

Model Rules of Procedure for Chapter Twenty of the North American Free Trade Agreement

Application

1. These rules are established under Article 2012(1) and shall apply to dispute settlement proceedings under Chapter Twenty unless the disputing Parties otherwise agree.

Definitions

2. In these rules:

adviser means a person retained by a Party to advise or assist the Party in connection with the panel proceeding;

Agreement means the North American Free Trade Agreement;

complaining Party means any Party that requests the establishment of an arbitral panel under Article 2008(1) or any Party that joins a panel proceeding under Article 2008(3);

disputing Parties means the complaining Party or Parties, and the Party complained against;

legal holiday, with respect to a Party's section of the Secretariat, means every Saturday and Sunday and any other day designated by that Party as a holiday for the purposes of these rules and notified by that Party to its section of the Secretariat and by that section to the other sections of the Secretariat and the other Parties;

panel means a panel established under Article 2008(2);

participating Parties means the disputing Parties and a third Party;

Party means a Party to the Agreement;

representative of a participating Party means an employee of a government department or agency or of any other government entity of a participating Party;

responsible section of the Secretariat means the section of the Secretariat of the Party complained against;

Secretariat means the Secretariat established under Article 2002(1); and

third Party means a Party, other than a disputing Party, that delivers a written notice in accordance with Article 2013.

3. Any reference made in these rules to an Article, Annex or Chapter is a reference to the appropriate Article, Annex or Chapter of the Agreement.

Terms of Reference

4. The disputing Parties shall promptly deliver any agreed terms of reference to the responsible section of the Secretariat which, in turn, shall provide for their delivery to any third Party, to the other sections of the Secretariat, and to the panel on selection of the last panelist, by the most expeditious means practicable.

5. If the disputing Parties have not agreed on terms of reference after 20 days of the request for the establishment of the panel, the complaining Party may so notify the responsible section of the Secretariat. On receipt of such notification, that section shall deliver the terms of reference set out in Article 2012(3) to the participating Parties, to the other sections of the Secretariat, and to the panel on selection of the last panelist, by the most expeditious means practicable.

Written Submissions and Other Documents

6. A participating Party shall deliver the original and nine copies of each of its written submissions to its section of the Secretariat and shall make a copy of each of its written submissions available to the Embassy of each other participating Party at the time it delivers the written submission to its section.

7. A complaining Party shall deliver the original and nine copies of its initial written submission to its section of the Secretariat no later than 10 days after the date on which the last panelist is selected. The Party complained against shall deliver the original and nine copies of its written counter-submission to its section of the Secretariat no later than 20 days after the date of delivery of the initial written submission. A third Party shall deliver the original and nine copies of its initial written submission to its section of the Secretariat no later than the date on which the counter-submission is due.

8. A section of the Secretariat that receives a written submission shall forward it by the most expeditious means practicable to the responsible section of the Secretariat which, in turn, shall provide for delivery of that submission by the most expeditious means practicable to the other sections of the Secretariat, the other participating Parties and the panel.

9. In the case of any request, notice or other document related to the panel proceeding that is not covered by rule 6, 7 or 8, the participating Party shall deliver the original and nine copies of the document to its section of the Secretariat and, on the same day, it shall deliver a copy to the other participating Parties by facsimile or other means of electronic transmission.

10. Minor errors of a clerical nature in any request, notice, written submission or other document related to the panel proceeding may be corrected by delivery of a new document clearly indicating the changes.

11. A participating Party that delivers any request, notice, written submission or other document to its section of the Secretariat shall, to the extent practicable, deliver a copy of the document in electronic form to that section.

12. Any delivery to a section of the Secretariat under these rules shall be made during the normal business hours of that section.

13. If the last day for delivery of a document to a section of the Secretariat falls on a legal holiday observed by that section or on any other day on which the offices of that section are closed by

order of the government or by *force majeure*, the document may be delivered to that section on the next business day.

Operation of Panels

14. The chair of the panel shall preside at all of its meetings. A panel may delegate to the chair authority to make administrative and procedural decisions.
15. Except as otherwise provided in these rules, the panel may conduct its business by any means, including by telephone, facsimile transmission or computer links.
16. Only panelists may take part in the deliberations of the panel but the panel may permit assistants, Secretariat personnel, interpreters or translators to be present during such deliberations.
17. Where a procedural question arises that is not covered by these rules, a panel may adopt an appropriate procedure that is not inconsistent with the Agreement.
18. If a panelist dies, withdraws or is removed, a replacement shall be selected as expeditiously as possible in accordance with the selection procedure followed to select the panelist.
19. Any time period applicable to the panel proceeding shall be suspended for a period beginning on the date the panelist dies, withdraws or is removed and ending on the date the replacement is selected.
20. A panel may, in consultation with the disputing Parties, modify any time period applicable in the panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding, such as where a panelist is replaced or where the Parties are required to reply in writing to the questions of a panel.

Hearings

21. The chair shall fix the date and time of the hearing in consultation with the participating Parties, the other members of the panel and the responsible section of the Secretariat. The responsible section of the Secretariat shall notify in writing the participating Parties of the date, time and location of the hearing.
22. The hearing shall be held in the capital of the Party complained against.
23. The panel may convene additional hearings if the disputing Parties so agree.
24. All panelists shall be present at hearings.
25. The following persons may attend a hearing:
 - (a) representatives of a participating Party;
 - (b) advisers to a participating Party provided that they do not address the panel and provided further that neither they nor their employers, partners, business associates or family members have a financial or personal interest in the proceeding;

(c) Secretariat personnel, interpreters, translators and court reporters; and

(d) panelists' assistants.

26. No later than five days before the date of a hearing, each participating Party shall deliver to the other participating Parties and the responsible section of the Secretariat a list of the names of those persons who will make oral arguments or presentations at the hearing on behalf of that Party and of other representatives or advisers who will be attending the hearing.

27. The hearing shall be conducted by the panel in the following manner, ensuring that the complaining Party or Parties and the Party complained against are afforded equal time:

Argument -

(i) Argument of the complaining Party or Parties.

(ii) Argument of the Party complained against.

(iii) Presentation of a third Party.

Rebuttal Argument -

(iv) Reply of the complaining Party or Parties.

(v) Counter-reply of the Party complained against.

28. The panel may direct questions to any participating Party at any time during a hearing.

29. The responsible section of the Secretariat shall arrange for a transcript of each hearing to be prepared and shall, as soon as possible after it is prepared, deliver a copy of the transcript to the participating Parties, the other sections of the Secretariat and the panel.

Supplementary Written Submissions

30. The panel may at any time during a proceeding address questions in writing to one or more of the participating Parties. The panel shall deliver the written questions to the Party or Parties to whom the questions are addressed through the responsible section of the Secretariat which, in turn, shall provide for the delivery of copies of the questions by the most expeditious means practicable to the other sections of the Secretariat and any other participating Party.

31. A participating Party to whom the panel addresses written questions shall deliver a copy of any written reply to its section of the Secretariat which, in turn, shall forward it by the most expeditious means practicable to the responsible section of the Secretariat. The responsible section of the Secretariat shall provide for the delivery of copies of the reply by the most expeditious means practicable to the other sections of the Secretariat and any other participating Party. Each other participating Party shall be given the opportunity to provide written comments on the reply within five days after the date of delivery.

32. Within 10 days after the date of the hearing, each participating Party may deliver to its section of the Secretariat a supplementary written submission responding to any matter that arose during the hearing.

Burden of Proof Regarding Inconsistent Measures and Exceptions

33. A Party asserting that a measure of another Party is inconsistent with the provisions of the Agreement shall have the burden of establishing such inconsistency.

34. A Party asserting that a measure is subject to an exception under the Agreement shall have the burden of establishing that the exception applies.

Availability of Information

35. The Parties shall maintain the confidentiality of the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel, in accordance with such procedures as may be agreed from time to time between representatives of the Parties.

Ex Parte Contacts

36. The panel shall not meet or contact one participating Party in the absence of the other participating Parties.

37. No panelist may discuss any aspect of the subject matter of the proceeding with a participating Party or Parties in the absence of the other panelists.

Scientific Review Boards

38. No panel may decide to request a written report of a scientific review board any later than 15 days after the date of the hearing, whether on its own initiative or at the request of a disputing Party.

39. Within five days after the date on which the panel decides to request a written report of a scientific review board, the panel shall request that the scientific bodies designated by each Party from time to time and set out in Appendix I provide, within 15 days after the date of the delivery of the request, a list of the names of possible members of the scientific review board, in such numbers as the panel requests and having expertise in the scientific matters that the panel identifies. 40. The panel shall deliver the request for the list of names of possible members of the scientific review board to the responsible section of the Secretariat which, in turn, shall provide for the delivery of copies of the request by the most expeditious means practicable to the other sections of the Secretariat and the participating Parties.

41. Within 25 days after its decision to request a written report of a scientific review board and after consulting the disputing Parties, the panel shall select up to three members to constitute the scientific review board. The panel shall make its selection from the lists provided by the scientific bodies wherever possible.

42. The panel shall not select as a member of a scientific review board an individual who has, or whose employers, partners, business associates or family members have, a financial or personal interest in the proceeding.

43. A participating Party may, before the date on which the last member of the scientific review board is selected, submit written comments to the panel on the factual issues to be referred to the board.

44. Within five days after the date on which the last member of the scientific review board is selected, the panel shall finalize the factual issues to be referred to the board, and may consult with members of the board in this regard.

45. The panel shall deliver a copy of its referral to the responsible section of the Secretariat which, in turn, shall provide for the delivery of copies of the referral by the most expeditious means practicable to the other sections of the Secretariat, the participating Parties and the board.

46. A scientific review board shall deliver its report to the responsible section of the Secretariat within 30 days after the date on which the factual issues are referred to the board.

47. The responsible section of the Secretariat shall deliver the board's report to the participating Parties and their respective sections of the Secretariat. Any participating Party may provide comments on the report to its section of the Secretariat within 14 days after the date of delivery of the report. The appropriate section of the Secretariat shall promptly deliver any such comments to the responsible section of the Secretariat which, in turn, shall no later than the next business day deliver such comments to the other participating Parties and their respective sections of the Secretariat, and shall deliver the report and all such comments to the panel.

48. Where a request is made for a written report of a scientific review board, any time period applicable to the panel proceeding shall be suspended for a period beginning on the date of delivery of the request and ending on the date the report is delivered to the panel.

Appendix I

Scientific Bodies

Canada
The Royal Society of Canada

Mexico
El Colegio Nacional

United States
The National Research Council of the National Academy of Sciences

The National Academy of Engineering

The Institute of Medicine

Supplementary Procedures Pursuant to Rule 35 on the Availability of Information

July 13, 1995

Ms. Jennifer A. Hillman, Esquire
General Counsel
Office of the USTR
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ms. Hillman:

Pursuant to Rule 35 of the NAFTA Chapter Twenty Model Rules of Procedure, I have the honour to confirm the following understanding reached between representatives of Canada, the United Mexican States and the United States of America regarding the availability of information in the context of NAFTA Chapter Twenty dispute settlement procedures.

NAFTA Parties will maintain the confidentiality of the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel, in accordance with the following procedures:

A Party or, subject to its direction, the Party's section of the Secretariat, may make available to the public at any time the Party's written submissions and those of the other participating Parties. Before such documents are made available to the public they shall be redacted to remove any information designated for confidential treatment by a participating Party pursuant to paragraph (4).

Party or, subject to its direction, the Party's section of the Secretariat, may make the hearing transcript available to the public 15 days after the final report of the panel is published pursuant to Article 2017(5). Before the transcript is made available to the public it shall be redacted to remove any information designated for confidential treatment by a participating Party pursuant to paragraph (4).

(3) Where information has been removed from a document pursuant to paragraph (1) or (2), the document shall indicate clearly each place where such information has been removed.

the extent it considers strictly necessary to protect personal privacy or to address essential confidentiality concerns, a participating Party may designate specific information included in its written submissions, or that it has presented in the panel hearing, for confidential treatment.

participating Party may disclose to other persons such information in connection with the panel proceedings as it considers necessary for the preparation of its case, but it shall ensure that those persons maintain the confidentiality of any such information.

participating Party shall treat as confidential the initial report and information submitted by another Party to the panel that the Party has designated as confidential pursuant to paragraph (4).

(7)The responsible section of the Secretariat shall take such reasonable steps as are necessary to ensure that experts, scientific review board members, interpreters, translators, court reporters and other individuals retained by the Secretariat maintain the confidentiality of the panel proceedings.

(8)Except as provided under paragraphs (1) and (2), Secretariat personnel shall maintain the confidentiality of the panel proceedings.

I have the honour to propose that this letter, which is equally authentic in English and French, and your letter of confirmation in reply, constitute an understanding between our two Governments, to take effect on this day.

Yours sincerely,

Jonathan T. Fried
Principal Counsel
Trade Law Division

July 13, 1995

Lic. Hugo Perezcano Diaz
Director General de Soporte
Juridico de Negociaciones
Secretaria de Comercio y Fomento Industrial
Subsecretaria de Negociaciones Comerciales
Internacionales
Alfonso Reyes no. 30., Piso 17
Col. Hipodromo Condesa
06179 Mexico City, D.F. Mexico

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