

Institutional Arrangements
and Dispute Settlement Procedures

INSTITUTIONS

Article 2301: The USA MEX[North American] Trade Commission

1. The Parties hereby establish the USA MEX[North American] Trade Commission (the Commission).
2. The Commission shall comprise representatives of each Party. The principal representative of each Party shall be the cabinet-level officer or Minister primarily responsible for international trade or their designees.
3. The Commission shall:
 - (a) supervise the implementation of this Agreement;
 - (b) oversee its further elaboration;
 - (c) resolve disputes that may arise regarding its interpretation or application;
 - (d) supervise the work of all committees, working groups and expert groups established under this Agreement, as set out in Annex 2301; and
 - (e) consider any other matter that may affect the operation of this Agreement.
4. The Commission may:
 - (a) establish, and delegate responsibilities to, ad hoc or standing committees, working groups or expert groups;
 - (b) seek the advice of non-governmental persons or groups; and
 - (c) take such other action in the exercise of its functions as the Parties may agree.
5. The Commission shall establish its rules and procedures. MEX USA[All decisions of the Commission shall be taken by consensus, except as the Commission may otherwise provide.]
6. The Commission shall convene at least once a year in regular session to review the implementation and further elaboration of this Agreement and to consider any other matter that may affect its operation. Regular sessions of the Commission shall be chaired successively by each Party.

Article 2302: The Secretariat

1. The Commission shall establish and oversee a Secretariat comprising national Sections.
2. Each Party shall:
 - (a) establish a permanent office of its Section;
 - (b) be responsible for the operation and costs of its Section;
 - (c) designate an individual to serve as Secretary for its Section, who shall be responsible for its administration and management; and
 - (d) notify the Commission of the location of its Section's office.
3. The Secretariat shall:
 - (a) provide assistance to the Commission;
 - (b) provide administrative assistance to the panels established under [this Agreement], in accordance with the procedures established pursuant to Article 2313; and
 - (c) as the Commission may direct:
 - (i) support the work of committees and other groups established under this Agreement; and
 - (ii) otherwise facilitate the operation of this Agreement.

DISPUTE SETTLEMENT

Article 2303: Cooperation

The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

Article 2304: Recourse to Dispute Settlement Procedures

[Except as otherwise provided in this Agreement,] the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes regarding the interpretation or application of this Agreement or whenever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement [or cause nullification or impairment in the sense of Article _____].

Article 2305: GATT Dispute Settlement¹

1. Subject to paragraph 2, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, and agreements negotiated thereunder (GATT),² may be settled in either forum at the discretion of the complaining Party. Once a dispute settlement proceeding has been initiated pursuant to Article 2308 of this Agreement or [under the MTO], the forum selected shall be used to the exclusion of the other.

2. Before a Party initiates a dispute settlement proceeding in the GATT against another Party on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall inform the MEX USA [third] CDA [other] Party CDA [or Parties] of its intention. If such Party wishes to initiate a dispute settlement proceeding under this Agreement regarding the matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreement on a single forum. If those Parties cannot agree, the dispute settlement proceeding normally shall be initiated under this Agreement.³

3. For the purposes of paragraph 1, proceedings under the MTO are deemed to be initiated by a Party's request for a panel, such as under Article XXIII:2 of the GATT, or for a Committee investigation, such as under Article 20.1 of the Agreement on Implementation of Article VII of the GATT (Customs Valuation Code).⁴

¹ The three sides agree that the suspension of benefits as the result of a GATT proceeding (or a proceeding under the US-CFTA) should not be considered a violation of this Agreement. Similarly, the suspension of benefits as a result of a panel proceeding under this Agreement should not be the basis for a proceeding under the GATT or the US-CFTA. Further consideration needs to be given as to whether this understanding should be reflected in the text.

² Need to review consistency of terminology: "agreement" and "forum" as well as decide whether "Agreements under GATT" includes understandings and decisions under GATT.

³ All three sides will reflect further on the drafting of this paragraph.

⁴ All three sides wish to consider drafting further.

Article 2306: [FTA Dispute Settlement]⁵

USA[1. Disputes between Canada and the United States regarding any matter arising under both this Agreement and the Canada-United States Free-Trade Agreement ("CUSFTA") shall be settled under the provisions of this Agreement unless both Parties agree otherwise. For such disputes, once Canada and the United States have initiated a dispute settlement proceeding pursuant to Article 2308 of this Agreement or Article 1805 of the CUSFTA, the forum selected shall be used to the exclusion of the other.]⁶

MEX[1. All disputes arising under both this Agreement and the CUSFTA shall be settled under the provisions of this Agreement. Disputes arising exclusively under the CUSFTA provisions listed in Annex 2306 ___ shall be settled pursuant to the provisions of the CUSFTA.]

CDA[1. Disputes arising under both this Agreement and the *Canada-United States Free Trade Agreement*, or arising under both this Agreement and other trade agreements binding between the Parties to a dispute, may be settled in either forum at the discretion of the complaining Party, according to the rules of that forum.

2. Once the dispute settlement provisions of this Agreement or the *Canada-United States Free Trade Agreement* or that other agreement have been initiated pursuant to Article 2308, the *Free Trade Agreement* or that other agreement, the procedure initiated shall be used to the exclusion of any other.]

CDA[3.] The referral of a dispute for resolution under the CUSFTA shall not affect any rights that Mexico may have under this Agreement with respect to the matter, including its right to initiate dispute settlement procedures under this Chapter.

Article 2307: Consultations

1. Any Party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.

2. The requesting Party shall deliver the request to the other Parties and to its Section of the Secretariat.

3. If USA MEX[the third] CDA[any other] Party considers that it has a substantial interest in the matter, it shall be entitled to participate in the consultations on delivery of written notice to the other Parties and to its Section of the Secretariat.

4. Consultations on matters regarding perishable goods⁷ shall commence within [15] days of the date of delivery of the request.

⁵ Canada agrees that the relationship between the FTA and NAFTA should be defined when the substantive negotiations are completed. It also recognizes that its existing text does not reflect its current thinking; it will develop new text when the substantive provisions have been negotiated.

⁶ See U.S. proposal for suspension of certain provisions of the CUSFTA (Article 2506).

⁷ U.S. acceptance of this provision is based on defining "perishable goods." Mexico will propose a definition.

5. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the consulting Parties shall:

- (a) [to the greatest extent possible,]⁸ provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation of this Agreement;
- (b) treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information; and
- (c) seek to avoid any resolution that adversely affects the interests under this Agreement of CDA[any other] MEX USA[the third] Party.

Article 2308: Initiation of Procedures - Good Offices, Conciliation, Mediation

1. If the consulting Parties fail to resolve a matter pursuant to Article 2307 within:

- (a) 30 days of delivery of a request for consultations;
- (b) 45 days of delivery of such request if CDA[any other] MEX USA[the third] Party has subsequently requested or has participated in consultations regarding the same matter;
- (c) [15] days of delivery of a request for consultations in matters regarding perishable goods; or
- (d) such other period as they may agree;

any such Party may request in writing a meeting of the Commission.

2. The requesting Party shall state in the request the measure or other matter complained of and indicate the provisions of this Agreement that it considers relevant, and shall deliver it to the other Parties and to its Section of the Secretariat.

3. Unless otherwise agreed, the Commission shall convene within 10 days of delivery of the request and shall endeavor to resolve the dispute promptly.

4. The Commission may:

- (a) call on such technical advisors or create such working groups or expert groups as it deems necessary;
- (b) have recourse to good offices, conciliation, mediation or such other dispute resolution procedures; or
- (c) make recommendations,

as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute.

⁸ The U.S. is prepared to accept this phrase if Canada and Mexico accept the adverse inference provision in Article 2313(1)(c).

5. Unless it decides otherwise, the Commission shall consolidate two or more proceedings before it pursuant to this Article regarding the same measure. The Commission may consolidate two or more proceedings regarding other matters before it pursuant to this Article that it determines are appropriate to be considered jointly.

PANEL PROCEEDINGS

Article 2309: Request for Establishment of Consultative or Arbitral Panels

1. If the Commission has convened pursuant to Article 2308(3), and the matter has not been resolved within:

- (a) 30 days thereafter;
- (b) 30 days after the Commission has convened in respect of the matter most recently referred to it, where proceedings have been consolidated pursuant to Article 2308(5); or
- (c) such other period as the consulting Parties may agree,

any consulting Party may request the establishment of a consultative or arbitral panel. The requesting Party shall deliver the request to the other Parties and to its Section of the Secretariat.

2. Upon delivery of the request, the Commission shall establish:

- (a) an arbitral panel where MEX CDA [the dispute regards actions taken pursuant to Chapter 8 Safeguards-Emergency Action, Chapter 3 (Rules of Origin), Article 2320 (Suspension of Benefits), MEX [Chapter 12 (Technical Standards) and Article 505 (Technical Regulations and Standards for Agricultural, Food, Beverage and Certain Related Goods)] in accordance with the provisions of those chapters or Articles, or regarding any other dispute, when] the disputing Parties have so requested; or
- (b) a consultative panel, pursuant to any other request.

3. If CDA [another] MEX USA [the third] Party considers that it has a substantial interest in the matter, it shall be entitled to join as a complaining Party, on delivery of written notice of its intention to participate to the disputing Parties and its Section of the Secretariat at the earliest possible time, and in any event no later than seven days after the date of delivery of a request by a Party for the establishment of a panel.

4. If CDA [another] MEX USA [the third] Party does not join as a complaining Party in accordance with paragraph 3, it normally shall refrain thereafter from initiating a dispute settlement proceeding regarding the same matter:

- (a) under this Agreement; or
- (b) in the GATT on grounds that are substantially equivalent to those available to that Party under this Agreement,

in the absence of a significant change in economic or commercial circumstances.

5. Unless otherwise [specified in this Chapter, or] agreed by the disputing Parties, the panel shall be established and perform its functions in a manner consistent with the provisions of this Chapter.

Article 2310: Roster

1. The Parties shall establish and maintain a roster of up to 30 individuals who are willing and able to serve as panelists. The roster members shall be appointed by consensus for terms of three years, and may be reappointed.

2. Roster members shall:

(a) have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements, and shall be chosen strictly on the basis of objectivity, reliability and sound judgement;

(b) be independent of, and not be affiliated with or take instructions from, any Party;
and

(c) comply with a code of conduct to be established by the Commission.

Article 2311: Qualifications of Panelists

1. All panelists shall meet the qualifications set out in Article 2310(2).

2. Individuals may not serve as panelists for a dispute in which they have participated pursuant to Article 2308(4).

Article 2312: Panel Selection

1. Where there are two disputing Parties:

(a) The panel shall comprise five members.

(b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of the panel. If the disputing Parties are unable to agree on the chair within this period, the disputing Party chosen by lot shall select within [5] days as chair an individual who is not a citizen of that Party.

(c) Within 15 days of selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party.

(d) If a disputing Party fails to select its panelists within such period, such panelists shall be selected by lot from among the roster members who are citizens of the other disputing Party.

2. Where there are CAN[more than two] USA MEX[three] disputing Parties:

(a) The panel shall comprise five members.

(b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of the panel. If the disputing Parties are unable to agree on the chair within this period, the Party or Parties on the side of the dispute chosen by lot shall select within [5] days a chair who is not a citizen of such Party or Parties.

(c) Within 15 days of selection of the chair, the Party complained against shall select two panelists, one of whom is a citizen of a complaining Party, and the other of whom is a citizen of USA MEX[the other] CAN[another] complaining Party. The complaining Parties shall select two panelists who are citizens of the Party complained against.

(d) If any disputing Party fails to select a panelist within such period, such panelist shall be selected by lot in accordance with the citizenship criteria of subparagraph (c).

3. Panelists shall normally be selected from the roster. Any disputing Party may exercise within [X] days a peremptory challenge against any individual not on the roster who is proposed as a panelist by a disputing Party.

4. If a disputing Party believes that a panelist is in violation of the code of conduct, the disputing Parties shall consult and if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with the provisions of this Article.

CDA[5. Unless the Parties to a dispute involving financial services agree otherwise, panels shall include a majority of members possessing financial services expertise.]

Article 2313: Rules of Procedure

1. The Commission shall establish Model Rules of Procedure, in accordance with the following principles:

(a) The procedures shall assure a right to at least one hearing before the panel as well as the opportunity to provide initial and rebuttal written submissions.

(b) The panel's hearings, deliberations, and initial report, and all written submissions to and communications with the panel shall be confidential. [To this end:

(i) only the panelists and their assistants, [representatives of] the participating Parties and Secretariat personnel may be present at panel hearings;

(ii) a Party may disclose to other persons such information in connection with panel proceedings as it considers necessary for the preparation of its case; and

(iii) such Party shall take effective measures to prevent the further disclosure of any such information.]⁹

USA[(c) The procedures shall provide that a panel may draw adverse inferences if a disputing Party fails to provide information sufficient to enable the panel to make its findings, determinations, recommendations or disposition of the dispute.]

(d) A Party asserting that a measure of another Party is inconsistent with the provisions of this Agreement shall have the burden of establishing such inconsistency. [A Party asserting that a measure is subject to an exception under this Agreement shall have the burden of establishing that the exception applies.]

2. Unless the disputing Parties otherwise agree, the panel shall conduct its proceedings in accordance with the Model Rules of Procedure.¹⁰

3. Unless the disputing Parties otherwise agree within 20 days from the date of the delivery of the request for the establishment of the panel, the terms of reference shall be:

"To examine, in light of the relevant provisions of the NAFTA, the matter referred to the Commission (as set out in the request for a Commission meeting) and to make findings, determinations, recommendations or a disposition as provided in Article 2317(2)."

4. If a complaining Party wishes to argue that a matter has nullified or impaired benefits it reasonably expected to accrue to it, the terms of reference shall so indicate.

5. If a disputing Party wishes the panel to make findings as to the degree of adverse trade effects on any Party of any measure found not to conform with the obligations of the Agreement, ^{MEX USA} [or cause nullification or impairment in the sense of Article _____,]¹¹ the terms of reference shall so indicate.

Article 2314: Role of Experts

⁹ Once the three sides agree on the precise language for this bracketed language, it will be incorporated into the Model Rules.

¹⁰ The Model Rules shall provide that panels may decide any procedural matter not covered by the Rules or otherwise agreed by the Parties.

¹¹ Canada wants to revisit the drafting of this provision in light of further discussion of nullification and impairment.

At the request of a disputing Party, or at its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree.¹²

Article 2315: Scientific Review Boards¹³

1. At the request of a disputing Party or USA[, unless the disputing Parties disapprove,] on its own initiative, the panel may request a written report of a scientific review board on any factual issues concerning environmental USA[, health, safety] or other scientific matters raised by a disputing Party in a proceeding MEX CDA[, provided that the disputing Parties so agree and] subject to such terms and conditions as such Parties may agree.

2. The board shall be selected by the panel from among highly qualified MEX USA [, independent] experts in the scientific matters, after consultations with the disputing Parties and the scientific bodies set out in the Model Rules of Procedure established pursuant to Article 2313(1).

3. The participating Parties shall be provided:

(a) advance notice of, and an opportunity to provide comments to the panel on, the proposed factual issues to be referred to the board; and

(b) a copy of the board's report and an opportunity to provide comments on the report to the panel.

4. The panel shall take the board's report MEX CDA [and any comments by the Parties thereon]¹⁴ into account in the preparation of its report.

Article 2316: Third Party Participation

A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties and to its Section of the Secretariat, shall be entitled to attend all hearings, to make written and oral submissions to the panel, and to receive written submissions of the disputing Parties.

Article 2317: Initial Report

1. Unless the disputing Parties otherwise agree, the panel shall base its report on the submissions and arguments of the Parties.

¹² Consideration should be given to inclusion in the Model Rules of Procedure of some restraints on the basis for objections.

¹³ Mexico's acceptance of this Article is conditioned on the availability of scientific review boards in state-investor disputes.

¹⁴ The timing of receipt of the report and the opportunity to comment need to be addressed in the Rules.

2. Unless the disputing Parties otherwise agree, the panel shall, within 90 days after the last panelist is selected or such other period as the Model Rules of Procedure established pursuant to Article 2313(1) may provide, present to the disputing Parties an initial report containing:

- (a) findings of fact, including any findings pursuant to a request under Article 2313(5);
- (b) its determination as to whether the measure¹⁵ at issue is or would be inconsistent with the obligations of this Agreement ^{MEX USA} [or cause nullification or impairment in the sense of Article _____];¹⁶ and
- (c) if the panel is a consultative panel, its recommendations, if any, for resolution of the dispute; or
- (d) if the panel is an arbitral panel, its disposition of the dispute.

Panelists may furnish separate opinions on matters not unanimously agreed.

3. Within 14 days of presentation of the initial report of the panel, a disputing Party may submit written comments on the report to the panel.

4. In such an event, and after considering such written comments, the panel on its own motion or at the request of any disputing Party may:

- (a) request the views of any participating Party;
- (b) reconsider its report; and
- (c) make any further examination that it deems appropriate.

Article 2318: Final Report

1. The panel shall present to the disputing Parties a final report, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report, unless the disputing Parties otherwise agree.

2. Neither the initial report nor the final report shall disclose which panelists are associated with majority or minority opinions.

3. The final report of the panel ^{USA} [including any report of a scientific review board established under Article 2315],¹⁷ along with any written views that a disputing Party desires to be appended, shall be transmitted on a confidential basis to the Commission within a reasonable period of time after it is presented to the disputing Parties.

¹⁵ In Canada's view, "measure" may not include questions solely related to the interpretation of this Agreement.

¹⁶ Canada wants to revisit the drafting of this provision in light of further discussion of nullification and impairment.

¹⁷ Mexico's acceptance of this provision is based on its application to investor-state disputes.

4. Unless the Commission decides otherwise, the final report of the panel shall be published [seven] days after it is transmitted to the Commission.

Article 2319: Implementation of Final Report

1. Upon receipt of the final report of a consultative panel, the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel, and shall notify their Sections of the Secretariat of any agreed resolution of any dispute.

2. Whenever possible, such resolution shall be non-implementation or removal of a measure not conforming with this Agreement ^{MEX USA} [or causing nullification or impairment in the sense of Article ____] or, failing such a resolution, compensation.¹⁸

3. The disputing Parties shall comply in a timely fashion with the determinations and disposition of an arbitral panel.

Article 2320: Non-Implementation - Suspension of Benefits

1. If in its final report a consultative panel has determined that a measure is inconsistent with the obligations of this Agreement ^{MEX USA} [or causes nullification or impairment in the sense of Article ____] and the disputing Parties have not reached agreement on a mutually satisfactory resolution pursuant to Article 2319(1) within 30 days of receiving the final report, the complaining Party or Parties may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.

2. If a disputing Party fails to comply in a timely fashion with the determination and disposition of an arbitral panel and the Parties are unable to agree on appropriate compensation or remedial action, the other disputing Party or Parties shall have the right to suspend the application of equivalent benefits of this Agreement to the non-complying Party, in accordance with this Article.

3. In considering what benefits to suspend pursuant to paragraphs 1 or 2:

(a) a complaining Party should first seek to suspend benefits in the same sector or sectors, as set out in Annex 2320, as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Agreement ^{MEX USA} [or cause nullification or impairment by the non-complying Party]; and

(b) a complaining Party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.

4. At the request of any disputing Party, the Commission shall establish an arbitral panel [which shall be subject] to the provisions of this Chapter to determine whether the level of benefits suspended by a Party pursuant to paragraph 1 or 2 is manifestly excessive.¹⁹

¹⁸ Canada wants to revisit the drafting of this provision in light of further discussion of nullification and impairment.

¹⁹ All three sides will revisit the drafting of this paragraph.

5. The arbitral panel shall present its determination within 60 days after the last panelist is selected or such other period as the disputing Parties may agree.

MEX[6. No action authorized by this Article shall be considered a breach for purposes of Article XX07(2) of the Investment Chapter.]

DOMESTIC PROCEEDINGS

Article 2321: Referrals of Matters from Judicial or Administrative Proceedings

1. If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding²⁰ of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, the Commission shall be notified and shall endeavor to agree on an appropriate response as expeditiously as possible.

2. The Party in whose territory the court or administrative body is located shall submit any agreed interpretation to the court or administrative body in accordance with the rules of that forum.

3. If the Commission is unable to agree, any Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

N.B. Throughout the text the use of the terms "measure" and "matter" needs to be considered.

²⁰ The use of "administrative proceeding" needs to be examined in the context of its use in the Miscellaneous Provisions.

ANNEX 2301 -- COMMITTEES, WORKING GROUPS, EXPERT GROUPS

The Committees, working groups and expert groups established under this Agreement at the time of entry into force of this Agreement are:

[List -- name of committee or group and Article under which it is established]

ANNEX 2320 -- DEFINITIONS OF SECTORS

[For the purposes of Article 2320, "sector" means:

- (a) with respect to goods, all goods;
- (b) with respect to services, a principal sector as set out in [the classification set out in Chapter 13];
- (c) with respect to trade-related intellectual property rights, [to be negotiated]; and
- (d) with respect to investment, [to be negotiated].]