first meeting with the disputing parties. In order to provide some context at this early stage of the proceedings, Canada provides some preliminary comments on the nature of this arbitration.
2. Claimant, Eli Lilly and Company, is seeking through this arbitration to appeal Canadian domestic court decisions, and to second-guess these courts' determinations that it failed to fulfill all statutory conditions for the grant of two separate patents for pharmaceutical compounds.
3. The decisions in question by the Federal Court of Canada accorded Claimant extensive due process and were based on vast amounts of expert and fact evidence, and on principled application of the relevant law.
4. Claimant was granted review of each decision by the Federal Court of Appeal, and the opportunity to seek leave to appeal to the Supreme Court of Canada.
5. Such "measures" cannot result in any breach of NAFTA Chapter Eleven obligations.
6. Claimant and its counsel now ask this Arbitral Tribunal to misapply Articles 1105 and 1110 of NAFTA, step in as an international court of appeal on the domestic application of substantive patent law, and condemn Canada to compensate Claimant for domestic court rulings.
7. An international investment tribunal constituted under NAFTA Chapter Eleven has no jurisdiction to substitute its views for the considered, principled and procedurally fair decisions of domestic courts, either in their appreciation of the facts, or in their interpretation of the relevant law.

8. *A fortiori*, Canada cannot be sanctioned under NAFTA Chapter Eleven for failing to override such domestic court decisions.

B. Procedural Issues

9. The present submission addresses outstanding issues relating to the initial procedural organisation of this arbitration, further to directions from the Arbitral Tribunal set out in the Tribunal Secretary's correspondence dated April 22, 2014.
10. As set out in their joint submission to the Arbitral Tribunal of April 14, 2014, Canada and Claimant have agreed on most threshold procedural issues governing the conduct of this proceeding.
11. Nonetheless, several important issues remain outstanding. As set out in the submission that follows, Canada's positions on these outstanding issues, which it asks the Arbitral Tribunal to endorse in its Procedural Order No. 1 and in the Confidentiality Order, are as follows:

Legal Seat of the Arbitration. Canada has proposed either Ottawa or Toronto, with the Ontario Superior Court (and not the Federal Court) having exclusive jurisdiction to hear any application in connection with this matter. In the alternative, Canada proposes The Hague.

Bifurcation of Liability from Damages. For reasons of efficiency, the present matter should be bifurcated between a first phase on liability, and a second phase on damages.

Procedural Calendar. Canada has proposed a calendar reflecting the actual time required to conduct each phase of the arbitration, assuming bifurcated proceedings.

Confidentiality Provisions:

Restricted Access Information. Canada has agreed to protect information designated in this matter as confidential, including sharing such information only with government officials directly involved in preparing Canada's response. There is no justification for imposing an additional "Restricted Access Information" category.

Canada's domestic disclosure obligations. Canada's domestic legal disclosure obligations should be recognized in the Confidentiality Order.

Access of the United States and Mexico to materials generated in this arbitration. As non-disputing Parties to this arbitration, the United States and Mexico are entitled to access to hearings and to materials generated in this arbitration, including confidential materials and transcripts, as of right.

Transparency of Proceedings:

Open hearings. Hearing in this matter should be open to the public, subject to protection of confidential information, consistent with the provisions of the UNCITRAL Rules on Transparency.

Access to transcripts. Transcripts from oral hearings (redacted to protect any confidential information) should be made available to the public.

II. LEGAL SEAT OF THE ARBITRATION

A. Overview

12. In the circumstances of this arbitration, either Toronto or Ottawa would be the most appropriate legal seat of the arbitration. Both are more suitable than New York City. The domestic legal framework for arbitration, availability of judicial assistance, and subject-matter connections to the present dispute drive toward this conclusion, as do considerations of convenience. If there are doubts about the neutrality of Ottawa or Toronto, on the basis that the Federal Court whose decisions are at issue in this arbitration could also sit in review of the arbitral award, that concern can be fully addressed: Canada undertakes to bring applications in connection with this arbitration solely before the Ontario Superior Court. Moreover, the unique circumstances of this arbitration raise concerns about the neutrality of a U.S. legal seat. In the alternative, Canada proposes The Hague, as a compromise neutral seat.

B. Applicable Law

13. As the disputing parties have not agreed on the legal seat of the arbitration, the Arbitral Tribunal must select the seat, pursuant to the relevant provisions of the NAFTA¹ and the UNCITRAL Arbitration Rules 1976 (“UNCITRAL Rules”) under which this dispute has been brought.² Article 1130 of the NAFTA provides:

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:

[.....]

- (b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.

Article 16(1) of the UNCITRAL Rules provides:

Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

14. When selecting the legal seat of the arbitration, NAFTA Tribunals regularly take guidance from UNCITRAL Notes on Organizing Arbitral Proceedings (“UNCITRAL Notes”).³ Paragraph 22 of the UNCITRAL Notes identifies several “more prominent factors” relevant to determining the place of arbitration:

- (a) suitability of the law on arbitral procedure of the place of arbitration;
(b) whether there is a multilateral or bilateral treaty on enforcement of

¹ North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, 32 ILM 289 (entered into force 1 January 1994), Chapter Eleven [NAFTA].

² *UNCITRAL Arbitration Rules*, 1976. 25 ILM 715 (adopted by the General Assembly on 15 December 1976) [UNCITRAL Rules], **RL-001**.

³ UNCITRAL Notes on Organizing Arbitral Proceedings, 1996, **RL-002**. See e.g., *Canfor Corporation v. United States of America* (UNCITRAL), Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, 23 January 2004, para. 15, **RL-003**; *Ethyl Corporation v. Government of Canada* (UNCITRAL), Decision Regarding the Place of Arbitration, 28 November 1997, p. 5, **RL-004**.

arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.

15. Three of the factors in paragraph 22 of the UNCITRAL Notes are legal considerations directly relevant to the suitability of a legal seat of arbitration (factors (a), (b), and (e)). Two of the factors are practical considerations less relevant to the selection of a legal seat, since the Arbitral Tribunal may conduct hearings in locations other than the legal seat (factors (c) and (d)).⁴ Nevertheless, NAFTA Tribunals often refer to these practical considerations in determining the legal seat of the arbitration.⁵
16. Neutrality of the legal seat of the arbitration is also regularly considered by NAFTA Tribunals, despite that it is not a factor listed in of the UNCITRAL Notes.⁶
17. In the circumstances of this arbitration, considering the legal and practical factors set out in the UNCITRAL Notes and the issue of neutrality, the most appropriate legal seat is Toronto or Ottawa, both located in the province of Ontario.

C. Legal Factors in the UNCITRAL Notes Support An Ontario Legal Seat

a) Ontario Has More Suitable Law on Arbitral Procedure

18. The law on arbitral procedure in Canada, and Ontario specifically, is of the highest international standard. Both Canada and Ontario are “Model Law” jurisdictions,

⁴ *UNCITRAL Rules*, Article 16(2), **RL-001**.

⁵ See e.g. *Ethyl*, Decision Regarding the Place of Arbitration, p. 10, **RL-004**; *Methanex Corporation v. United States of America* (UNCITRAL), The Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of the Arbitration, 31 December 2000, para. 29, **RL-005**.

⁶ See e.g. *Ethyl*, Decision Regarding the Place of Arbitration, p. 10, fn 12, **RL-004**; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Procedural Order No. 1, Decision of the Tribunal on the Place of Arbitration, 7 October 2009, **RL-006**; *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Decision on Venue of the Arbitration, 26 September 2001, para. 21, **RL-007**.

meaning that the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) applies to NAFTA arbitrations seated in Toronto or Ottawa.⁷ In contrast, the Model Law would not apply to arbitrations seated in New York City, which would instead be governed by the U.S. *Federal Arbitration Act* (“FAA”).⁸

19. The large number of NAFTA arbitrations seated in Ontario attests to the suitability of its law on arbitral procedure. An Ontario city has been selected as legal seat in 16 NAFTA arbitrations (14 in Toronto⁹ and 2 in Ottawa¹⁰). This amounts to

⁷ The Model Law is implemented through Canada’s *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), **RL-008** and Ontario’s *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, **RL-009**. In the present matter, the federal *Commercial Arbitration Act* would apply, as the Canadian government is party to the dispute. See *Canada (Attorney General) v. S.D. Myers Inc.*, [2004] 3 F.C.R. 368, para. 21 (“S.D. Myers Inc.”) **RL-010**.

⁸ *US Federal Arbitration Act*, 9 U.S.C. §§ 1-16, **RL-011**.

⁹ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL), Procedural Order No. 1, 9 April 2009, (“*Bilcon*”) para. 17, **RL-012**; *Melvin J. Howard, Centurion Health Corp. & Howard Family Trust v. Government of Canada* (UNCITRAL), Correction of Order for the Termination of the Proceedings and Award on Costs, 9 August 2010, para. 4, **RL-013**; *Ethyl*, Decision Regarding the Place of Arbitration, **RL-004**; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3), Procedural Order No. 1, 24 January 2013, para. 23, **RL-014**; *Mobil*, Procedural Order No. 1, **RL-006**; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, para. 327, **RL-015**; *St. Marys VCNA, LLC v. Government of Canada* (UNCITRAL), Procedural Order No. 1, 10 September 2012, para. 6.1, **RL-016**; *Windstream Energy LLC v. Government of Canada* (UNCITRAL), Procedural Order No. 1, 16 September 2013, para. 3.1, **RL-017**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007, para. 24, **RL-018**; *Robert Azinian, Kenneth Davitian, & Ellen BACA v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, para. 41, **RL-019**; *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award, 19 June 2007, **RL-020**; *Cargill, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, para. 22, **RL-021**; *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008, para. 17, **RL-022**; *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/01), Decision on the Preliminary Question, 17 July 2003, para. 18, **RL-023**.

¹⁰ *Chemtura Corporation v. Government of Canada* (UNCITRAL), Procedural Order No. 1, 21 January 2008, para. 20, **RL-024**; *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB/(AF)/99/1), Procedural Order No. 1 Concerning the Place of Arbitration, 3 April 2000, **RL-025**.

approximately 40% of all NAFTA arbitrations to date. In contrast, New York City has only been designated as legal seat in three NAFTA arbitrations.¹¹

20. The law on arbitral procedure in Ontario offers two distinct advantages in the circumstances of this arbitration. First, the grounds for setting aside an arbitral award in Ontario courts are narrower and more certain than those applicable in New York City. Second, an arbitration seated in Ontario would have superior access to any judicial assistance, should it be required in this case.

i) **Ontario Law on Review of Arbitral Awards Offers Certainty**

21. The grounds for review of arbitral awards in Ontario are narrow and have been consistently applied. They are confined to those set out in the Model Law. Canadian courts have a strong track record of faithfully applying the Model Law, and rejecting invitations to review arbitral awards on the merits.¹² Indeed, the relative strength of Canada's legal framework for arbitration was recognized in a 2010 World Bank study, which ranked Canada higher than the United States on a "strength of laws" index for arbitrating commercial disputes.¹³
22. Canadian courts, and Ontario courts in particular, have consistently shown deference to NAFTA Chapter Eleven awards.¹⁴ Most recently, in *Mexico v.*

¹¹ *Apotex Inc. v. United States of America* (UNCITRAL), Procedural Order No. 1, 16 December 2010, para. 19, **RL-026**; *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), First Procedural Order, 29 November 2012, para. 9.1, **RL-027**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL), Award, 12 January 2011, p. 63, **RL-028**.

¹² See e.g. *United Mexican States v. Feldman*, Decision on Application to Set Aside Award, (Ont S.C.J.) December 3, 2003, para. 53 ("*Feldman*"), **RL-029**; *Bayview Irrigation District No. 11 et al. v. United Mexican States* (Ont. S.C.J.) May 5, 2008, para.11 ("*Bayview*"), **RL-030**; *S.D. Myers Inc.*, para.43, **RL-010**

¹³ World Bank, *Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 countries* (Washington, D.C.: World Bank, 2010), pp. 98, 164, ("*World Bank Report*"), **RL-031**.

¹⁴ *Mexico v. Cargill Incorporated*, 2011 ONCA 622, October 4, 2011 ("*Cargill Appeal*"), **RL-032**; *Mexico v. Cargill Incorporated*, 2010 ONSC 4656, August 26, 2010 ("*Cargill*"), **RL-033**; *Bayview*, **RL-030**; *United Mexican States v. Feldman*, Decision on Application to Set Aside Award, (Ont. S.C.J.) December 3, 2003 ("*Feldman*"), **RL-029**; *United Mexican States v. Feldman*, [2005] O.J. No. 16 (C.A.), January 11,

Cargill, the Ontario Court of Appeal held that a high degree of deference must be accorded to NAFTA Tribunals, upholding the Ontario Superior Court’s dismissal of a set-aside application. The Court of Appeal affirmed that reviewing courts should interfere only “sparingly or in extraordinary cases”¹⁵ and must limit interventions “in the strictest terms ... including on issues of jurisdiction.”¹⁶ The Court of Appeal stressed that reviewing courts must be circumspect in determining that a challenge is truly jurisdictional, narrowly define any such question, and not stray into review of the merits.¹⁷ As a ruling of the Ontario Court of Appeal, the framework articulated in *Cargill* is binding on the Ontario Superior Court in applications to set-aside NAFTA Chapter Eleven awards.

23. Earlier cases show that high deference to NAFTA Tribunals has been the consistent practice of Ontario courts. In *Mexico v. Feldman*, the Ontario Superior Court refused Mexico’s challenge of an arbitral award, holding that the court’s jurisdiction for review is strictly limited to the grounds set out in the Model Law.¹⁸ The Ontario Court of Appeal upheld the ruling, commenting that “international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly.”¹⁹ The Court of Appeal went on to state that “our domestic law in Canada dictates a high degree of deference for decisions of specialized tribunals generally and for awards of consensual arbitration tribunals in particular.”²⁰

2005 (“*Feldman Appeal*”), **RL-034**; *S. D. Myers Inc.*, **RL-010** and *United Mexican States v. Metalclad Corporation*, 2001 BCSC 664 (“*Metalclad*”) **RL-035**.

¹⁵ *Cargill Appeal*, para. 33, **RL-032**

¹⁶ *Cargill Appeal*, para. 46, **RL-032**

¹⁷ *Cargill Appeal*, paras. 47,74, **RL-032**

¹⁸ *Feldman*, para. 53, 77, **RL-029**

¹⁹ *Feldman Appeal*, para. 34, **RL-034**.

²⁰ *Feldman Appeal*, para. 37, **RL-034**.

24. When refusing to set aside the *Bayview v. Mexico* NAFTA Chapter Eleven award, the Ontario Superior Court noted that “[t]he court is not permitted to engage in a hearing *de novo* on the merits of the Tribunal’s decision or to undertake a review such as that conducted by a court in relation to the decision of a domestic tribunal.”²¹
25. Likewise, in *Canada v. S.D. Myers*, the only case in which Canada applied to set aside a NAFTA Chapter Eleven award against it, the Federal Court of Canada dismissed Canada’s application and emphasized “the principle of non-judicial intervention in an arbitral award.”²²
26. In contrast, the grounds for review of arbitral awards in the United States are less certain. The United States is not a Model Law jurisdiction. Review of arbitral awards is instead governed by the FAA. U.S. circuit courts are divided over whether, and in what manner, the FAA permits review of arbitral awards on the basis of manifest disregard of the law.²³ The U.S. Supreme Court decision in *Hall Street* left ambiguous the existence, scope, and operation of the manifest disregard doctrine.²⁴ Several circuit courts have subsequently held that manifest disregard is no longer a valid ground for vacating arbitral awards.²⁵ Others have held that manifest disregard survived *Hall Street*, under varying interpretations of how the doctrine operates.²⁶ The U.S. Court of Appeals for the Second Circuit – which binds the U.S. District Court in New York City – has held that manifest disregard persists as a “judicial gloss” on the enumerated statutory grounds for vacating

²¹ *Bayview*, para. 11, **RL-030**.

²² *S.D. Myers Inc.*, para. 42, **RL-010**.

²³ *Schafer v. Multibrand Corp.*, 2014 WL 30713, p. 4 (C.A.6 (Mich.)) **RL-036**.

²⁴ *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1404 (2008), **RL-037**.

²⁵ See e.g. *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir 2009) **RL-038**.

²⁶ See e.g. *Coffee Beanery, Ltd. v. WW LLC*, 300 Fed.Appx. 415, 2008 WL 4899478, 418 (C.A.6 (Mich.)) **RL-039**; *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012), **RL-040**.

arbitral awards.²⁷ It is uncertain how this unsettled area of U.S. jurisprudence on review of arbitral awards will develop in the coming years.

ii) **Ontario Will Provide Better Access to Judicial Assistance**

27. Judicial assistance for the taking of evidence in this arbitration will be more efficient if the legal seat of arbitration is Ottawa or Toronto, rather than New York City. As observed by the Arbitral Tribunal in *Mobil*, “to the extent that potential evidentiary issues might arise, they are more likely to be addressed expeditiously and efficiently by the courts of the jurisdiction that is most closely connected to the facts of the dispute.”²⁸ In *Mesa*, where Claimant alleged that key evidence was located in Florida, the Arbitral Tribunal selected Miami as the legal seat of arbitration because it believed that Florida courts were best placed to provide judicial assistance for the taking of evidence within Florida.²⁹
28. In the present arbitration, evidentiary issues requiring judicial assistance are more likely to arise in Canada than in the United States. Canada is where Claimant made its investment, where the challenged measures were taken, and where Claimant alleges it suffered damages. As such, the evidence necessary to resolve this dispute is most likely to be located in Canada.
29. If the legal seat of the arbitration is Ottawa or Toronto, the Arbitral Tribunal may directly issue a letter of request to Canadian courts for assistance in the taking of evidence.³⁰ This is because the Model Law provides for requests for court

²⁷ *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d. 85, 94 (2d Cir. 2008), **RL-041**.

²⁸ *Mobil*, Procedural Order 1, para. 40, **RL-006**.

²⁹ *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL), Procedural Order No. 3, 28 March 2013, para. 55, **RL-042**.

³⁰ *B.F. Jones Logistics Inc. v. Rolko* (2004), 72 O.R. (3d) 355 (Ont. Sup. Ct.) (“*Rolko*”), **RL-043**; *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A* (1999), O.R. (3d) 183, aff’d 136 O.A.C. 113, para. 50, **RL-044**.

assistance *within* the jurisdiction in which the arbitration is seated.³¹ As held by the Ontario Superior Court in *B. F. Jones Logistics Inc. v. Rolko*, the Model Law “provides for the enforcement by Ontario courts of Letters of Request sent by Ontario arbitrators.”³²

30. Conversely, Canadian courts cannot enforce a letter of request received directly from an Arbitral Tribunal seated in the United States. Foreign letters of request must be issued by courts of law or equity to be enforced by Canadian courts.³³ Consequently, to obtain Canadian judicial assistance, an Arbitral Tribunal seated in New York City would first have to petition a U.S. court, which would in turn issue a letter of request to the Canadian court, which would then make a determination on whether to enforce the request.³⁴ All of this reduces the efficiency of the arbitral process.
31. More generally, the Canadian legal framework for providing judicial assistance is highly regarded. The World Bank rated Canada significantly higher than the United States on an index measuring “extent of judicial assistance” for arbitration of commercial disputes.³⁵

b) Canada is a Party to the New York Convention

32. Another factor in the UNCITRAL Notes is whether a treaty exists that governs the “...enforcement of arbitral awards between the State where the arbitration takes

³¹ *Commercial Arbitration Act*, Schedule 1, Article 27, **RL-008** ; *International Commercial Arbitration Act*, Schedule 1, Article 27, **RL-009**.

³² *Rolko*, para. 7, **RL-043**.

³³ Kenneth C. MacDonald, *Cross-Border Litigation: Interjurisdictional Practice and Procedure* (Aurora, Ont.: Canada Law Book, 2009), p. 202-203, **RL-045**; See also *McCarthy v. Menin*, [1963] 2 O.R. 154, 38 D.L.R. (2d) 660, paras.7- 9, **RL-046**; *Rolko*, para. 7, **RL-043**.

³⁴ See *McCarthy v. Menin*, para. 7, **RL-046**.

³⁵ *World Bank Report*, p. 98, 164, **RL-031**.

place and the State or States where the award may have to be enforced.”³⁶ This factor is neutral as between legal seats of arbitration in Canada and the United States, as both countries are party to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“New York Convention”).³⁷

c) Ontario is the Location of the Dispute and of Relevant Evidence

33. The location of the subject-matter in dispute and proximity to the evidence strongly favour Toronto or Ottawa over New York City as the legal seat of the arbitration. This factor in the UNCITRAL Notes has been the decisive consideration for numerous NAFTA Tribunals in selecting a legal seat.³⁸
34. The subject-matter in dispute refers to the measures alleged to be inconsistent with the obligations of NAFTA Chapter Eleven.³⁹ In *Ethyl*, the Arbitral Tribunal named Toronto as the legal seat of the arbitration, over New York City, because the subject-matter in dispute was federal Canadian legislation.⁴⁰ Similarly, the *ADF*, *Canfor*, and *Methanex* Tribunals all found that because the subject-matter of the dispute involved alleged breaches of NAFTA Chapter Eleven by the United States, Washington was appropriate to designate as the legal seat of the arbitration.⁴¹ The Arbitral Tribunal in *Mobil* noted there was no disagreement that the subject-matter

³⁶ UNCITRAL Notes, para. 22, **RL-002**.

³⁷ United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958, 330 U.N.T.S. 38 (“New York Convention”), **RL-047**.

³⁸ *Mobil*, Procedural Order No. 1, paras. 38, 42, **RL-006**; *Canfor*, Decision on the Place of Arbitration, para. 36, **RL-003**; *Ethyl*, Decision Regarding the Place of Arbitration pp. 8, 10, **RL-004**.

³⁹ *Ethyl*, Decision Regarding Place of Arbitration, p. 8, **RL-004**; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Procedural Order No. 2 Concerning the Place of Arbitration, para. 20, **RL-048**; *Canfor*, Decision on the Place of Arbitration, paras. 34-36, **RL-003**; *Methanex*, The Written Reasons for the Tribunal’s Decision of 7th September 2000 on the Place of Arbitration, para. 33, **RL-005**.

⁴⁰ *Ethyl*, Decision Regarding the Place of Arbitration, pp. 5, 8, **RL-004**.

⁴¹ *ADF*, Procedural Order No. 2, para. 20, **RL-048**; *Canfor*, Decision on the Place of Arbitration, paras. 34-37, **RL-003**; *Methanex*, The Written Reasons for the Tribunal’s Decision of 7th September 2000 on the Place of Arbitration, paras. 33-34, 40, **RL-005**.

of the dispute was located in Canada and, on that basis, selected Toronto as the legal seat of the arbitration.⁴²

35. Here, the subject-matter in dispute is overwhelmingly concentrated in Canada, and specifically in Ottawa and Toronto. The measures at issue concern two Canadian court proceedings, which unfolded entirely in Toronto and Ottawa. Those proceedings involved the application of the federal *Patent Act*, a law passed by the Parliament of Canada and administered by Industry Canada, both of which are situated in Ottawa. The court proceedings resulted in the invalidation of two patents held by Claimant, which had conferred monopoly rights within the territory of Canada. The patents at issue were originally issued by the Patent Office, located in Ottawa. Claimant's patent applications were handled by Canadian patent agents located in Ottawa. Claimant alleges that it incurred damages relating to its monopoly rights in the Canadian market, and to its enterprise Eli Lilly Canada, Inc., located in Toronto.
36. Given the concentration of the subject-matter of the dispute in Toronto and Ottawa, these cities are most proximate to the evidence – both documentary and testimonial – that will be required in this arbitration. This is likely to include evidence relating to the court proceedings at issue, the substance of Canadian patent law, the patent applications at issue, Patent Office practice, sales of Claimant's patented products in the Canadian marketplace, and the operation of Claimant's enterprise, Eli Lilly Canada, Inc.
37. In contrast, there is simply no subject-matter connection to New York City and no basis to conclude that New York City is proximate to any of the evidence that will be relevant in this matter.

⁴² *Mobil*, Procedural Order No. 1, para. 42, **RL-006**.

D. Practical Factors in the UNCITRAL Notes Further Support Ontario

a) Both Toronto and Ottawa are More Convenient than New York City

38. Numerous NAFTA Chapter Eleven Tribunals have given weight to the convenience of the parties and arbitrators in determining the legal seat of arbitration.⁴³ NAFTA Tribunals have recognized that the location of counsel,⁴⁴ involved government departments,⁴⁵ and implicated investor subsidiaries⁴⁶ are all relevant to determining the convenience of the parties.
39. In the circumstances of this case, either Toronto or Ottawa⁴⁷ would be more convenient legal seats than New York City. Counsel for Canada and co-counsel for Claimant are based in Ottawa. The various Canadian government departments and agencies involved in this arbitration are all located in Ottawa.⁴⁸ Finally, Claimant's Canadian enterprise, Eli Lilly Canada, Inc., is located in Toronto.
40. In contrast, none of the parties or their counsel is based in New York City.
41. Both Ottawa and Toronto have convenient air connections to Washington, D.C. and Europe. Toronto is a major air transport hub, with multiple daily direct flights to Washington, D.C. and European centres. Ottawa also has multiple daily direct

⁴³ See e.g. *Ethyl*, Decision Regarding the Place of Arbitration, pp. 6-7, **RL-004**; *Methanex*, The Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration, paras. 28-31, **RL-005**; *Canfor*, Decision on the Place of Arbitration, paras. 27-28, **RL-003**; *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL), Decision of the Tribunal on the Place of Arbitration, 17 October 2001, para. 16, **RL-049**; *ADF*, Procedural Order No. 2 Concerning the Place of Arbitration, para. 18, **RL-048**.

⁴⁴ *Ethyl*, Decision Regarding the Place of Arbitration pp. 7, 10, **RL-004**; *Methanex*, The Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration, para. 28, **RL-005**, *UPS*, Decision of the Tribunal on the Place of Arbitration, para. 13, **RL-049**.

⁴⁵ *ADF*, Procedural Order No. 2, para. 18, **RL-048**; *Methanex*, The Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration, para. 29, **RL-005**.

⁴⁶ *Ethyl*, Decision Regarding the Place of Arbitration, p. 6, **RL-004**.

⁴⁷ Ottawa and Toronto are one hour apart by plane and four hours apart by train or car.

⁴⁸ These include Foreign Affairs, Trade and Development Canada, Industry Canada, and the Canadian Intellectual Property Office (CIPO).

flights to Washington, D.C., daily direct flights to London, and convenient connections to other global centres.

b) Both Toronto and Ottawa offer Support Services at Competitive Cost

42. NAFTA Tribunals have considered the availability and cost of support services in selecting the legal seat of the arbitration.⁴⁹ In every case where Ottawa or Toronto was proposed, NAFTA Tribunals have recognized that the support services in these cities are equally suitable to those in other global centres.⁵⁰ Toronto’s newly-opened bespoke arbitration facility offers a full range of required services at highly competitive rates.⁵¹ Hearings on the merits in *Chemtura* were held in Ottawa in a centrally-located, well-adapted and inexpensive conference centre, adjacent to Ottawa’s principal hotels. NAFTA Tribunals have recognized that Ottawa and Toronto offer a relative cost advantage over U.S. centres such as New York City in the provision of support services.⁵²

E. The Ontario Superior Court would be Neutral

43. Neutrality has been considered by NAFTA Tribunals in determining the legal seat of the arbitration, though this factor is not expressly referred to in the NAFTA, UNCITRAL Rules, or UNCITRAL Notes.⁵³ In the circumstances of this

⁴⁹ See e.g. *Canfor*, Decision on the Place of Arbitration, paras. 29-30, **RL-003**.

⁵⁰ *Ethyl*, Decision Regarding the Place of Arbitration, p. 7, **RL-004** (observing that “it is clear that all necessary support services for this arbitration are available” in Ottawa, Toronto, and New York); *Canfor*, Decision on the Place of Arbitration, paras. 29-30, **RL-003**; *Detroit International Bridge Company v. Government of Canada* (UNCITRAL), Procedural Order No. 2, 28 January 2013, para. 24, **RL-050**.

⁵¹ See Letter from Arbitration Place re: Quotation for Arbitration Hearing, April 23, 2014 **RL-051**. See also Kyriaki Karadelis, *Try Toronto?* Global Arbitration Review, August 16, 2012, **RL-052**.

⁵² *Ethyl*, Decision Regarding the Place of Arbitration, para. 7, **RL-004**; *Methanex*, The Written Reasons for the Tribunal’s Decision of 7th September 2000 on the Place of Arbitration, para. 32, **RL-005**.

⁵³ “Perception of a place as neutral” was expressly excluded from an earlier draft of the UNCITRAL Notes as a criterion for determining the place of arbitration: Report to UNCITRAL, 28th session, Vienna, XXVI UNCITRAL Yearbook, 1995, p. 44, para. 337, **RL-053**.

arbitration, the issue of neutrality does not support the selection of New York City over Ottawa or Toronto as the legal seat of the arbitration.

44. This matter concerns Claimant’s attempt to characterise certain decisions of the Federal Court of Canada, finding two of Claimant’s patents invalid following full court review, as violations of Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation) of the NAFTA. Claimant may argue that neither Ottawa nor Toronto are neutral venues in that, with either legal seat, Canada could thereafter seek review of the Arbitral Tribunal’s award before the same Federal Court whose decisions are the “measures” at issue in this arbitration. Canada can address and resolve this concern entirely. The Ontario Superior Court and Federal Court of Canada have concurrent jurisdiction to hear applications relating to a NAFTA Chapter Eleven arbitration seated in Ontario involving a claim against the Government of Canada.⁵⁴ However, in the event that Ottawa or Toronto is selected as the legal seat of the arbitration, Canada undertakes to file any applications concerning this arbitration solely with the Ontario Superior Court, and not with the Federal Court. Canada made this same undertaking in *Mobil*, and the NAFTA Tribunal ordered that the Ontario Superior Court would be the court of the legal place of arbitration with exclusive jurisdiction with regard to that arbitration.⁵⁵
45. Canada’s undertaking will ensure that applications concerning this arbitration will be heard by the Ontario Superior Court, which is entirely independent of the Federal Court whose measures are at issue in this arbitration. The Canadian legal system makes a distinction between the Federal Court and provincial Superior

⁵⁴ *Commercial Arbitration Act*, s. 6, Schedule 1, Art. 27, 34, **RL-008**.

⁵⁵ *Mobil*, Procedural Order No. 1, para. 43, **RL-006**; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Procedural Order No. 2, Decision of the Tribunal on the Court of the Place of Arbitration, 5 November 2009, **RL-054**; similarly, in *Gallo*, the arbitral tribunal, in selecting Toronto as the legal seat of the arbitration, required that Canada stand by its submissions with regard to the content of Canadian law on review of arbitral awards in the event of set aside proceedings. *Vito G. Gallo v. Government of Canada* (UNCITRAL), Letter from Tribunal to the Disputing Parties on Procedural Issues, 4 June 2008, para. 26, **RL-055**.

Court. They are independent of one another, with different sources of legal authority and separate rosters of judges.⁵⁶ There is no hierarchy between them. A case cannot be appealed from the Ontario Superior Court to the Federal Court of Appeal,⁵⁷ and decisions of the Federal Court of Appeal do not bind the Ontario Superior Court.⁵⁸

46. The Ontario Superior Court had no involvement in the Federal Court decisions at issue in this arbitration. More generally, the Ontario Superior Court lacks jurisdiction to make *in rem* declarations of patent invalidity, which are within the exclusive jurisdiction of the Federal Court.⁵⁹ The Ontario Superior Court does retain concurrent jurisdiction to make *in personam* validity rulings, for example to give effect to a defence of invalidity in the context of patent infringement proceedings.⁶⁰ However, given its restricted patent law jurisdiction, it is extremely rare that issues of patent validity come before the Ontario Superior Court.
47. There is no basis to think that the Ontario Superior Court would lack neutrality in the present arbitration. Claimants and NAFTA Tribunals have repeatedly shown their confidence in the neutrality of Canadian courts, selecting a Canadian legal seat

⁵⁶ *The Constitution Act*, 1867, 30 & 31 Vict c 3, ss. 96, 101, <http://laws-lois.justice.gc.ca/eng/Const//page-5.html#docCont>; *Federal Courts Act*, RSC 1985, c F-7, <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-f-7/latest/rsc-1985-c-f-7.html>; *Courts of Justice Act*, RSO 1990, c C.43, <https://www.canlii.org/en/on/laws/stat/rso-1990-c-c43/latest/>.

⁵⁷ *Federal Courts Act*, ss. 27-28, <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-f-7/latest/rsc-1985-c-f-7.html>.

⁵⁸ *Bedard v. Issac*, 1971 CarswellOnt 320, [1972] 2 O.R. 391, 25 D.L.R. (3d) 551, rev'd on other grounds [1974] S.C.R. 1349, para. 17 (Ont. H.C.), **RL-056**; *R. v. Davies*, 2013 ONCJ 639, [2013] O.J. No. 5429, 110 W.C.B. (2d) 556, para. 53 (Ont. C.J.), **RL-057**.

⁵⁹ *Federal Courts Act*, s. 20(1)(b) <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-f-7/latest/rsc-1985-c-f-7.html>; *Patent Act*, RSC, 1985, c. P-4, s. 60, <http://www.laws-lois.justice.gc.ca/eng/acts/P-4/FullText.html>; *Roche Palo Alto LLC v. Apotex Inc.*, 2005 CarswellOnt 6691, 45 CPR (4th) 248, para. 5 (Ont. S.C.J.), **RL-058**; *University of Toronto v. John N. Harbinson*, 2005 CarswellOnt 7307, 46 C.P.R. (4th) 175, 78 O.R. (3d) 547, para. 21 (Ont. S.C.J.), **RL-059**.

⁶⁰ *Sno Jet Ltd. v. Bombardier Ltee*, 1975 CarswellNat 497, 22 C.P.R. (2d) 224, para. 13 (FC TD), **RL-060**.

in 12 of 16 NAFTA Chapter Eleven claims against Canada.⁶¹ Similarly, a U.S. legal seat has been chosen in all NAFTA Chapter Eleven claims against the United States, including cases where U.S. court decisions were at issue.⁶² NAFTA Tribunals have repeatedly acknowledged the independence, integrity, and professionalism of Canadian courts.⁶³ On the only occasion where Canada sought review of a NAFTA Chapter Eleven award against it, the Federal Court dismissed Canada's arguments, strictly applied the Model Law criteria for the review of arbitral awards, and upheld the award against Canada.⁶⁴

48. To the extent that Claimant considers that Ottawa or Toronto raise neutrality concerns, despite Canada's undertaking, neutrality concerns of at least equal gravity must be recognized with respect to the selection of a U.S. legal seat, in the unique circumstances of this arbitration.

⁶¹ *AbitibiBowater Inc. v. Government of Canada* (UNCITRAL), Consent Award, 15 December 2010, **RL-061**; *Bilcon*, Procedural Order No. 1, **RL-012**; *Centurion*, Correction of Order for the Termination of the Proceedings and Award on Costs, **RL-013**; *Chemtura*, Procedural Order No. 1, **RL-024**; *Ethyl*, Decision Regarding the Place of Arbitration, **RL-004**; *Gallo*, Letter from Tribunal to the Disputing Parties on Procedural Issues, **RL-055**; *Mercer*, Procedural Order No.1, **RL-014**; *Mobil*, Procedural Order No. 1, Decision of the Tribunal on the Place of Arbitration, **RL-006**; *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL), Ruling Concerning the Investor's Motion to Change the Place of Arbitration, 14 March 2002, **RL-062**; *S.D. Myers*, Partial Award, **RL-015**; *St Mary's*, Procedural Order No. 1, **RL-016**; *Windstream*, Procedural Order No. 1, **RL-017**.

⁶² *Apotex*, Procedural Order No. 1, para. 19, **RL-026**; *Apotex Holdings*, First Procedural Order, para. 9.1, **RL-027**; *ADF*, Procedural Order No. 2, para. 22, **RL-048**; *Canfor*, Decision on the Place of Arbitration, para. 37, **RL-003**; *Cattle Cases Consolidated Canadian Claims v. United States of America* (UNCITRAL), Procedural Order No. 1, 20 October 2006, para. 3.4, **RL-063**; *Glamis Gold Ltd. v. United States of America* (UNCITRAL), Agreement on Certain Procedural Matters, 20 January 2004, para. 1, **RL-064**; *Grand River v. United States of America* (UNCITRAL), Minutes of the First Session of the Tribunal, 31 March 2005, para. 13, **RL-065**; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, para. 19, **RL-066**; *Methanex*, The Written Reasons for the Tribunal's Decision of the 7th September 2000 on the Place of Arbitration, para. 40, **RL-005**; *Mondev International Ltd. v. United States of America* (ICSID ARB(AF)/99/2), Award, 11 October 2002, para. 26, **RL-067**.

⁶³ *Mobil*, Procedural Order No. 1, paras. 35, 37, **RL-006**; *Gallo*, Letter from Tribunal to the Disputing Parties on Procedural Issues, paras. 16-17, **RL-055**; *DIBC*, Procedural Order No. 2, para. 26, **RL-050**.

⁶⁴ *S.D. Myers Inc.*, **RL-010**.

49. Claimant is in effect seeking to overturn the interpretation by Canada’s Federal Court of Canadian patent law, declaring its interpretations “illegal”, based upon Claimant’s competing views regarding the content of international intellectual property obligations. In presenting these allegations, Claimant relies heavily on limited references to interpretations by U.S. courts of U.S. patent law. It in effect suggests that U.S. legal interpretations of terms such as “utility”, particularly decisions of the U.S. Court of Appeals for the Federal Circuit, should be treated as defining the content of intellectual property obligations in Chapter Seventeen of the NAFTA and of other international intellectual property instruments.⁶⁵ Claimant notably characterizes Canadian jurisprudence as “significantly out of step with the law of utility in Canada’s NAFTA partners,”⁶⁶ relying upon U.S. court decisions in support of this contention.⁶⁷ Regarding the specific patents at issue in this matter, Claimant directly compares the decisions of Canadian courts with those of U.S. courts for allegedly equivalent U.S. patents.⁶⁸
50. Claimant’s reliance on the jurisprudence of the U.S. Court of Appeals for the Federal Circuit raises particular neutrality concerns. In matters of patent law, the U.S. Court of Appeals for the Federal Circuit sits in direct hierarchy above all U.S. District Courts, including those that would review any arbitral award if this arbitration is seated in New York City. The evidentiary record adduced in support of Claimant’s allegations may include the affidavit of retired Chief Judge of the U.S. Court of Appeals for the Federal Circuit, Paul R. Michel. This affidavit was filed by Claimant in its application for leave to appeal to the Supreme Court of Canada, in the proceedings concerning its invalidated patent relating to the

⁶⁵ Notice of Arbitration, paras. 31, 54; *See also* Notice of Intent, paras. 15, 29.

⁶⁶ Notice of Arbitration, para. 9.

⁶⁷ Notice of Arbitration, paras. 31, 54; *See also* Notice of Intent, paras. 15, 29.

⁶⁸ Notice of Arbitration, para. 54; *See also* Notice of Intent, paras. 82, 83, 84.

pharmaceutical compound olanzapine, one of the two patents at issue here.⁶⁹ In this affidavit, Chief Judge Michel states that Canadian judicial practice on the law of utility is “sharply different” and “virtually the opposite” from that of U.S. courts.⁷⁰ He asserts that U.S. practice squarely complies with the NAFTA and TRIPS⁷¹ while the Canadian “judge-made law” creates “international disuniformity” and calls into question Canada’s compliance with the NAFTA and TRIPS.⁷²

51. Claimant has further undertaken intensive political lobbying efforts in the United States, seeking to elicit hostile comment on the functioning of Canada’s domestic patent system, based upon the allegations set out in its Notice of Arbitration.⁷³
52. In these circumstances, the United States cannot be viewed as a “neutral” location for ultimate review of the Arbitral Tribunal’s award.
53. Canada further proposes, in the alternative, that The Hague could make an appropriate legal seat. This assumes that concerns regarding perceptions of neutrality take precedence over issues such as availability of judicial assistance and subject-matter connections, outlined above. The Netherlands, like Canada, applies a limited set of grounds for the set-aside of arbitral awards. Its courts have demonstrated deference to the decisions of Arbitral Tribunals.

⁶⁹ Affidavit of Chief Judge Paul R. Michel, *Eli Lilly Canada Inc., Eli Lilly and Company, Eli Lilly and Company Limited and Eli Lilly SA v. Novopharm Limited*, A-473-11, (Supreme Court of Canada), **RL-068**.

⁷⁰ Affidavit of Chief Judge Paul R. Michel, para. 20, **RL-068**.

⁷¹ Affidavit of Chief Judge Paul R. Michel, para. 18, **RL-068**.

⁷² Affidavit of Chief Judge Paul R. Michel, para. 21, **RL-068**.

⁷³ Ed Silverman, *U.S Trade Rep Delivers a Blow to Eli Lilly*, The Wall Street Journal Blog, 30 April 2014 <http://blogs.wsj.com/corporate-intelligence/2014/04/30/lilly-suffers-setback-at-hands-of-u-s-trade-rep/>

54. Given the very specific circumstances of the present case, while Canada remains of the view that either Ottawa or Toronto would be the most appropriate legal seat, Canada further proposes The Hague, as a compromise solution.

III. BIFURCATION OF LIABILITY FROM DAMAGES

A. Overview

55. Canada proposes that the Arbitral Tribunal proceed with this arbitration in two separate phases. In the first phase, Canada proposes that the Arbitral Tribunal hear arguments concerning Claimant's allegations on liability. Canada proposes that the Arbitral Tribunal proceed to the second phase, in which it would hear arguments with respect to the alleged damages suffered by Claimant, only if it finds that there had been a breach of NAFTA Chapter Eleven. As explained below, this approach represents the most efficient method of conducting this arbitration.

B. The Tribunal Has the Authority to Conduct this Arbitration in Phases

56. Pursuant to NAFTA Articles 1120(1)(c) and 1139, Claimant has elected to proceed under the UNCITRAL Rules. Article 15.1 of the UNCITRAL Rules provides the Arbitral Tribunal with the authority to conduct the proceedings as it sees fit. Specifically, it provides:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

57. Pursuant to this authority, it is standard practice for NAFTA Tribunals to separate the damages phase from the other phases, where circumstances so warrant.

Damages have to date been considered in a separate phase in at least twelve NAFTA arbitrations.⁷⁴

58. In deciding whether or not to bifurcate a proceeding, the primary consideration is whether or not it would result in a more efficient arbitration. Factors that should be considered include: (1) whether bifurcation will reduce the cost and length of the proceedings; (2) whether it will result in a material reduction of proceedings in the damages phase, and (3) whether the facts and issues to be addressed in the liability phase are so distinct from the facts and issues of the damages phase that having a single proceeding would not result in savings of cost and time.⁷⁵ Each of these factors favors bifurcation of the liability and damages phases in this arbitration.

C. Bifurcation of Merits and Damages is Appropriate in this Arbitration

a) Bifurcation Will Reduce the Costs and Length of this Arbitration

59. As recognized by Redfern and Hunter in their treatise on arbitral practice:

⁷⁴ *Ethyl Corporation v. Government of Canada* (UNCITRAL) Procedural Order, 25 June 1998, **RL-069**; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 1, 28 May 1999, **RL-070**; *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 7, 19 January 2000, **RL-071**; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Minutes of the First Session of the Tribunal, 3 February 2001, **RL-072**; *Mondev*, Award, para. 26, **RL-067**; *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1), Summary of the First Session of the Tribunal, 31 October 2002, **RL-073**; *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL), Procedural Directions and Order of the Tribunal, 4 April 2003, **RL-074**; *Methanex Corporation v. United States of America* (UNCITRAL), Procedural Order, 2 June 2003, **RL-075**; *Corn Products International, Inc. v. Mexico* (ICISD Case No. ARB(AF)04/01), Minutes of the First Session of the Tribunal, 14 January 2005, **RL-076**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 3, 3 June 2009, **RL-077**; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Decision on Liability and on Principles of Quantum, 22 May 2012, **RL-078**; *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, **RL-079**.

⁷⁵ See *Glamis Gold Ltd. v. United States* (UNCITRAL), Procedural Order No. 2, IIC 118 (2005), 31 May 2005, para. 12, **RL-080** (applying these factors to the question of whether to bifurcate jurisdiction from the merits); See also *Tulip Real Estate Investment and Development Netherlands B.V. c. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on the Respondent's Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012, **RL-081**.

In many modern disputes arising out of international trade, particularly in relation to [...] intellectual property disputes, the quantification of claims is a major exercise. It may involve both the parties and the arbitral tribunal in considering large numbers of documents, as well as complex technical matters involving experts appointed by the parties, or by the arbitral tribunal, or both. In such cases, it may often be convenient for the tribunal to determine questions of liability first. In this way, the parties avoid the expense and time involved in submitting evidence and argument on detailed aspects of quantification that may turn out to be irrelevant following the arbitral tribunal's decision on liability.⁷⁶

60. In this case, the investigation of the damages allegedly suffered by Claimant will be extraordinarily complex, costly and time-consuming. Claimant seeks damages for “direct losses and consequential damages”⁷⁷ following Federal Court decisions declaring two of Claimant's patents invalid. In order to adequately assess these damages allegations, it will be necessary for the disputing parties to develop and provide to the Arbitral Tribunal evidence on a broad range of issues, potentially including, but not limited to:

- sales of Claimant's olanzapine and atomoxetine-based products on the Canadian market, both before and after invalidation of their related patents;
- the alleged displacement effect of competing generic products employing olanzapine and atomoxetine;
- the presence of competing products in the Canadian market employing alternatives to atomoxetine or olanzapine;
- the potential introduction of other competing products, assuming a maintained monopoly through Claimant's olanzapine and atomoxetine-related patents;
- the advantages, if any, of olanzapine and/or atomoxetine over such competing products;

⁷⁶ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed., Thomson, London, 2004, p. 282, **RL-082**.

⁷⁷ Notice of Arbitration, para. 85(i).

- potential effects of each brand-name pharmaceutical and generic counterpart co-existing in the market place;
 - the presumed behavior of the consumer drug market (producers and consumers), assuming higher prices for olanzapine and/or atomoxetine-based products; and
 - the impact on Claimant’s profits of actual or potential class actions based upon the side-effects of Claimant’s olanzapine and/or atomoxetine-based products.⁷⁸
61. These issues will require extensive legal briefing, numerous witness statements and expert reports on a wide variety of topics, as well as extensive document production, all on issues relevant to the damages phase only. Damages experts are among the most costly in international arbitration, a problem compounded by the highly specialized nature of patent damages calculations. Moreover, olanzapine and atomoxetine are separate, unrelated pharmaceuticals that would require independent damages assessments.
62. This complex, costly and lengthy analysis will become entirely irrelevant if the Arbitral Tribunal ultimately fails to find any violation of NAFTA Chapter Eleven. As explained by Mr. Born in his treatise on international commercial arbitration, “if damages quantification is conducted before a liability determination, and no liability is found, the unnecessary expense for both parties can be considerable.”⁷⁹
63. It is not surprising that in the only other NAFTA Chapter Eleven proceedings brought by a pharmaceutical manufacturer for alleged damages due to lost sales, the Arbitral Tribunal ordered the bifurcation between merits and damages.⁸⁰

⁷⁸ Eli Lilly and Company has already paid out in excess of a billion dollars in class-action settlements and other fines relating to its olanzapine-based product, marketed under the brand name Zyprexa: see for instance: <http://healthland.time.com/2012/09/17/pharma-behaving-badly-top-10-drug-company-settlements/slide/eli-lilly/>, and <http://blogs.wsj.com/health/2009/01/15/justice-department-beats-chest-over-zyprexa-settlement/>

⁷⁹ Gary B. Born, *International Commercial Arbitration*, Kluwer Law International, London, 2009, p. 1817, **RL-083**.

⁸⁰ *Apotex Holdings*, First Procedural Order, **RL-027**.

64. The same result prevails in domestic Canadian proceedings where patent damages are at issue. Canada’s leading patent trial lawyer notes that “in virtually all patent infringement cases, the action is bifurcated. Issues of profits and damages are left until after trial, if required.”⁸¹ Indeed, the Federal Court of Canada provides a model bifurcation order on its website for parties’ consideration and use.⁸²
65. A similar practice prevails in the United States: in *Robert Bosch, LLC v. Pylon Manufacturing Corp.*, in ruling on the Defendant’s motion requesting the bifurcation of liability and damages, the United States District Court for the District of Delaware stated that “bifurcation is appropriate, if not necessary, in all but exceptional patent cases”, and that issues related to a damages trial are “a drain on scarce judicial resources.”⁸³
66. Bifurcating liability and damages in patent disputes is common in many other countries, including Germany, the United Kingdom and Japan.⁸⁴
67. Bifurcation is adopted in patent cases precisely because damages calculation in such cases is extremely onerous, and may never be required if no liability is found. In the 2013 infringement proceeding brought by the pharmaceutical company *Merck & Co.* before the Federal Court of Canada, the Court, after ordering bifurcation, heard nearly one month of oral evidence solely on damages issues.⁸⁵
68. Claimant in this matter has raised extremely speculative and controversial claims. Putting Canada to the enormous task of undertaking defence of damages claims, in

⁸¹ Ron Dimock, *Intellectual Property Disputes: Resolutions and Remedies*, loose-leaf (Toronto: ON: Carswell, 2002), p. 11-2(a), **RL-084**.

⁸² See the model at http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Notices.

⁸³ *Robert Bosch LLC v. Pylon Mfg. Corp.*, (D. Del. Aug. 26, 2009), para. 1, **RL-085**.

⁸⁴ See a summary by the author of his own publication (Thomas F. Cotter, *Comparative Patent Remedies: A Legal and Economic Analysis*, Oxford University Press, 2013), at <http://comparativepatentremedies.blogspot.ca/2013/05/bifurcation-of-liability-and-damages.html>

⁸⁵ *Merck & Co. Inc. and al. v. Apotex Inc.*, 2013 FC 751, **RL- 086**.

the absence of any initial finding of liability, would be a fundamental violation of principles of efficiency in arbitral proceedings. It could also prejudice Canada's right of reply in this matter, unnecessarily forcing Canada to divide its focus between issues of liability and damages, in a case where Claimant's liability allegations already raise serious legal and systemic implications.

b) Bifurcation Could Result in a Significant Reduction in the Number of Issues to be Contested in a Damages Phase

69. Irrespective of the Arbitral Tribunal's finding on liability, bifurcating the damages phase will substantially reduce the costs and length of this arbitration. Notably, the Arbitral Tribunal may find liability only in respect of one of the two patents that are the basis of Claimant's complaint. The two pharmaceutical compounds at issue, olanzapine and atomoxetine, related to wholly different pharmaceutical markets, sales profits, and competing products. Damages calculations for one product will be wholly irrelevant for the other product. An enormous and highly fact-specific "but for" damages inquiry will have been conducted for absolutely no reason.
70. Similarly, the Arbitral Tribunal might find partial liability in respect of Article 1105, but not in respect of Article 1110. As damages calculations under these two headings may be distinct, conducting such calculations in advance of a determination on liability would represent significant wasted effort.
71. Moreover, as recognized by Redfern and Hunter, holding both phases together would deprive disputing parties of the opportunity to settle on the issue of quantum if liability is found:

A decision by an arbitral tribunal on certain issues of principle in a dispute may well encourage the Parties to reach a settlement on quantum. They are usually well aware of the costs likely to be involved if the arbitral tribunal itself has to go into the detailed quantification of a claim,

a process that often involves taking evidence from accountants, technical experts, and others.⁸⁶

c) The Facts and Issues Relevant to Liability are Distinct from the Facts and Issues Relevant to Alleged Damages

72. Even if the Arbitral Tribunal were to find in favor of Claimant with respect to each of its allegations on NAFTA Chapter Eleven and proceed to a full damages phase, there would be no cost or time penalty to hearing damages separately from liability. This is because the facts and issues in dispute with respect to liability are entirely distinct from those at issue with respect to the quantification of any alleged loss. Given the entirely distinct issues they raise, combining damages and liability into one phase would substantially increase the time required for each phase of the proceedings, notably pleadings and document discovery.
73. In its Notice of Arbitration, Claimant has alleged breaches of the Minimum Standard of Treatment (NAFTA Article 1105) and Expropriation (NAFTA Article 1110). None of these allegations will require proof of facts, or legal analysis of issues that are salient to Claimant's alleged damages.
74. The facts in dispute relate exclusively to the invalidation by Canada's Federal Court of two separate patents relating to the pharmaceutical compounds olanzapine and atomoxetine. Claimant argues that: (1) the alleged "promise doctrine" as interpreted by Canadian courts to invalidate the patents at issue, imposed a significantly higher burden on Claimant than the standard of utility allegedly mandated by NAFTA Chapter Seventeen⁸⁷; and that (2) additional disclosure requirements imposed by Canadian courts were inconsistent with Canada's obligations under the Patent Cooperation Treaty ("PCT").⁸⁸ According to Claimant,

⁸⁶ Alan Redfern and J. Martin Hunter, *Redfern and Hunter on International Arbitration*, (Oxford, University Press 2009), para. 9.27, **RL-146**.

⁸⁷ Notice of Arbitration, para. 68.

⁸⁸ Notice of Arbitration, para. 70.

Canada’s application of the “promise doctrine” to its patents related to the pharmaceutical compounds olanzapine and atomoxetine, and Canada’s alleged “failure to bring its utility standard into compliance with Canada’s NAFTA and PCT obligations,” breach Canada’s obligations under NAFTA Chapter Eleven.⁸⁹

75. None of these allegations of liability will require proof of facts or legal analysis of issues that are salient to Claimant’s alleged damages. The facts in dispute relate to the Federal Court proceedings concerning Claimant’s two invalid patents. These issues are of no relevance at all to damages issues, as outlined above. There will be no intertwining of facts between the two phases and no repetition of evidence or arguments will be required. Indeed, Claimant fails to address issues pertinent to the damages phase until the very last paragraphs of its Notice of Arbitration.⁹⁰
76. Put simply, due to the distinctness of the facts and issues involved, no efficiencies are possible as a result of hearing liability and damages arguments at the same time. On the other hand, as explained in detail above, there are significant likely times and cost savings to be achieved by bifurcating the issue of liability from that of damages.

IV. ARBITRAL CALENDAR

A. Overview

77. Canada’s proposed arbitral calendar reflects the actual time required for procedural events through to the proposed hearing on the merits in this matter, assuming a proceeding bifurcated between liability and damages. Canada’s calendar reflects typical arbitral practice and is consistent with the applicable rules. It avoids likely disruption to the calendar by proposing realistic dates from the outset of the proceedings.

⁸⁹ Notice of Arbitration, para. 72.

⁹⁰ Notice of Arbitration, para. 85.

78. Claimant's proposed timeline, by contrast, underestimates time required for each procedural step. If adopted, it would prejudice Canada's right of response in this matter. Moreover, the inadequate timelines Claimant proposes would leave the disputing parties and the Arbitral Tribunal exposed to significant risk of disruption to the arbitral calendar.

B. Canada's Calendar Proposes Realistic Dates

79. Canada's proposed arbitral calendar sets out realistic time-lines for submissions and other procedural events in this arbitration. Our proposals assume that the proceedings will be bifurcated between issues of liability, in a first phase, with issues regarding damages addressed in a subsequent phase, as required.

80. The issues raised in respect of liability in this matter are substantial and will require extensive briefing.

81. Claimant's Notice of Arbitration raises novel allegations of liability under Chapter Eleven that, if successful, could have important systemic implications. It seeks to condemn two decisions of Canada's Federal Court in the highly specific, technical area of domestic patent law, finding certain pharmaceutical patents invalid under Canada's *Patent Act*, as violations of substantive obligations under NAFTA Chapter Eleven. Claimant does so relying on the alleged non-compliance of such decisions with its reading of Chapter Seventeen of NAFTA, of other international intellectual property agreements, and of U.S. patent law.

82. Given the complexity and import of the issues raised by the present claim, Canada seeks adequate time to respond at each stage in this proceeding, while ensuring that the efficiency of the proceeding is overall maintained.

a) Canada's Proposed Timelines Reflect Its Position as Respondent

83. The time Canada requires to prepare its submissions notably reflects its position as Respondent in this arbitration.

84. Claimant may determine long in advance its strategy and the contents of its submissions. Claimant has the ability to determine in advance which facts and expert witnesses to put forward, and upon which contemporary documents it seeks to rely. Its counsel were already involved as counsel in the domestic court proceedings leading to the Federal Court decisions that are the “measure” at issue in this arbitration.
85. By contrast, Canada cannot settle on its response until it sees Claimant’s full submissions. Claimant substantially modified the basis of its claims between its Notice of Intent and Notice of Arbitration – abandoning allegations of breach of Article 1102 (National Treatment), and shifting focus from the TRIPS Agreement to NAFTA Chapter Seventeen. It may seek to further amend its position going-forward. Unlike Claimant, Canada and its counsel were not involved in the underlying domestic court proceedings, which were litigations between private parties concerning the validity of the patents at issue. It is only upon receipt of Claimant’s Memorial that Canada will be in a position to determine its full responding case, including identifying all necessary responding witnesses and required experts, selecting the relevant factual record, and confirming its response on legal issues raised.
86. Canada’s response times also takes account of its circumstances as a State Respondent. In a government context, expert witness contracting alone is an extremely onerous process. This issue will arise both at the Counter-Memorial and at the Rejoinder stage, where new responding experts and fact witnesses may be required.
87. Moreover, decisions taken in respect of all aspects of the arbitration require consultation with stakeholders in several government departments and agencies, given the systemic issues raised in this matter.

88. Overall, failure to grant Canada adequate time to respond to the substantial issues raised in this arbitration, in light of its circumstances as State Respondent, will prejudice Canada's right of response in this matter.

b) Canada's Proposals Are Reasonable and Cause No Undue Delay

89. Canada's calendar proposals are also consistently reasonable, and do not unduly delay the proceedings. The calendar Canada proposes reflects the time required to accomplish the work at each stage, based upon Canada's extensive experience in NAFTA Chapter Eleven proceedings. Canada's proposals are in most cases only slightly longer than Claimant's. Canada's proposals are notably consistent with NAFTA Chapter Eleven practice regarding timing of initial pleadings⁹¹, Memorials⁹², and responding Memorials.⁹³

⁹¹ See for example, *Windstream Energy LLC v. Government of Canada* (UNCITRAL), Canada's Response to the Notice of Arbitration, 26 April 2013, p. 1, **RL-087**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL), Statement of Defence, 4 May 2009, p.1, **RL-088**; *Vito G. Gallo v. Government of Canada* (UNCITRAL), Procedural Order No. 1 (Amended), 10 March 2009, para. 34, **RL-089**; *Ethyl Corporation v. Government of Canada* (UNCITRAL), Statement of Defence, 27 September 1997, **RL-090**; *Merrill and Ring Forestry L.P v. Government of Canada*, (UNCITRAL) Statement of Defence, 30 October 2007, p.1, **RL-091**; *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL), Statement of Defence, 8 October 1999, p. 1, **RL-092**; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Statement of Defence, 18 June 1999, p.1, **RL-093**; *Apotex*, Procedural Order No. 1, para. 62, **RL-026**; *Grand River*, Minutes of First Session of the Tribunal 24 June 2008, paras. 16-17, **RL-065**.

⁹² See for example, *Windstream*, Procedural Order No. 1, Annex A, **RL-017**; *Bilcon*, Procedural Order No. 3, Annex A, **RL-077**; *Bilcon*, Letter sent on behalf of the Tribunal dated September 28, 2011 granting Canada's request for an extension of 46 days in addition to the 90 days originally granted in Procedural Order No. 3, **RL-94**; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Minutes of the First Session of the Tribunal with the Parties, 6 May 2009, **RL-095**; *Gallo*, Procedural Order No. 1 (Amended), para. 34, **RL-089**; *Grand River v. United States of America*, Letter to Parties Convening Further Revised Schedule for Merits Submissions and Hearing, para. 3, 24 June 2008, **RL-096**; *Metalclad Corporation v. United Mexican States*, (ICSID Case ARB/(AF)/97/1), Award, 30 August 2000, para. 14, **RL-097**; *Azinian*, Award, 1 November 1999, para. 79, **RL-019**.

⁹³ See for example, *Windstream*, Procedural Order No. 1, Annex A, **RL-017**; *Mercer*, Procedural Order No. 1, para. 88, **RL-014**; *Metalclad*, Award, para. 18, **RL-097**; *Azinian*, Award, 1 November 1999, para. 63, **RL-019**.

c) Canada's Proposals on Document Production Seek to Avoid Disruption and Reduce Issues in Dispute

90. Canada's proposals are also meant to avoid in advance likely disruptions to the arbitral calendar, deriving from initial, inadequate timing provisions. This issue is particularly relevant to document production. Document production takes time, particularly in a government context (where information repositories can be widespread), and in relation to allegations involving multiple stakeholders and historical time-lines going back to the early 1990s. The time-frame Canada has proposed for document production reflects the scope Canada anticipates for document production on liability issues in this matter. In Canada's experience, failure to allow adequate time to collect, review and produce documents simply engineers likely disruptions to the schedule, substantially impacting the efficiency of the overall proceedings.
91. Canada's calendar proposals regarding initial generation of document requests, objections to requests, and responses to such objections, are also intended to reduce the number of issues to be submitted to the Arbitral Tribunal for decision. Sufficient time after filing of Memorials allows both sides to generate specific, targeted requests for documents, based upon thorough analysis of the submissions to date. Less time to prepare typically results in broader requests, and greater probability of disputes. Similarly, adequate opportunity to make considered responses to document requests, and to consider such responses, tends to narrow disputed issues submitted to the Arbitral Tribunal.
92. In the draft consolidated calendar attached to the Arbitral Tribunal's communication of April 28, 2014, the Arbitral Tribunal has suggested that document production on non-disputed requests should take place in parallel with exchanges on disputed requests, with a subsidiary exchange pursuant to the Arbitral Tribunal's decisions in the latter category. In Canada's experience, this approach leads to greater inefficiencies than Canada's proposed approach of producing all

documents in a single phase. It is frequently the case that documents produced are relevant to more than one category. Staggered production therefore almost inevitably generates duplicative production. Moreover, staggered production tends to double the document review effort: instead of reviewing potentially relevant documents once for all requests the review work must be carried out twice, across an entire document data-base: first to address agreed requests; and then again, to address those newly-ordered. Overall, the added “efficiency” to the schedule of staggered production in effect leads to substantial inefficiencies for the disputing parties.

d) Canada Agrees that the Initial Pleadings Phase is Inefficient

93. The Arbitral Tribunal has also requested comment on the disputing parties’ agreement to an initial Statement of Claim / Statement of Defence phase, followed by a Memorial and Counter Memorial, noting the potential for redundant submissions. Canada agrees the suggestion to omit the initial pleading phase is consistent with our original proposal to Claimant and with our practice in other NAFTA Chapter Eleven Arbitration.⁹⁴ Arbitral practice reserves the filing of witness statements, expert reports, and most supporting documents to the Memorial/Counter Memorial phase, with the Statement of Claim/Statement of Defence a “bare pleading” phase. It would be more efficient if Claimant were simply to state its full case in a Memorial, to which Canada can then fully respond.

e) Canada’s Proposal on 1128/Amicus Promotes the Effectiveness of this Phase

94. With regard to Article 1128 and non-disputing party (*amicus*) submissions, Canada’s calendar proposals again seek to ensure that the NAFTA Parties have adequate time to assess all submissions of the disputing parties, and make considered submissions to the Arbitral Tribunal, as necessary, on issues of

⁹⁴ See for example, *Chemtura*, First Procedural Order, para. 37, **RL-024**.

interpretation of the NAFTA. Similarly, the extent to which *amicus* submissions may be helpful to the Arbitral Tribunal depends upon granting adequate time to non-disputing parties to take account of each disputing party's full case and, in light of these submissions, determine to what extent they may bring a useful additional point of view to the proceedings.

f) Summary of Proposed Calendar

95. For the sake of convenience, Canada sets out below the main differences in time between Canada's proposed calendar, and that proposed by Claimant:
- *Statement of Claim / Statement of Defence.* Claimant seeks 30 days each, while Canada seeks 45 days, assuming this phase is maintained.
 - *Memorial / Counter-Memorial.* Claimant seeks 75 days each, while Canada seeks 120 days.
 - *Document production phase.* Claimant seeks 14 days for initial exchange of document requests, while Canada seeks 30 days. Claimant seeks to exchange objections in only 7 days, while Canada seeks 30 days. Claimant seeks replies to objections within 7 days, while Canada proposes 15. Canada also proposes 15 days to review and consider responses to objections (as this in our experience further reduces the scope of issues submitted to the Tribunal), a step omitted by Claimant. Finally, Claimant suggests that production of documents can occur within 45 days, while Canada requests 90 days.
 - *Reply and Rejoinder Phase.* Claimant seeks 75 days while Canada seeks 90 days.
 - *Article 1128 / non-disputing party (amicus) phase.* Claimant provides only 30 days for Article 1128 submissions and *amicus* submissions. Canada provides 60 days. Claimant provides for 15 days for the disputing parties to comment on 1128 submissions and to response to *amicus* submissions. Canada provides for 30 days. Canada also provides for comments by the disputing Parties and by non-disputing Parties on any *amicus* submissions admitted by the Tribunal.
96. Canada requests the Arbitral Tribunal's endorsement of the timing and sequencing set out in our draft procedural calendar.

V. CONFIDENTIALITY

A. Overview

97. Canada asks that, in addition to adopting the Confidentiality Order as otherwise agreed between the disputing parties, the Arbitral Tribunal confirm that: 1) a “Restricted Access Information” category of information is unnecessary in this case; 2) the Confidentiality Order should expressly acknowledge Canada’s disclosure obligations at domestic law; and 3) non-disputing Parties should have access to hearings, transcripts, and confidential information in this matter, as of right, pursuant to NAFTA Articles 1127-29.

B. A “Restricted Access Information” Category of Information is Unnecessary

98. The draft Confidentiality Order provides that information designated by a disputing party as confidential may only be made available to counsel, expert and fact witnesses, and client representatives to whom the disclosure of such information is necessary for the defence of this case.⁹⁵ Such persons cannot use this information for purposes other than the arbitration, nor can they circulate it, even internally, to other client representatives not involved in the arbitration.

99. Despite such agreed precautions, Claimant is seeking to enforce an additional level of confidentiality, called “Restricted Access Information” (“RAI”). RAI would be “counsel eyes only.” Canada has only agreed to such an onerous and restrictive category in cases where Canada was in a competitive relationship with a claimant, or where a third party competitor was otherwise directly involved in the matter. Neither situation applies to the present case, making Claimant’s request unjustified.

⁹⁵ See draft paragraph 7(c) of the Confidentiality Order.

a) Claimant's Concern is Addressed by the "Confidential Information" Category of the Draft Confidentiality Order

100. Pursuant to agreed draft paragraph 7(c) of the Confidentiality Order, information designated as confidential is only disclosed within government to "officials and employees of the disputing parties to whom disclosure is reasonably considered by the disputing party to be necessary in connection with preparation of the disputing party's case."⁹⁶ Government officials are bound by its contents and cannot disclose to the public any information designated as confidential. Therefore, the draft Confidentiality Order not only binds the disputing parties, but places limitations on who can have access to confidential information within the Canadian government and what can be done with it. In any event, it is general practice within the Government of Canada to share information between officials on a need-to-know basis. It is up to Canada to determine which of its officials require information for the preparation of its response in this arbitration.

101. Claimant has sought to justify a separate and additional RAI category, based upon concerns that confidential information might be "widely disseminated" within the Government of Canada. In light of the Confidentiality Order's basic provisions regarding treatment of confidential information at draft paragraph 7(c), such concerns are unfounded.

b) A "Restricted Access Information" Category Protects Third Party / Competitor Information, and there is None in this Arbitration

102. The RAI designation is used in NAFTA Chapter Eleven arbitrations only to prevent disclosure of third-party or competitor information. In these circumstances, a

⁹⁶ See draft paragraph 7(c) of the Confidentiality Order.

“counsel-eyes only” designation is needed to avoid material harm to a disputing party or a third party.⁹⁷ In the current arbitration, such considerations do not arise.

103. Third party or competitor information becomes an issue in the context of a National Treatment (Article 1102) or Most-Favoured Nation (Article 1103) claim because these allegations may require the disclosure of comparator data to assess whether or not there has been a breach of either Article.⁹⁸ An RAI designation has also been introduced when a Claimant has been in direct competition with Canada as Respondent, such as in the NAFTA matter *UPS*⁹⁹, where Claimant was competing with Canada Post, or in the NAFTA matter *Mercer*¹⁰⁰, because of the involvement of B.C. Hydro (as that case concerns electricity generation in British Columbia).¹⁰¹ Under either of these circumstances, an RAI designation was justified to avoid serious material gain or loss to a disputing party or third party through disclosure to competitors of sensitive and confidential business information.
104. None of these circumstances are present in this arbitration. Claimant has not alleged an Article 1102 or Article 1103 violation, and nor is it in competition with the

⁹⁷ Notably, Claimant’s draft paragraph 1(b) (d) (“Restricted Access Information”) of the Confidentiality Order does not include reference to third parties or other entities. However, equivalent paragraphs found in other Confidentiality Orders in NAFTA Chapter Eleven cases do mention these third parties, suggesting that the category was designed to cover situations where a party or entity is in a competitive position with a disputing party. See for example, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3), Confidentiality Order, 24 January 2013, **RL-100**; *Windstream Energy LLC v. Government of Canada* (UNCITRAL), Confidentiality Order, 16 September 2013, **RL-101**; and, in *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL), Confidentiality Order, 21 November 2012, **RL-102**.

⁹⁸ See for example, the Confidentiality Orders of *Bilcon*, Confidentiality Order, 4 May 2009, **RL-099**; and Notice of Arbitration, 26 May, 2008, **RL-103**; *Mercer*, Confidentiality Order, 24 January 2013, **RL-100**; Notice of Arbitration, 30 April 2012, **RL-104**; *Windstream*, Confidentiality Order, 16 September 2013, **RL-101**; and Amended Notice of Arbitration, 5 November 2013, **RL-105**; and, *Mesa*, Confidentiality Order, 21 November 2012, **RL-102**, Notice of Arbitration, 4 October 2011, **RL-106**. All four cases had Article 1102 and 1103 allegations.

⁹⁹ *UPS*, Procedural Directions and Order of the Tribunal, 4 April 2003, **RL-074**.

¹⁰⁰ *Mercer*, Confidentiality Order, **RL-100**.

¹⁰¹ In addition to these unique circumstances, which warrant a Restricted Access Information designation, both *UPS* and *Mercer* cases involve Articles 1102 and 1103 claims: see *UPS*, Notice of Arbitration 19 April 2000, **RL-107** and *Mercer* Notice of arbitration, 30 April 2012, **RL-104**.

Government of Canada. There is absolutely no reason to have a counsel-eyes only designation for information. The potential for material harm to Claimant in this case comes only from Claimant's confidential information being released to the public. This concern is entirely met by the standard and already-agreed "confidential information" designation and related provisions in the Confidentiality Order.

c) A "Restricted Access Information" Category is Potentially Prejudicial to Respondent, Onerous and Inefficient

105. The introduction of an RAI category has both substantive and practical implications for arbitrations in which it is introduced. Government of Canada counsel are notably prevented from sharing information designated as Restricted Access with their government advisors and clients. This is a formidable handicap considering the highly technical nature of the issues raised in this arbitration, and the need to rely on patent policy experts to analyse such issues and mount a defence. Canada would also be unable to share any of Claimant's submissions with its clients or experts, for a full fifteen days after any submission is filed, pending Claimant's confirmation of what specifically it might designate as "Restricted Access".¹⁰² This is valuable lost time that would not be lost for Claimant (since it and not Canada has asserted its intention to use the RAI category).

106. The RAI category further adds another layer of complication in document review and disclosure, in effect creating three categories of review and redaction (Public, Confidential, Restricted Access), rather than two. It therefore imposes a substantial additional burden, for no good reason. The RAI designation also creates another

¹⁰² See draft paragraph 2 of the Confidentiality Order which outlines the process for redacting Confidential (and presumably Restricted Access) Information.

ground upon which the parties may disagree, introducing additional inefficiencies.¹⁰³

107. For all of these reasons, there needs to be a very strong justification to introduce an RAI category. There is no such justification in this arbitration. Claimant's request for such a category therefore should be denied.

C. Canada's Domestic Access to Information Obligations Are Consistent with NAFTA

108. Canada has proposed language in paragraph 16 of the draft Confidentiality Order¹⁰⁴ ensuring that documents requested by the public under the *Access to Information Act* ("ATIA")¹⁰⁵, are governed by the ATIA or other relevant legislation. In essence, Canada seeks recognition that Canadian domestic legislation continues to apply to access to information requests by citizens, regardless of the current NAFTA arbitration. Such access to information requests can include materials that Canada has received in the course of a NAFTA Chapter Eleven proceeding.

109. There is no inconsistency between the ATIA and the draft Confidentiality Order. The ATIA fairly balances the public's right to access the records of a government institution, with protecting the release of confidential information. The legislation therefore causes no prejudice to Claimant. By refusing to address the issue in the Confidentiality Order, Claimant is in effect engineering a conflict between the

¹⁰³For example, see *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL), Tribunal Order, 16 December 2013, paras. 4-19, **RL-108**, where the Tribunal ruled against Claimant for incorrectly designating documents as restricted access. The Tribunal stated that a Party making such designations must establish that the information at issue satisfies the requirements of the order, "thereby justifying the severe restrictions imposed by the Order on the disclosure of the information." (para. 11).

¹⁰⁴ Draft paragraph 16 of the Confidentiality Order reads: "Notwithstanding any other provision in this Confidentiality Order, any request for documents, or for the production of documents under the applicable domestic law of the disputing State party including documents produced in Canada in these proceedings, shall be wholly governed by the relevant legislation."

¹⁰⁵*Access to Information Act*, R.S.C. c. A-1, s. 4, **RL-109**

provisions of the Confidentiality Order and Canada's domestic disclosure obligations.

a) Canada's Access to Information Legislation is Consistent with NAFTA's Objective of Transparency

110. Canada's ATIA legislation is consistent with the NAFTA Parties' commitment to transparency.¹⁰⁶ Indeed, the Free Trade Commission Notes of Interpretation of 2001 ("FTC Note")¹⁰⁷, binding upon this Arbitral Tribunal, confirms that nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration.¹⁰⁸ Further, the FTC Note is clear in affirming that nothing in the NAFTA precludes Canada from providing public access to documents in a NAFTA Chapter Eleven proceeding.

b) Canada's Domestic Access to Information Legislation Provides Ample Safeguards for Claimant

111. The right to information in Canada's domestic access to information legislation is not absolute. The legislation provides strong safeguards for third parties, by providing for consultations and allowing the Government of Canada to refuse the

¹⁰⁶ The general objectives of transparency in NAFTA are stated in Article 102(1): "The objectives of this Agreement, as elaborated more specifically through its principles and rules[...], include[e][...] transparency...".

¹⁰⁷ Note of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001), ("*FTC Note*"), **RL-147**.

¹⁰⁸ See *FTC Note* (1)(a): "Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal." Also see the *Loewen Tribunal* "we do not accept the Claimant's submission that each party is under a general obligation of confidentiality in relation to the proceedings. In our view, [Article 44 of the ICSID Additional Facility Rules] does not impliedly impose such an obligation on the parties, when read in its context or against the background of international commercial law. In the case of an arbitration under NAFTA, particularly in an arbitration to which a Government is a party, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public knowledge and information concerning government and public affairs." *The Loewen Group*, Decision of the Tribunal on Respondent's Request of May 26, 1999 for a Ruling on Disclosure, para. 8, **RL-110**.

release of confidential information to the public. These safeguards would prevent the release of any confidential business information, such as business information, that may be of concern to Claimant in this arbitration.

112. Specifically, the ATIA provides that the head of a responsible government institution shall refuse to disclose any record that contains:

- trade secrets of a third party;
- financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
- information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could be reasonably be expected to prejudice the competitive position of a third party; or
- information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.¹⁰⁹

113. Moreover, the ATIA provides additional safeguards for any third party affected by a potential disclosure. The head of the government institution involved in an information request must give written notice to the affected third parties when it intends to disclose:

- a record requested under the ATIA that it has reason to believe might contain trade secrets of a third party;
 - financial, commercial, scientific or technical information that is confidential information;
- or;
- information that the government institution reasonably foresees will affect the competitive or contractual position of a third party.¹¹⁰

¹⁰⁹ *Access to Information Act*, ss. 20(1), **RL-109**.

¹¹⁰ *Access to Information Act*, ss. 27(1), **RL -109**.

114. After notification, the affected third party can either consent to the disclosure or make representations to the responsible government institution explaining why the record should not be disclosed.¹¹¹ Any government decision to disclose a third party's information may be reviewed by the Federal Court of Canada.¹¹²

115. The safeguards provided in the legislation are robust. Canada's access to information legislation does not prejudice Claimant in any way as it protects confidential business information, and provides recourse to the courts in the event of a disagreement. Indeed, it protects the same kinds of information that are protected under the Confidentiality Order.

c) Canada's Proposal is Consistent with Past NAFTA Practice

116. Arbitral Tribunals in a number of past and ongoing NAFTA Chapter Eleven arbitrations consistently have recognized Canada's domestic access to information legislation, notwithstanding other provisions of the Confidentiality Order.¹¹³

Arbitral Tribunals have also explicitly recognized that while NAFTA Parties must protect confidential business information in NAFTA Chapter Eleven arbitrations, they are also bound by their domestic disclosure obligations, and that these obligations are not limited or circumscribed by the NAFTA or applicable arbitral rules.

117. For example, in *Mondev v. United States*, the Arbitral Tribunal rejected Claimant's request for an Order directing the United States to refrain from releasing materials

¹¹¹ *Access to Information Act*, ss. 44(1), **RL-109**.

¹¹² *Access to Information Act*, ss. 44(1), **RL-109**.

¹¹³ See for example, *Bilcon*, Confidentiality Order, para. 17, **RL-099**; *Mercer*, Confidentiality Order, para. 15, **RL-100**; *Mobil*, Procedural Order No. 1, para. 9, **RL-006**; *Mesa*, Confidentiality Order, para. 16, **RL-102**; *Windstream*, Confidentiality Order, para. 16, **RL-101**; *Merrill and Ring Forestry L.P v. Government of Canada*, Confidentiality Order, 21 January 2008, para. 15, **RL-111**.

exchanged in the arbitration in response to a request made under the U.S. *Freedom of Information Act* (“FOIA”)¹¹⁴. The Arbitral Tribunal found that:

The FOIA creates a statutory obligation of disclosure upon the Respondent. The ICSID (Additional Facility) Rules provide that the minutes of all hearings shall not be published without the consent of the parties (Article 44(2)) and that the consent of the parties determines who shall attend those hearings (Article 39(2)). *In general terms, however, the Rules do not purport to qualify statutory obligations of disclosure which may exist for either party.*¹¹⁵

118. In the *Loewen v. United States* arbitration, the Arbitral Tribunal similarly noted that no provision of the ICSID Arbitration (Additional Facility) Rules could affect or qualify a statute-imposed obligation of disclosure.¹¹⁶

D. NAFTA Requires Non-Disputing parties to Respect Confidentiality Rules

119. Canada proposes a new paragraph 18 of the draft Confidentiality Order to recognize the rights and obligations of non-disputing Parties pursuant to NAFTA Articles 1127, 1128 and 1129. In this regard Canada amends the language in the current draft Confidentiality Order and now proposes the following:

Pursuant to Articles 1127, 1128 and 1129 of the NAFTA, non-disputing Parties may attend oral hearings, and have access to confidential versions of transcripts, written submissions and exhibits, including witness statements and expert reports. Non-disputing Parties shall be made aware of this Confidentiality Order and pursuant to Article 1129, shall treat all

¹¹⁴ *Freedom of Information Act*, 5 U.S.C. para. 552, As Amended by Public Law No. 110-175, 121 Stat. 2524, and Public Law No. 111-83, para. 564, 123 Stat. 2142, 2184, **RL-112**.

¹¹⁵ *Mondev International Ltd. v. United States*, (ICSID Case No. ARB/AF/99/2), Interim Decision regarding U.S. compliance with FOIA request, 25 January 2001, p. 2, **RL-113**. More specifically, the ICSID Rules pertaining to transcripts of hearings not being made public without the consent of the parties did not prevent the disclosure of information pursuant to an FOIA request.

¹¹⁶ *The Loewen Group*, Decision on hearing of Respondent’s objection to competence and jurisdiction, para. 28, **RL-066**. Also see more generally *Metalclad Corporation v. Mexico*, (ICSID Case ARB/(AF)/97/1), Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information regarding, 27 October 1997, paras. 9-10, **RL-114**: The Tribunal discussed trying to keep the public discussion of the case to a minimum “subject only to any externally imposed obligations of disclosure by which either of them may be legally bound.”.

information received from the Respondent as if they were a disputing Party, notably in respect of protection of confidential information.

120. This draft paragraph recognizes that officials of non-disputing Parties have access to information filed in this proceeding and to hearings as a right. Further, it confirms that non-disputing Parties (and their officials) are already bound to respect the terms of the Confidentiality Order, as though they were a disputing Party.

a) NAFTA Articles 1127-1129 Give the Non-Disputing Parties the Right to Attend Hearings and to Confidential Versions of All Documents, Including Transcripts

121. Pursuant to NAFTA Article 1127, non-disputing Parties have a right to copies of all pleadings filed in an arbitration.¹¹⁷ Similarly, Article 1129(1) entitles non-disputing Parties to receive the evidence tendered to an Arbitral Tribunal and the written argument of the disputing parties.¹¹⁸ These rights are confirmed by the FTC Note, which is explicit in stating that non-disputing Parties have a right to all relevant documents in the course of Chapter Eleven disputes, including confidential information.¹¹⁹

¹¹⁷ Article 1127: Notice

A disputing Party shall deliver to the other Parties:

- (a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted; and
- (b) copies of all pleadings filed in the arbitration.

¹¹⁸ Article 1129: Documents

- 1. A Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party a copy of:
 - (a) the evidence that has been tendered to the Tribunal; and
 - (b) the written argument of the disputing parties.
- 2. A party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.

¹¹⁹ The FTC Note of July 31, 2001 states at 1(b)(iv) that the “Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, *including confidential information.*” (emphasis added)

122. The rights of non-disputing Parties under Articles 1127 and 1129 have been acknowledged in the Confidentiality Orders of numerous past and ongoing NAFTA Chapter Eleven arbitrations.¹²⁰ Further, it is the consistent practice of Chapter Eleven Tribunals not to impose pre-conditions upon access to confidential written submission by such parties and their officials. Indeed, nothing in Articles 1127 and 1129 indicates that these rights are contingent.
123. Right of access to hearings and to all materials generated in the arbitration flow from NAFTA Parties' unqualified right under Article 1128 to make submissions to the Arbitral Tribunal on questions of interpretation of the NAFTA.¹²¹ As the Arbitral Tribunal noted in *ADF v. United States*, "submissions" includes both written and oral submissions.¹²² It is not unheard-of for a non-disputing Party to exercise its right to make an oral submission.¹²³ Moreover, attendance at oral hearings is necessary as written submissions can and do occur at any time in an

¹²⁰ See for example, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Procedural Order No. 11, 11 March 1999, para. 6, **RL-115**; *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL), Procedural Order No. 1, 29 October 1999, **RL-116** and No. 5, 17 December 1999, para. 4, **RL-117**; *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL), Tribunal Ruling of 4 April 2005, para. 2, **RL-118**; *Bilcon*, Confidentiality Order, para. 20, **RL-099**; *Windstream*, Confidentiality Order; para. 17, **RL-101**; *Mercer* Confidentiality Order, para. 16, **RL-100**; *Mesa*, Confidentiality Order, para. 17, **RL-102**.

¹²¹ Article 1128: Participation by a Party

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

¹²² *ADF*, Minutes of the First Session of the Tribunal, **RL-072**: "The parties recognize that the Governments of Canada and Mexico have the right to make written and oral submissions pursuant to NAFTA Article 1128."

¹²³ For example, *S.D. Myers*, Partial Award, paras. 77-79, **RL-015**; *S.D. Myers Inc. v. Government of Canada* (UNCITRAL) Supplemental Submission of the United Mexican States, 25 September 2001, para. 1, **RL-119** (referring to arguments adduced at the damages hearing); *S.D. Myers Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, paras. 71, 76, **RL-120**; Letter from U.S. Department of State to Arbitral Tribunal in *Detroit International Bridge Company*, 19 March 2014 citing *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/01), Transcript of Hearing on Jurisdiction, Day 2, at 328-31, **RL-121** (Nov. 15, 2006), (intervention by the United States to address NAFTA Chapter Eleven's territoriality requirement).

arbitration, including after oral hearings.¹²⁴ Indeed, a non-disputing Party could not know if it wants to exercise its right to make a post-hearing submission unless it has attended the hearing.

124. This interpretation of the NAFTA is reflected in the past practice of Tribunals, which has been to allow non-disputing Parties to attend the hearings, even when they have been *in camera*.¹²⁵ Ordinarily, non-disputing Parties are not even required to seek permission to attend the hearings: Tribunal Secretaries customarily advise non-disputing Parties of the date and location of hearings and request the names of the attendees from each non-disputing Party.

125. The only exception to this universal treatment of non-disputing Parties recently arose the current arbitration *Detroit International Bridge Company v. Government*

¹²⁴ See *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Supplemental Submission of the United Mexican States, 25 May 2000, **RL-122** (referring to arguments and questions arising during the May 1, 2000 hearing); *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Eighth Article 1128 Submission of the United States of America, 3 December 2001, **RL-123** (referring and responding to arguments by the claimant and question from the Tribunal during the November 15, 2001 hearing); *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Post-Hearing Article 1128 Submission of United Mexican States (Damages Phase), 3 December 2001, **RL-124** (referring and responding to arguments by the claimant and directions by the Tribunal during the November 15, 2001 hearing); See *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Submission of the United States of America, 30 June 2003, **RL-126**; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Transcript of Jurisdictional hearing, 17 September 2003 at 44, **RL-127**; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Procedural Order No. 5, 7 April 2004, **RL-128**; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004, paras. 7, 11, **RL-129** (“Mexico raised jurisdictional objections. They were the subject of a special hearing on 17 September 2003...in the course of which counsel addressed the Tribunal and answered questions put to them by the arbitrators...Representatives of the Governments of Canada and the United States of America were present...”), See *S.D. Myers*, Partial Award, paras. 77-79, **RL-015** ; *S.D. Myers*, Supplemental Submission of the United Mexican States, para. 1, **RL-119** (referring to arguments adduced at the damages hearing); *S.D. Myers*, Second Partial Award, paras. 71, 76, **RL-120**.

¹²⁵ For example, the non-disputing Parties attended the *in camera* hearings of *S.D. Myers*, Procedural Order No. 11, **RL-115**, *Pope & Talbot*, Procedural Order No. 5, **RL-117**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Procedural Order No. 1, 31 January 2003, para. 12.1, **RL-125** and *Chemtura*, Confidentiality Order, **RL-144**. For references to submissions made by the non-disputing Parties in these cases, please see footnote 124.

*of Canada*¹²⁶, where the Arbitral Tribunal ruled that because the Confidentiality Order did not specifically refer to the presence of non-disputing Parties at the hearings, and those hearings are *in camera*, those Parties cannot be present.¹²⁷ Canada, the United States and Mexico strongly disagree with the Procedural Order¹²⁸ and Canada has requested that the Confidentiality Order be amended to reflect the rights of non-disputing Parties.¹²⁹ Responding to the DIBC order, Canada's proposal in the current arbitration makes explicit that non-disputing Parties have a right to attend the hearings and to obtain copies of the transcripts of oral hearings, despite the fact that Claimant has requested an *in camera* hearing. Indeed Claimant acknowledges these rights of access of the non-disputing Parties, and therefore should agree to include reference to them in the Confidentiality Order.¹³⁰

c) Pursuant to NAFTA Article 1129, the Non-Disputing Parties are Bound by the Confidentiality Order

126. Article 1129(2) of NAFTA provides that: "A Party receiving information pursuant to paragraph 1 shall treat information as if it were a disputing Party."¹³¹ Through this provision, non-disputing Parties are to treat confidential information "as if they were a disputing Party", *i.e.* in a manner consistent with the Confidentiality Order binding upon Canada in this proceeding. As in Canada's case, these obligations automatically flow to State officials and representatives. These obligations include sharing confidential information with employees and officials only on a need-to-

¹²⁶ *Detroit International Bridge Company v. Government of Canada* (UNCITRAL). Confidentiality Order, 27 March 2013, **RL-149**

¹²⁷ *DIBC*, Procedural Orders 6 and 7, **RL-130**.

¹²⁸ See Letter from US State Department, March 19, 2014, **RL-121** and letter from Mexico Legal Counsel dated March 19, 2014, **RL-131**.

¹²⁹ *DIBC*, Letter from Canada April 17, 2014, **RL-132**. Both the United States and Mexico will also be making submissions requesting a change to the decision.

¹³⁰ See draft paragraph 18 of the Confidentiality Order.

¹³¹ NAFTA Notes of Interpretation, Article 1129(2).

know basis.¹³² Claimant has expressed concern that its confidential information might be indiscriminately circulated within either the U.S. or Mexican governments. Based upon the cited provisions of the Confidentiality Order (e.g. section 7(c)), its concern is unfounded.

127. In order to underline these obligations, Canada newly proposes revised language at paragraph 18 of the Confidentiality Order stating that non-disputing Parties “shall treat all information received from the Respondent as if it were a disputing Party, *notably in respect of protection of confidential information*” (emphasis added). This approach is similar to that taken in the case of *UPS*, where the Confidentiality Order specifically referred to the obligations on the non-disputing Parties to treat confidential information as if they were a disputing Party.¹³³ By contrast, the Confidentiality Order provides for Confidentiality Undertakings to be signed by independent experts or outside witnesses, as (unlike government officials) they are not automatically bound by the State undertaking.¹³⁴

VI. TRANSPARENCY OF PROCEEDINGS

A. Overview

128. Canada requests that the present proceedings be fully transparent and accessible to the public, including the hearings and the transcripts of those hearings, except as required for the protection of confidential information. Transparency is a central

¹³² See draft paragraph 7(c) of the Confidentiality Order.

¹³³ *UPS* Tribunal Ruling, 4 April 2005, **RL-118**.

¹³⁴ See draft paragraph 7 of the Eli Lilly Confidentiality Order read together with draft paragraph 11. See also paras. 8, 9 and 13 of *Mesa* Confidentiality Order, **RL-102**, where the disputing parties do not need to file a Confidentiality Undertaking; See paras. 8, 9 and 13 of *Windstream*, Confidentiality Order, **RL-101**; See also paras. 7 and 9, *Merrill*, Confidentiality Order, **RL-111**; See also paras. 14 and 16 of *St. Marys VCNA, LLC v. Government of Canada* (UNCITRAL), Confidentiality Order, October 2012, **RL-133**, where it is the “responsibility of the disputing party wishing to disclose material containing confidential information to any person to ensure that such person executes a Confidentiality Order.”

objective of the NAFTA and all three NAFTA Parties have repeatedly re-affirmed their commitment to this principle.

129. Canada's request is reflected in recent NAFTA Chapter Eleven arbitral practice. It is also consistent with the newly adopted UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "UNCITRAL Rules on Transparency"), adopted by the General Assembly of the United Nations on 16 December 2013.¹³⁵ Canada asks this Arbitral Tribunal to reject Claimant's demand that neither hearings nor transcripts be publicly accessible.

B. Presumption of Transparency in NAFTA

130. Transparency is essential to international investment arbitration and is one of the principal objectives of the NAFTA, as stated in Article 102(1).¹³⁶ The NAFTA Parties have made a strong commitment to this objective and have reaffirmed its importance in three subsequent texts: the FTC Note¹³⁷, the 2003 Statements in Open Hearings¹³⁸ and the 2003 Free Trade Commission Statement on non-disputing party Participation.¹³⁹
131. The corollary of the principle of transparency as applicable to NAFTA Chapter Eleven proceedings is that there is no general duty of confidentiality. Rather,

¹³⁵ United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules, A/RES/68/109, 16 December 2013 ("*UNCITRAL Rules on Transparency*"), GA/11473, **RL-134**.

¹³⁶ *NAFTA*, Article 102 (1). Article 102 (1) states that: "The objectives of this Agreement, as elaborated more specifically through its principles and rules[...], includ[e][...] transparency..."

¹³⁷ *FTC Note*, **RL-147**.

¹³⁸ Statement of Canada on Open Hearings in *NAFTA* Chapter Eleven Arbitrations, 7 October 2003, **RL-135** ("*Statement of Canada on Open Hearings*"); Statement of United States on Open Hearings in *NAFTA* Chapter Eleven Arbitrations, 7 October 2003, ("*Statement of United States on Open Hearings*") **RL-136**; endorsed by Mexico in 2004 *NAFTA* Commission Meeting "NAFTA Free Trade Commission Joint Statement" 16 July 2004, ("*NAFTA Free Trade Commission Joint Statement*"), **RL-137**.

¹³⁹ *NAFTA* Free Trade Commission, "Statement of the Free Trade Commission on non-disputing party Participation", 7 October 2003, **RL-138**.

information generated in NAFTA Chapter Eleven proceedings is presumed to be available to the public unless a specific provision, rule or order prohibits such access. One of the first NAFTA Chapter Eleven Tribunals to find that there is no general duty of confidentiality under the NAFTA was the Arbitral Tribunal in *Loewen*. The Arbitral Tribunal held that:

... we do not accept the Claimants' submission that each party is under a general obligation of confidentiality in relation to the proceedings. In our view, Article 44 [of the ICSID Additional Facility Rules] does not impliedly impose such an obligation on the parties, when read in its context or against the background of international commercial law. In the case of an arbitrator [*sic.*] under NAFTA, particularly an arbitration to which a Government is a party, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs.¹⁴⁰

132. The Arbitral Tribunal in *Loewen* correctly took into account the strong public interest involved in investor-state arbitration, where domestic measures of States are challenged under international law. Arbitrations under the NAFTA, including the present arbitration, raise serious and specific public policy issues. An investor's decision to proceed with claims of this sort must in turn respect the democratic principles that are the fundamental basis of transparency rules.

133. The principle of transparency and the absence of a general duty of confidentiality in NAFTA proceedings was confirmed by the FTC Note. The FTC Note establishes transparency as the default norm under the NAFTA. It is binding on Chapter Eleven Tribunals pursuant to Article 1131(2).¹⁴¹ It confirms *inter alia* that nothing in the

¹⁴⁰ *The Loewen Group*. Decision of the Tribunal on the Respondent's Request of May 26, 1999, for a Ruling on Disclosure", para. 8, **RL-110**.

¹⁴¹ *NAFTA*, Article 1131(2). Article 1131(2), provides that: "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section".

NAFTA imposes a general duty of confidentiality, and creates a general presumption in favour of transparency. Treatment of information generated by such a proceeding is subject only to the protection of certain restricted categories of information, notably business confidential and privileged information.

134. Canada's position on transparency under the NAFTA is also consistent with the UNCITRAL Rules on Transparency. These provisions are now reflected in the 2010 UNCITRAL Arbitration Rules, as amended.¹⁴²
135. The UNCITRAL Rules on Transparency reveal the broad consensus among States regarding the essential importance of transparency in arbitral proceedings at all stages and regarding all aspects of the procedure, subject to the protection of confidential information. In adopting these Rules, all 193 countries comprising the General Assembly of the United Nations recognized the necessity of transparency in investor-State arbitrations, in order "to take account of the public interest involved in such arbitration"¹⁴³, and to contribute "to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase [...] accountability and promote good governance."¹⁴⁴
136. In summary, the NAFTA, FTC Note and the UNCITRAL Rules on Transparency all provide for the public disclosure of information generated in the course of a Chapter Eleven arbitration, subject only to specific exceptions of confidentiality. Canada respectfully invites the Arbitral Tribunal to observe the agreement of the NAFTA Parties as set out in these sources.

¹⁴² New Article 1(4) reads: "For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency." See UNCITRAL Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in December 2013), A/RES/65/22, 16 December 2013, **RL-134**.

¹⁴³ *UNCITRAL Rules on Transparency*, fifth preamble, **RL-134**.

¹⁴⁴ *UNCITRAL Rules on Transparency*, sixth preamble, **RL-134**.

C. The Tribunal Should Order Open Hearings in this Matter

137. Canada requests that hearings in this matter should be open to the public, except as required for the protection of confidential information. By contrast, Claimant refers to Article 25(4) of the UNCITRAL Rules and relies upon it to insist that hearings in this matter should be held *in camera*.¹⁴⁵

138. Canada's position on open hearings is consistent with the stated NAFTA objective of transparency discussed above and is shared by all NAFTA Parties. Indeed, all three signatory States have made clear commitments to holding open hearings in NAFTA Chapter Eleven arbitrations. On October 7, 2003, Canada issued a Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations, affirming that:

Having reviewed the operation of arbitration proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, Canada affirms that it will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information. Canada recommends that tribunals determine the appropriate logistical arrangements for open hearings in consultation with disputing parties. These arrangements may include, for example, use of closed-circuit television systems, Internet webcasting, or other forms of access.¹⁴⁶

139. The United States issued an identical affirmation on that same day.¹⁴⁷ Mexico joined Canada and the United States in endorsing this policy following the meeting of the Free Trade Commission of 2004.¹⁴⁸ Canada therefore requests that the Arbitral Tribunal observe the clear intent of the NAFTA Parties and agree to make the hearings accessible to the public.

¹⁴⁵ Procedural Order, para. 23.1.

¹⁴⁶ *Statement of Canada on Open Hearing*, **RL-135**.

¹⁴⁷ *Statement of the United States on Open Hearings*, **RL-136**.

¹⁴⁸ *NAFTA Free Trade Commission Joint Statement*, 16 July 2004, **RL-137**.

140. The commitment of the NAFTA Parties to open hearings is further reflected by NAFTA Chapter Eleven arbitral practice. Since 2001, the disputing parties and Arbitral Tribunals in a majority of NAFTA arbitrations have agreed to hold public hearings, including in *UPS v. Canada*,¹⁴⁹ *Glamis Gold v. United States*,¹⁵⁰ *Grand River Enterprises v. United States*,¹⁵¹ *Methanex v. United States*,¹⁵² and *Canfor v. United States*.¹⁵³ Most recently, public hearings were held in *Mobil v. Canada*,¹⁵⁴ *Merrill & Ring v. Canada*,¹⁵⁵ *Apotex v. United States*¹⁵⁶ and in *Bilcon v. Canada*.¹⁵⁷ In the latter case, the hearings were even video recorded and broadcast live.¹⁵⁸ Public hearings will also be held in three more cases to which Canada is a party: *Windstream v. Canada*,¹⁵⁹ *Mesa v. Canada*,¹⁶⁰ and *Mercer v. Canada*.¹⁶¹
141. It is to be noted that Claimant's confidentiality can be maintained since open hearings do not jeopardize the protection of confidential information. In past practice, including in the cases referred to above, reasoned claims for

¹⁴⁹ *UPS*, Procedural Direction and Order of the Tribunal, Part II, para. 14, **RL-074**.

¹⁵⁰ *Glamis Gold, Ltd. v. United States*, (UNCITRAL), Procedural Order No.1, 3 March 2005, para. 5(d), **RL-139**.

¹⁵¹ *Grand River*, Minutes of the First Session of the Tribunal, para. 10, **RL-065**.

¹⁵² ICSID News Release, "*Methanex Corporation v. United States of America NAFTA/UNCITRAL Arbitration Rules Proceeding*", 8 June 2004, **RL-140**.

¹⁵³ ICSID News Release, "*Canfor Corporation v. United States of America NAFTA/UNCITRAL Arbitration Rules Proceeding*", 2 December 2004, **RL-141**.

¹⁵⁴ *Mobil*, Minutes of First Session, p. 16, **RL-095**.

¹⁵⁵ *Merrill*, Confidential Order, para. 24, **RL-111**.

¹⁵⁶ *Apotex Inc. v. The United States of America*, (UNCITRAL) Award, 14 June 2013, para. 43, **RL-142**. See also Procedural Order No. 1, 16 December 2010, para. 26, **RL-026**.

¹⁵⁷ *Bilcon*, Procedural Order 2 (Confidentiality Order), 4 May 2009, para. 26, **RL-099**.

¹⁵⁸ See *Bilcon of Delaware et al. v. The Government of Canada*, Procedural Order No. 18, 16 April 2013, para.7.1, **RL-143**.

¹⁵⁹ *Windstream*, Procedural Order No. 1, para. 18, **RL-017**.

¹⁶⁰ *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL), Procedural Order, 21 November 2012, para. 22.2, **RL-148**.

¹⁶¹ *Mercer*, Procedural Order No. 1, para 76, **RL-014**; *Mercer*, Confidentiality Order, para. 19, **RL-100**.

confidentiality have been easily addressed by holding necessary portions of otherwise public hearings *in camera* to ensure that there is no disclosure of confidential information. Concerns about potential interference with the proceeding can be fully addressed, for example, by ensuring public access via live video-feed, which can be suspended briefly for the presentation of confidential information or at the request of either disputing party.¹⁶²

142. Finally, the approach proposed by Canada with regard to open hearing is consistent with the UNCITRAL Rules on Transparency, discussed above. Article 6 provides that “hearings for the presentation of evidence or for oral argument [...] shall be public”, subject to the protection of confidential information.¹⁶³ It also states that “[t]he arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video link or such other means as it deems appropriate).”¹⁶⁴

143. For the foregoing reasons, Canada’s position should be preferred and the hearings in this matter declared open to the public, save for brief periods when confidential or privileged information is under discussion.

D. The Tribunal Should Ensure Public Access to Transcripts of Hearings

144. The disputing parties are in disagreement as to whether the transcripts of hearings should be publicly disclosed or remain confidential. Canada proposes that the transcripts be accessible to the public in redacted form in order to protect confidential information. Canada’s position in this matter directly flows from the NAFTA Parties’ commitment to transparency in Chapter Eleven arbitrations, amply

¹⁶² See e.g. *Grand River*, Minutes of the First Session of the Tribunal, para. 10, **RL-065**.

¹⁶³ *UNCITRAL Rules on Transparency*, Article 6, **RL-134**.

¹⁶⁴ *UNCITRAL Rules on Transparency*, Article 6, **RL-134**.

discussed above, and reflects Article 3 of the UNCITRAL Rules on Transparency, which expressly provides that transcripts are to be made public.

145. Claimant, for its part, suggests that transcripts of hearings be kept confidential and disclosed only in accordance with the conditions stipulated for the release of confidential or redacted access information.¹⁶⁵ To the contrary, transcripts should be treated like all other pleadings and documents generated by this arbitration, including written submissions, witness statements, correspondence to and from the Arbitral Tribunal, as well as procedural rulings, orders, and awards.

146. In accordance with the FTC Note referred to above, which is binding on the Arbitral Tribunal, all documents submitted to or issued by a NAFTA Chapter Eleven Tribunal are to be made available to the public. There is no special exception or exemption for transcripts of hearings. The FTC Note recognizes the importance of confidential or otherwise protected information and provides that documents containing such information can be redacted. Claimant's concerns regarding confidentiality can thus be addressed: any confidential information properly designated as such will be redacted from the transcripts.

a) Public Access to Transcripts Ensures Equal Treatment of the Parties in Accordance with the UNCITRAL Arbitration Rules

147. Public disclosure of transcripts ensures the equal treatment of the disputing parties, as mandated by the UNCITRAL Rules. Article 15 of these Rules provides that in exercising its discretionary authority over the conduct of the arbitral proceedings, the Arbitral Tribunal must ensure that the parties are treated with equality.¹⁶⁶

148. Preventing public disclosure of hearing transcripts, subject to the redaction of confidential information, does not lead to equal treatment of the parties. If

¹⁶⁵ Confidentiality Order, paras. 15-16.

¹⁶⁶ *UNCITRAL Arbitration Rules*, Article 15(1).

transcripts are not released, the public will only hear one side of the story: Claimant will submit, alongside its Memorial, public version of its witness statements¹⁶⁷ which will provide the direct testimony of Claimant's witnesses. If the Arbitral Tribunal determines that the hearing transcripts must be kept confidential, potential inconsistencies in witness testimony, which might only become apparent under both direct and cross-examination, will never be publicly revealed. This will, to the prejudice of Canada, leave the public with a distorted understanding of the facts in this arbitration.

b) The Publication of Transcripts is in Accordance with Canadian Law

149. Canada's request that transcripts be available to the public is consistent with the approach to transparency under Canadian law, as reflected in the federal *Access to Information Act*.¹⁶⁸ As noted above, this domestic law requires Canada to release documents, including transcripts, if requested by the public, unless a relevant exception applies.¹⁶⁹ Exceptions include provisions which protect business confidential information. By requesting that the Arbitral Tribunal prohibit the disclosure of the transcripts under *any* circumstances, Claimant is effectively requesting that it place Canada in a position which would potentially require it to breach these domestic laws. A similar request by Claimant in the *Mondev* NAFTA Chapter Eleven arbitration was rejected by the Arbitral Tribunal.¹⁷⁰

¹⁶⁷ Confidentiality Order, para. 15.

¹⁶⁸ *Access to Information Act*, R.S.C. 1985, c. A-1, **RL-109**.

¹⁶⁹ See Part V section C.

¹⁷⁰ *Mondev*, Award, para. 29, **RL-067** ("Since it appeared that the [Freedom of Information Act] created a statutory obligation of disclosure for the Respondent, the Tribunal rejected Claimant's request for the Tribunal to prohibit the Respondent from releasing its submissions and correspondence in the case pursuant to the [Freedom of Information Act].")

c) *The Transcripts Should be Accessible to the Public Regardless of whether the Hearings are Held in Camera*

150. Should the Arbitral Tribunal decide that hearings in this arbitration are to be held *in camera*, the transcripts of those hearings should nevertheless be made accessible to the public. It does not automatically follow from Claimant's election under Article 25(4) of the UNCITRAL Rules that Claimant has a right to unilaterally cloak the transcripts of the hearings in secrecy. In the absence of an agreement of the parties, this is a matter that is left to the discretion of the Arbitral Tribunal under its inherent power to "conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality ...".¹⁷¹
151. The distinction between *in camera* hearings and secret transcripts has been consistently recognized by the disputing parties in NAFTA Chapter Eleven arbitrations. For example, in *Chemtura v. Canada*, the Claimant refused to consent to public hearings but agreed to the Confidentiality Order expressly allowing for transcript publication.¹⁷² Hearings have also been closed, but transcripts made publicly available in *Mondev v. United States*,¹⁷³ *Thunderbird v. Mexico*,¹⁷⁴ and *Fireman's Fund v. Mexico*.¹⁷⁵ Disputing Parties and Tribunals in these cases have recognized that a limited election to have *in camera* hearings does not necessarily extend to the transcripts being kept confidential.

¹⁷¹ *UNCITRAL Arbitration Rules*, Article 15(1), **RL- 001**.

¹⁷² *Chemtura Corporation v. Government of Canada* (UNCITRAL) Confidentiality Order, 21 January 2008, para. 11, **RL-144**.

¹⁷³ The transcripts are available on the website of the State Department, at: <http://www.state.gov/s/l/c3758.htm>.

¹⁷⁴ *International Thunderbird Gaming Corp. v. United Mexican States* (UNCITRAL) Procedural Order No. 1, 27 June 2003, para. 6.3, **RL -145**.

¹⁷⁵ *Fireman's Fund*, Summary of First Session, para. 27, **RL-073**.

VII. RELIEF REQUESTED

152. For the reasons set out above, Canada requests that the Arbitral Tribunal:

- Confirm the provisions of Procedural Order No. 1 and the Confidentiality Order as agreed to date by the disputing parties, subject to the Arbitral Tribunal's proposed amendments communicated to the disputing Parties on April 28, 2014, except as provided below;
- Confirm that the legal place of arbitration in this matter shall be either Ottawa or Toronto, or in the alternative The Hague;
- Confirm that the calendar of this proceeding shall be bifurcated between a first phase on liability issues, and a second phase on damages issues;
- Direct the disputing parties to proceed directly to a Memorial/Counter-Memorial phase on liability;
- Otherwise adopt the calendar proposed by Canada with regard to timing and sequencing of events in this arbitration, with equivalent amendments to the Arbitral Tribunal's draft Procedural Order No. 1 concerning sequencing of document production;
- Decline to adopt a Restricted Access Information category in the Confidentiality Order;
- Recognize in the Confidentiality Order Canada's disclosure obligation under Canadian law;
- Confirm that the US and Mexico shall have access to hearings, transcripts, and materials filed in this arbitration without restrictions as to confidential information, in accordance with their status as non-disputing Parties;
- Order that oral hearings in this matter shall be open to the public, subject to measures adopted to protect confidential information;
- Order that transcripts of oral hearings in this matter shall be publicly available, subject to redaction of confidential information;

- Make all consequential amendments to the draft Procedural Order No. 1 and Confidentiality Order required to implement the above decisions; and
- Grant such further and other relief as to the Arbitral Tribunal may deem just.

Respectfully submitted on behalf of the
Government of Canada this 2nd day of May
2014

[Signed]

Sylvie Tabet
Christophe Douaire de Bondy
Yasmin Shaker
Maxime Dea
Adrian Johnston

Of Counsel for the Respondent