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International Arbitration Case Law

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Award Name and Date: Eli Lilly and Company v. Government of Canada (ICSID Case No. UNCT/14/2) - *Final Award* – 16 March 2017

Case Report by: Marina Kofman**, Editor Diego Luis Alonso Massa***

Summary: Claimant asserted claims against Respondent after the invalidation of two of its Canadian patents on the ground that they did not meet the requirement under Canadian patent law that the invention be “useful”. Claimant argued that the basis for the Canadian Courts’ decisions was their adoption in the mid-2000s of the “promise utility doctrine”, which Claimant considered to be radically new, arbitrary and discriminatory against pharmaceutical companies and products. Claimant argued that the retroactive application of the doctrine to Claimant’s patents resulted in the unlawful expropriation of Claimant’s investments under NAFTA Article 1110 and a breach of Respondent’s obligation to provide the minimum standard of treatment under NAFTA Article 1105. The tribunal dismissed the claims.

Main Issues: NAFTA Article 1110 – NAFTA Article 1105 – minimum standard of treatment – arbitrary and discriminatory conduct – judicial measures as expropriation – whether limited to denial of justice

Tribunal: Professor Albert Jan Van Den Berg (President), Sir Daniel Bethlehem QC (Arbitrator) and Mr. Gary Born (Arbitrator)

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Digest:

1. Relevant Facts

The Claimant in the arbitration is Eli Lilly and Company (“**Claimant**” or “**Eli Lilly**”), a pharmaceutical company incorporated in the USA under the laws of Indiana. Claimant brought its claims on its own behalf and on behalf of its indirectly owned subsidiary, Eli Lilly Canada Inc. Respondent is the Government of Canada (“**Respondent**” or “**Canada**”) (¶ 1). Claimant submitted its dispute to international arbitration pursuant to Chapter 11 of the North American Free Trade Agreement (“**NAFTA**”) and the UNCITRAL Arbitration Rules 1976 (“**UNCITRAL Rules**”) (¶ 4).

The Canadian patent system is rooted in the Canadian Patent Act (“**Patent Act**”) (¶ 63). At the heart of the dispute was the “utility requirement” under the Patent Act, i.e. the requirement that the “invention” be “useful” (¶ 66). Under Canadian judicial authority, utility can either be demonstrated or “soundly predicted”. The doctrine of sound prediction was adopted in a 1979 Supreme Court of Canada decision (¶ 67).

1.1 Zyprexa Patent (Olanzapine)

In 1980, Lilly Industries Limited U.K. obtained a Canadian patent for olanzapine under Canadian Patent No. 1,075,687 (the “**687 patent**”) (¶ 71). In 1991 Eli Lilly and Company U.K. filed another Canadian Patent Application in relation to olanzapine, as a selection from the genus of the 687 Patent (the “**Zyprexa Patent**” or “**113 Patent**”) (¶ 73). The patent was issued on 14 July 1998 (¶ 78).

Lilly Canada filed a patent infringement suit against Canadian drug manufacturer Novopharm Limited (“**Novopharm**”). On 5 October 2009, the Federal Court dismissed the claim and in the same judgment invalidated the patent on the basis that it did not describe an invention over and above what was disclosed in the 687 patent. Lilly Canada appealed the decision and the appeal was allowed, but the decision was remanded to the Federal Court for re-determination on the issues of “utility” and “sufficiency of disclosure”. In a judgment dated 10 November 2011 (the “**Zyprexa Decision**”), the Court found the Zyprexa Patent to be invalid for a lack of utility. Lilly Canada appealed the Zyprexa Decision and the Federal Court of Appeal dismissed the appeal on 10 September 2012. On 16 May 2013, the Supreme Court of Canada refused leave to appeal the decision. (¶¶ 80-84)

1.2 Strattera Patent (Atomoxetine)

In 1979, Eli Lilly obtained a Canadian patent for a genus group of compounds including atomoxetine. In 1985, Claimant filed for a second patent relating only to atomoxetine (¶¶ 85-86). On 4 January 1996, Claimant filed a “new use” patent application for atomoxetine (the “**Strattera Patent**” or “**735 Patent**”) (¶ 88). The Strattera Patent was issued on 1 October 2002 (¶ 91).

Novopharm challenged the validity of the Strattera Patent in the Federal Court. On 14 September 2010, the Court issued a judgment finding the Strattera Patent to be invalid on the basis of inutility (the “**Strattera Decision**”) (¶ 93). Claimant appealed the decision but on 5 July 2011, the Federal Court of Appeal dismissed the appeal. On 8 December 2011, Claimant was denied leave to appeal to the Supreme Court of Canada (¶ 94).

2. Procedural History

On 7 November 2012, Claimant delivered a Notice of Intent to Submit a Claim to Arbitration to Respondent in respect of its patent for Strattera. On 13 June 2013, Claimant delivered a second Notice of Intent, which contained claims identical to those raised in the first Notice, but added the Zyprexa patent (9). On 12 September 2013, Claimant submitted its Notice of Arbitration (¶ 10). The Tribunal was deemed to have been constituted on 2 April 2014 (¶ 16). A Procedural hearing was held on 10 May 2014 (¶ 19). On 23 February 2016, the Tribunal issued Procedural Order 4, which granted leave to various applicants to file six *amicus* submissions (¶ 46). On 18 March 2016, Mexico and the United States filed written submissions (¶ 47). A pre-hearing teleconference was held on 27 April 2016 (¶ 50). The hearing on jurisdiction and the merits was held in Washington D.C. from 30 May to 8 June 2016 (¶ 55).

3. Jurisdiction

3.1 *The parties’ positions*

The Respondent raised an objection to the Tribunal’s jurisdiction *rationae temporis*. According to Respondent, Claimant had recast its claim in the Reply in a way that brought it outside of the three-year limitation period set out in NAFTA Articles 1116(2) and 1117(2) (¶ 115). Respondent argued that in Claimant’s Reply, it became clear that the measure Claimant was challenging was the promise utility doctrine itself, rather than the judiciary’s invalidation of the Zyprexa and Strattera Patents (¶ 126).

Respondent argued that, on Claimant’s own case, the promise utility doctrine crystallized when it was applied to Claimant’s patent for raloxifene (the “**Raloxifene Patent**”) in a Federal Court decision on 5 February 2008 (¶ 121). Further, Respondent alleged that Claimant suffered a loss as a result of the application of the promise utility doctrine when on 22 October 2009 the Supreme Court denied it leave to appeal that decision. According to Respondent, this was therefore the first moment at which the three-year limitation began to run, and because Claimant chose not to submit a claim within the prescribed period, it ran afoul of NAFTA articles 1116(2) and 1117(2) (¶¶ 123, 128-129).

In response, Claimant argued that the jurisdictional objection should be rejected as untimely so should not be considered, and in any event that it fails as a matter of law (¶ 114). Claimant submitted that under Article 21(3) of the UNCITRAL Rules, any objection to the Tribunal’s jurisdiction must be raised no later than the Statement of defense (¶ 134). Claimant further rejected Respondent’s submission that Claimant had “recast” its case in the Reply as untenable, because it had consistently argued that the measures at issue were the invalidations of the Zyprexa and Strattera Patents, and not the promise utility doctrine (¶ 137). Claimant argued that therefore its references to earlier Canadian court decisions were appropriate and served only as a factual predicate (¶ 143). In this context, Claimant had filed its Notice of Arbitration within three years of the dates of the relevant final judgments concerning the Zyprexa and Strattera Patents (¶ 140).

3.2 The Tribunal's analysis

The Tribunal decided that an overall reading of the Reply confirmed Claimant's challenge was aimed solely at the invalidation of the Zyprexa and Strattera Patents. It therefore rejected Respondent's re-characterisation of Claimant's claim (¶¶ 164-165).

The Tribunal also rejected Respondent's argument regarding the court decisions about the Raloxifene patent being the first moment in which the three-year limitation began to run. The Tribunal stated that (a) an investor cannot be obliged or deemed to know of a breach before it occurs and (b) any loss suffered by Claimant before the date of the alleged breach with respect to a different investment is irrelevant to the application of NAFTA Articles 1116(2) and 1117(2) to the investments in issue in the arbitration (¶ 167). The Articles also cannot be interpreted to require investors to bring claims for possible future breaches on the basis of potential (and therefore hypothetical) losses to their investments or the increased risk of such losses (¶ 169).

The Tribunal did not need to decide the issue about the timeliness of the jurisdictional objection due to its above conclusions (¶ 160).

4. Liability –

4.1.1 The Parties' positions - Claimant

Claimant rejected Respondent's position that under international law, the only possible theory of liability for judicial measures is a denial of justice (¶ 174). Claimant's position was that NAFTA Chapter 11 does not distinguish between executive, legislative or judicial actions (¶ 176). Claimant argued that when a state court violates a substantive rule of international law, it is a freestanding basis of liability, pointing to Professor Jan Paulsson's book and a statement of the Tribunal in *Azinian v. Mexico* in support (¶¶ 179-180).

In the context of NAFTA Article 1110 Claimant argued that tribunals have concluded that judicial measures qualify as indirect expropriation when they result in a substantial deprivation and violate a rule of international law, citing the tribunals in *Saipem v. Bangladesh*, *ATA v. Jordan*, *Rumeli Telekom v. Kazakhstan* and *Oil Field of Texas v. Iran* in support (¶¶ 181-182).

In the context of NAFTA Article 1105, Claimant argued that multiple arbitral awards have confirmed that denial of justice is not the only protection against judicial actions offered by the minimum standard of treatment, citing *Liman Caspian Oil v. Kazakhstan*, *White Industries v. India*, *Frontier Petroleum v. Czech Republic* and *Mondev v. United States* in support. Claimant distinguished *Waste Management v. Mexico*, *Azinian v. Mexico* and *Loewen v. United States* as denial of justice was the only relevant theory of liability before the tribunal in those cases (¶¶ 183-185).

4.1.2 The Parties' positions - Respondent

As its primary defense, Respondent asserted that Claimant had failed to state a claim under Articles 1116(1) and 1117(1) for a breach of Articles 1110 and 1105 because it admitted that there had been no denial of justice. According to Respondent, the only substantive obligation under NAFTA Chapter Eleven with respect to judicial measures is to ensure that the investments of an investor are not denied justice (¶ 186).

In the context of NAFTA Article 1110 Respondent argued that a denial of justice is the only basis on which a domestic court judgment on the validity of a property right could constitute an expropriation (¶ 188). Respondent rejected Claimant's submission that domestic court judgments can be expropriatory if they violate a rule of international law, as this would transform NAFTA Tribunals into tribunals with plenary jurisdiction over all international treaties and supranational courts of appeal in domestic property law issues (¶ 190).

Respondent argued that Claimant's reliance on the arbitral jurisprudence and on passages of Professor Paulsson's book was misplaced. Respondent further argued that (i) Claimant could not point to any examples of a judicial expropriation in the absence of a denial of justice; (ii) instances where a judicial determination that a property right was invalid under domestic law was found to be an expropriation under international law; or (iii) evidence of State practice (¶¶ 191-196).

In relation to NAFTA Article 1105 Respondent pointed to the FTC Note which it said makes clear that the only source of obligations in Article 1105 is the customary international law minimum standard of treatment, and that denial of justice is the only customary international law rule applicable to State organs exercising an adjudicative function (¶ 196). Respondent pointed to a number of decisions in support including *waste Management, Inc. v. United Mexican States*, *Glamis Gold v. United States*, *Cargill v. Mexico*, *Mobil and Murphy v. Canada*, and *International Thunderbird v. Mexico* (¶ 197), while asserting that the cases Claimant relied on did not support its position (¶ 200).

4.2 The Tribunal's analysis

Two questions to be addressed are whether there is a distinction to be drawn between a substantive denial of justice and the requirements of procedural due process and whether conduct that does not constitute a denial of justice may nonetheless be capable of qualifying as a violation of NAFTA Articles 1105 or 1110. The Tribunal did not need to decide these issues having regard to its conclusions on the utility requirement under Canadian patent law, but made some brief observations (¶¶ 218-219).

Firstly, as a matter of broad proposition, the Tribunal found it was possible to contemplate circumstances in which a judicial act or omission may engage questions of expropriation under NAFTA Article 1110 (¶ 221). As regards NAFTA Article 1105(1), the Tribunal accepted in principle the analysis and conclusions of the tribunal in *Glamis Gold* on the content of the customary international law standard of treatment (“...an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards...”) (¶ 222).

In the Tribunal's view, a claimed breach of the customary international law minimum standard of treatment requirement of NAFTA 1105(1) may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that it is not cast in denial of justice terms. Having regard to the content of the customary international law minimum standard of treatment, the Tribunal was unwilling to shut the door to the possibility that judicial conduct characterized other than as a denial of justice may engage a respondent's obligations under NAFTA Article 1105, within the standard articulated in *Glamis*. The Tribunal considered this assessment was consistent with the tribunal in *Mondev*, with which it was content to agree (¶ 223). It will only be in “very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct”

that will be appropriate for a NAFTA Chapter Eleven tribunal to assess such conduct against the obligations of the respondent state under NAFTA Article 1105(1) (¶ 224).

5. The alleged dramatic change in the utility requirement under Canadian law

5.1.1 The Parties' positions – Claimant

Claimant argued that the promise utility doctrine was a radical departure from Canada's traditional utility standard and the utility standards applied by Canada's NAFTA partners (¶ 227). According to Claimant, in the mid-1990s when NAFTA entered into force and when the Zyprexa and Strattera patents were granted, the utility requirement enshrined in the Patent Act had a well-established meaning that was applied by the Federal Courts, the Patent Office, and inventors, which had a low threshold of utility (¶ 228). Claimant pointed to evidence that between 1980 to 2004 there were only 28 utility challenges in Canadian trial courts and not a single pharmaceutical patent was found to lack utility (¶ 229). Claimant also pointed to the Manual of Patent Office Practice (“MOPOP”) in support of the low threshold for utility in pharmaceutical patents (¶¶ 230-233).

Claimant argued that in the mid-2000s, Canada's utility requirement underwent a dramatic transformation as the promise utility doctrine emerged (¶ 234). Claimant submitted that the interpretation that the Canadian courts have made since 2005 of the requirements of the “promise standard” resulted in identifying the patent's “promise” as being inherently arbitrary and unpredictable (¶ 236). It further argued that the promise utility standard imposes three elements that drastically depart from the traditional utility test (¶ 235). The new standard was reflected by amendments in 2009 and 2010 to the MOPOP (¶¶ 249-254). Claimant also submitted statistical evidence on the number of patents that were invalidated by Canadian courts for inutility in support of its position (¶¶ 255-257). Claimant alleged that the “dramatic change” was further evidenced by the recent divergence between the utility requirement in Canada and in the other NAFTA parties (¶¶ 258-260).

Claimant submitted that it had legitimate expectations that its Zyprexa and Strattera patents would not be invalidated on the basis of a radically new utility requirement. This expectation was grounded in (i) Canadian patent law, (ii) Respondent's grant of the patents and (iii) Respondent's international commitments under NAFTA and the Patent Cooperation Treaty (¶ 261). Claimant relied upon this expectation when making significant investment decisions (¶ 265). Claimant also drew a “distinction between measured change in the law or clarification of previously unsettled law, on the one hand, and the adoption of a completely new doctrine in a well-settled area, on the other”. Claimant argued that it could not have reasonably expected that Canadian courts would create and then retroactively apply a new utility requirement (¶ 269).

5.1.2 The Parties' positions – Respondent

Respondent rejected Claimant's allegation of a recent change in the Canadian law on utility. According to Respondent, the term “useful” is not defined in the Patent Act, and its meaning has therefore necessarily evolved through jurisprudence. Respondent argued that what Claimant presented as a unitary “promise utility doctrine” is in reality three distinct, long-standing patent law rules (¶ 270).

Respondent argued that Claimant's allegation that the "dramatic change" it alleged occurred in 2005 in not holding patentees to promises of utility *per se*, but holding them to promises found in the disclosure portion of the patent, was incorrect (¶¶ 272-273). Respondent pointed to what it considered extensive historical evidence demonstrating the existence of the promise standard in Canadian law long before Claimant filed its patents or NAFTA entered into force (¶¶ 274-278). Respondent similarly rejected Claimant's arguments on the alleged new legal requirements in respect of both post-filing evidence (¶¶ 279-284) and the disclosure for sound prediction requirement (¶¶ 285-290).

It was Respondent's position that the MOPOP is neither an authoritative statement of the law nor a comprehensive summary of Canadian patent law or Patent Office practice (¶ 291), and in any event Respondent rejected that MOPOP and Patent Office practice reflect the creation of the promise utility doctrine in the mid-2000s (¶ 292). Respondent also rejected Claimant's statistical evidence on a number of grounds (¶¶ 294-296) and argued that differences in patent law regimes across jurisdictions is irrelevant as international patent law is not harmonized by NAFTA or otherwise (¶ 297).

As to legitimate expectations, Respondent argued that a mere failure to fulfill an investor's expectation does not breach the minimum standard of treatment in NAFTA Article 1105(1), although it may be relevant to the analysis of whether a measure was sufficiently egregious to breach customary international law (¶ 300). In any event, Respondent argued that Claimant had failed to establish its legitimate expectations, and, among other reasons, could not point to a specific assurance or promise in relation to the Zyprexa and Strattera Patents. Respondent argued that Claimant cannot rely on the grant of the patents as a basis for its alleged legitimate expectations because patents issued by the Patent Office are only presumptively valid, subject to challenge and to final determination by the judiciary. Finally, in Respondent's view, any sophisticated investor expects development in the law (¶¶ 301-306).

5.1.3 The Tribunal's analysis

The fundamental question before the Tribunal was whether there was a "dramatic" change in the utility requirement in Canada (¶ 307). The Tribunal found that Claimant has not met its burden of proving this allegation (¶ 308).

The Tribunal analysed the case law in relation to each of the three elements of the doctrine asserted by Claimant, and concluded that on the evidence in the record the facts surrounding each of the elements did not demonstrate a dramatic transformation of the utility requirement in Canadian law (¶¶ 307-351).

On the question of the MOPOP, the Tribunal concluded that it is only relevant as a general guide to Canadian patent law and was cautious in drawing conclusions from any specific amendments (¶¶ 357). Further, the Tribunal found that the MOPOP itself does not indicate that the promise standard is derived from new jurisprudence (¶¶ 361-362) and nothing in the 1990 version of the MOPOP suggests post-filing evidence of utility would be admitted, rather the 1990 MOPOP had a requirement that "Utility must be disclosed" (¶¶ 364). On the whole, Claimant's evidence relating to MOPOP and Patent Office practice did not support its allegation of a dramatic change in the law (¶ 366).

The tribunal expressed doubts about Claimant's selection of 1 January 2005 as the dividing line between 'before' and 'after' the promise utility doctrine in its statistical evidence, which did not appear to correspond to any relevant dates in the record, and the choice of which was not adequately explained (¶ 368). The Tribunal observed that changing the date even slightly undermines the conclusions Claimant sought to draw from the evidence (¶ 369). Further, the small data set was a fundamental problem in terms of establishing a statistically significant difference in the rate of invalidations (¶ 371). In the context of an undisputed spike in utility challenges in the pharmaceutical sector, absent evidence of a corresponding rate of invalidations, the Tribunal found nothing striking about an increase in invalidations as more patents were challenged (¶ 372). The Tribunal concluded that the quantitative date provided insufficient evidentiary support for its allegation of a dramatic change in the law (¶ 376).

The Tribunal was also not persuaded that Claimant's comparative analysis of patent law in North America altered its other findings (¶ 379).

The Tribunal dismissed Claimant's argument about legitimate expectations because the argument was dependent on Claimant establishing a dramatic change in Canadian law on utility. The Tribunal also did not need to determine the legal question of whether a violation of an investor's legitimate expectations can constitute a breach of NAFTA Article 1105 (¶¶ 380-381). The Tribunal concluded that each of the three elements of the alleged promise utility doctrine had a foundation in Canadian law when Claimant's patents were filed and while Claimant may not have been able to predict the precise trajectory of the law on utility, it should have, and could have, anticipated that the law would change over time as a function of judicial decision-making (¶ 384).

The Tribunal found that, on the record of the arbitration, Claimant had not demonstrated a fundamental or dramatic change in Canadian patent law, nor that its legitimate expectations were violated. Rather, the evidence before the Tribunal showed that Canada's utility requirement underwent incremental and evolutionary changes between the time the Zyprexa and Strattera Patents were granted and then invalidated (¶¶ 386-387).

6. The alleged arbitrary and discriminatory nature of the utility requirement under Canadian law

6.1.1 The Parties' positions - Claimant

Claimant alleged that the promise utility doctrine is arbitrary because it (i) "is unpredictable and incoherent", and (ii) "serves no legitimate public purpose" (¶ 390). The Tribunal decided to address these allegations despite their rejection of Claimant's main argument in the arbitration because as a matter of hypothesis an arbitrary or discriminatory measure could violate NAFTA Articles 1105 and/or 1110 in the absence of a fundamental or dramatic change in the relevant area of law (¶ 389).

Claimant submitted each limb of the promise utility doctrine was arbitrary. Claimant alleged that the process of construing the promise of a patent is inherently arbitrary because it allows the courts to ignore the distinction between the claims and the disclosure (¶ 391). Claimant then alleged that the heightened evidentiary burden is arbitrary and unpredictable because it bars post-filing evidence that could validate earlier tests (¶ 392). Claimant finally alleged that the sound prediction disclosure obligation in practice functions in a way that is unpredictable and unfair (¶ 393). Claimant submitted that an incoherent rule of law such as the promise utility

doctrine cannot support a policy objective because it leads to inconsistent results and does not promote compliance (¶ 395).

Claimant argued that the promise utility doctrine is discriminatory in that it discriminates against pharmaceutical patents as a field of technology, which NAFTA expressly prohibits (¶ 397). Claimant also argued that despite being facially neutral, that as a matter of fact only patents held by foreign firms have been invalidated pursuant to the doctrine (¶ 401).

6.1.2 The Parties' positions – Respondent

Respondent denied that the doctrine is a unitary doctrine, and submitted it is rather several distinct rules of Canadian patent law. Respondent denied that any of the elements of the alleged doctrine are arbitrary (¶¶ 402-403). In relation to assertions about inconsistent outcomes, Respondent pointed to outcomes being highly fact-dependent in the circumstances of each case (¶ 404). In relation to the ban on post-filing evidence Respondent argued it is not arbitrary to require inventors to demonstrate or soundly predict utility at the time of filing a patent (¶ 406). Further, Respondent pointed out that all three elements of the alleged doctrine serve important policy objectives.

In relation to discrimination, Respondent attacked the methodological aspects of Claimant's statistical evidence, which it used to support this argument (¶¶ 409-414). Respondent also submitted that Canadian biopharmaceutical companies are subject to the same rules as foreign companies such as Claimant (¶ 415).

6.1.3 Tribunal's Analysis

The Tribunal was satisfied that under any plausible standard, the challenged decisions of the Canadian courts are neither arbitrary nor discriminatory, nor could it be said that the judicial measures were expropriatory within the meaning of NAFTA Article 1110. The Tribunal held that (a) the interpretative process described by Claimant falls well within the scope of duties that courts are routinely asked to perform (¶ 420), (b) that Respondent had asserted a legitimate public policy purpose justification for the promise doctrine, (c) that Claimant had provided no persuasive evidence showing that the post-filing evidence rule is unpredictable and (d) that Respondent had advanced a legitimate justification for the disclosure rule in the sound prediction doctrine (¶¶ 420-428). The Tribunal found that on the evidence before it, none of the three elements of the doctrine is arbitrary (¶ 430). The Tribunal concluded that the patent grants to Claimant were made in a legal system that historically has, and necessarily, evolves, and this evolution resulted in later decisions, rationally and not unforeseeably, that concluded the initial patent grants were invalid, just as the Canadian statutory patent regime envisions (¶ 418).

On the discrimination argument, the Tribunal found that even if it were to fully embrace Claimant's statistical evidence, the Tribunal could not reach the conclusion, based on the evidence on the record, that the doctrine has differentially disadvantageous effects on the pharmaceutical sector (¶ 432). It also appeared to the Tribunal that Claimant had not made much effort to fully develop its theory of *de facto* nationality-based discrimination, and as such the Tribunal was unwilling to infer discrimination from such a bare record (¶ 441). Claimant ultimately failed to establish the factual premise on which its allegations of arbitrariness and discrimination were based (¶ 442).

7. Costs

The Tribunal followed the “loser pays” principle in Article 40(1) of the UNCITRAL Rules and ordered Claimant to bear the costs of the arbitration, as well as to pay 75 percent of Respondent’s legal fees and disbursements (¶¶ 457, 460).