

ANNEX 12-A
RULES OF PROCEDURE
FOR ARBITRAL TRIBUNAL PROCEEDINGS

Application

1. The following rules of procedure are established under Article 12.13 and shall apply to Arbitral Tribunal proceedings under this Chapter unless the Parties otherwise agree.

Definitions

2. For purposes of this Annex:

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

Arbitral Tribunal means an Arbitral Tribunal established under Article 12.10;

arbitrator means a member of an Arbitral Tribunal established under Article 12.10;

assistant means a person who, under the terms of appointment of an arbitrator, conducts research or provides other professional or administrative support to any arbitrator;

Chapter means Chapter 12;

complaining Party means a Party that requests the establishment of an Arbitral Tribunal;

expert means a person or group that provides information, technical advice or expert opinion to an Arbitral Tribunal;

holiday means every Friday, Saturday and Sunday and any other day designated by a Party as an official holiday;

Party complained against means a Party that receives the request for the establishment of an Arbitral Tribunal;

proceedings means an Arbitral Tribunal proceeding;

representative of a Party means an employee or any person appointed by a government department or agency or any other public entity of a Party; and

staff means persons under the direction and control of the arbitrator, or of the Arbitral Tribunal, other than assistants.

Composition of the Arbitral Tribunal

3. On the selection of a candidate to serve as an arbitrator, the complaining Party shall promptly inform the appointed candidate of the candidate's appointment as an arbitrator. The appointed candidate shall inform the Parties in writing of his or her acceptance of such appointment within five days after the candidate was informed of its appointment. If the appointed candidate fails to communicate its acceptance, within the said period, to the Parties, such appointed candidate shall be deemed not to accept the appointment.

4. The appointed candidate shall complete and provide the Undertaking Form attached to Annex 12-B to the Parties together with its written acceptance to serve on an Arbitral Tribunal.

5. Pursuant to the circumstances described in Article 12.11.3, a replacement to an arbitrator shall be selected as expeditiously as possible in accordance with the selection procedure under Article 12.11.1. Any time period applicable to the proceeding shall be suspended until the date the replacement is selected.

Written Submissions and Other Documents

6. The Parties and the Arbitral Tribunal shall deliver any written submission, request, notification or other document by delivery against receipt, registered post, courier, facsimile transmission, e-mail or any other means of telecommunication that provides a record of the sending thereof. Where a Party or an Arbitral Tribunal delivers physical copies of written submissions or any other documents related to the panel proceeding, it shall deliver at the same time an electronic version of such submissions or documents.

7. The Parties shall deliver simultaneously a copy of their written submissions and any other document to the other Party and to each one of the arbitrators.

8. At any time a Party may correct minor errors of a clerical nature in any written submission, request, notification or other document related to the proceedings by delivery of a new document clearly indicating the changes.

9. Written submissions, requests, notifications or other documents of all types shall be deemed to be received, on the date upon which the electronic version of them is received.

10. The deadlines are counted from the day following the date of the receipt of such submission or documents.

11. When a term referred to in this Chapter or in this Annex begins or ends on a holiday observed by a Party or on any other day on which the government offices of that Party are closed by order of the government or by force majeure, it shall be regarded as having begun or ended on the next business day. The Parties shall exchange a list of dates of their official holidays for the following year on the first Monday of every December.

Burden of Proof

12. A Party asserting that a measure of the other Party is inconsistent with the provisions of this Agreement, or that the other Party has otherwise failed to fulfill its obligations under this Agreement, or that a benefit the Party could reasonably have expected to accrue to it under this Agreement is being nullified or impaired, shall have the burden of proving its assertions.

13. A Party complained against asserting that a measure is subject to an exception under this Agreement shall have the burden of proving that the exception applies.

Commencing the Arbitration

14. Unless the Parties agree otherwise, the Arbitral Tribunal within seven days from its establishment shall contact the Parties in order to determine procedural matters that the Parties or the Arbitral Tribunal deem appropriate.

Reasoned objection against an arbitrator

15. Where a Party raises a reasoned objection against an arbitrator or a chair regarding his or her compliance with the Code of Conduct, it shall send a written notice to the other Party providing its reasons based on clear evidence regarding the violation of the Code of Conduct.

16. The Parties shall consult on the matter and come to a conclusion within seven days from receipt of such notice:

- (a) if the Parties agree, that there exists proof of a violation of the Code of Conduct, they shall remove that arbitrator or chair and select a replacement in accordance with Article 12.11.1;
- (b) if the Parties fail to agree that there exists proof of a violation of the Code of Conduct by an arbitrator, either Party may request the chair of the Arbitral Tribunal to consider and settle this matter. If the challenge is being raised against the chair of the Arbitral Tribunal, the matter shall be considered by the other two arbitrators. If no agreement is reached between the two arbitrators, the chair shall be removed. The decision adopted pursuant to this rule is definitive. The selection of the new arbitrator or chair shall be done in accordance with Article 12.11.

Initial Submissions and Counter-Submissions

17. The complaining Party shall deliver its initial written submission to the Party complained against and to each of the arbitrators, no later than 15 days after the date of establishment of the Arbitral Tribunal.

18. The initial written submission shall contain the following:

- (a) designated authorized representative;
- (b) service address, telephone and facsimile numbers, and e-mail addresses to which communications arising in the course of the proceeding shall be sent;
- (c) summary of the relevant facts and circumstances;
- (d) state clearly the Party's claim, including identification of the measures at issue, the relevant provisions of this Agreement, an indication of the legal basis for the complaint, and a request for an award;
- (e) supporting evidence, including information, technical advice or expert opinion, and specify any other evidence which cannot be produced at the time of the submission, but will be presented to the Arbitral Tribunal before or during the first hearing;
- (f) date and signature.

19. The Party complained against shall subsequently deliver its written counter-submission to the complaining Party and to each of the arbitrators, no later than 30 days after the date of receipt of the initial written submission.

20. The counter-submission shall contain the following:

- (a) designated authorized representative;
- (b) service address, telephone and facsimile numbers and e-mail addresses to which communications arising in the course of the proceeding shall be sent;
- (c) facts and arguments upon which its defense is based;
- (d) supporting evidence, including information, technical advice or expert opinion, and specify any other evidence which cannot be produced at the time of the submission, but will be presented to the Arbitral Tribunal before or during the first hearing;
- (e) date and signature.

Operation of Arbitral Tribunals

21. The chair of the Arbitral Tribunal shall preside at all its meetings.

22. Unless provided otherwise in these rules, the Arbitral Tribunal may conduct its activities by any appropriate means, including technological means such as telephone, computer connections or video-conference, provided that the right of a Party to effectively participate in the proceedings is maintained.

23. The arbitration tribunal shall record minutes of the meetings held during each

proceeding, which shall be kept in the files of the dispute.

24. Only arbitrators may take part in the deliberations of the Arbitral Tribunal. The Arbitral Tribunal may permit assistants, interpreters, translators, or stenographers to be present during such deliberations.

25. The Arbitral Tribunal in consultation with the Parties, may employ,

- (a) an assistant, interpreter, translator and stenographer as it requires to carry out its functions; and
- (b) an additional reasonable number of such persons as it deems necessary for the proceeding.

26. Where a procedural question arises that is not covered by these rules, the Arbitral Tribunal, after consulting the Parties, may adopt an appropriate procedure that is consistent with this Agreement.

27. The Arbitral Tribunal, upon mutual agreement of the Parties, may modify a time-period applicable to the proceedings and make other procedural or administrative adjustments as may be required during the proceeding.

Information, technical advice and expert opinions

28. On request of a Party, or on its own initiative, the Arbitral Tribunal may seek information, technical advice or expert opinions from any person or body that it deems appropriate, subject to rules 28 to 35, and to such additional terms and conditions as the Parties may agree.

29. Before the Arbitral Tribunal seeks information, technical advice or expert opinions, pursuant to rule 28, it shall notify the Parties of its intention to seek information, technical advice or expert opinions, provide them with an adequate period of time to submit comments, and take into consideration these comments.

30. In the notification mentioned in rule 29, the Arbitral Tribunal shall provide duly justified reasons for seeking information, technical advice or expert opinions and identify the individual or body from whom/which the information, technical advice or expert opinion is sought.

31. The Arbitral Tribunal shall only seek information, technical advice or expert opinions relating to the factual or legal issues before it.

32. The Arbitral Tribunal shall provide the Parties with a copy of any information, technical advice or expert opinion received under rule 28 and provide them with an adequate period of time to submit comments.

33. When the Arbitral Tribunal takes into consideration information, technical advice or expert opinions, received under rule 28 for the preparation of its award, it shall also take into

consideration comments or observations submitted by the Parties with respect to such information, technical advice or expert opinion.

34. The Arbitral Tribunal shall set a reasonable time limit for the submission of the information, technical advice or expert opinions requested pursuant to rule 28, which shall not exceed 45 days, unless otherwise agreed by the Parties.

35. When a request is made to seek information, technical advice or expert opinions under rule 28, an Arbitral Tribunal may suspend any time limit applicable to the proceedings until the date the information, the technical advice or expert opinion is received by the Arbitral Tribunal.

Confidentiality

36. All documentation, decisions and proceedings linked to the procedure established in this Chapter, as well as meetings, hearings, deliberations and sessions of the Arbitral Tribunal, shall be confidential, except for the award of the Arbitral Tribunal. Nevertheless, the award shall not include any information submitted by the Parties to the Arbitral Tribunal which any of them designates as confidential.

37. The Parties shall take all reasonable steps to ensure that their representatives, advisers and any person or body that has access to the proceedings on their behalf, maintain the confidentiality of all documentation, decisions and proceedings linked to the procedure established in this Chapter, as well as meetings, hearings, and sessions of the Arbitral Tribunal, except for the award of the Arbitral Tribunal.

38. Nothing in these Rules of Procedure shall preclude a Party from disclosing statements of its own positions to the public.

Hearings

39. Each Party shall have a right to at least one hearing before the Arbitral Tribunal. The Arbitral Tribunal may convene additional hearings if the Parties so agree.

40. The Party complained against shall be in charge of the logistical administration of the hearings, particularly the venue, the assistance of interpreters and other staff necessary, unless otherwise agreed by the Parties.

41. The chair shall fix the date and time of the hearings in consultation with the Parties and the other arbitrators, and then notify the Parties in writing of those dates and times, no later than 15 days prior to the hearings.

42. All arbitrators shall be present during the entirety of all hearings.

43. Hearings shall be held in closed sessions. Nevertheless, the following persons may attend the hearings:

- (a) representatives;

- (b) advisers;
- (c) staff and translators;
- (d) assistants; and
- (e) court stenographers.

Only the representatives and advisers may address the Arbitral Tribunal.

44. No later than five days before the date of a hearing, each Party shall deliver 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.

45. Each hearing shall be conducted by the Arbitral Tribunal in a manner that ensures that the complaining Party and the Party complained against are afforded equal time for arguments, rebuttals and counter-rebuttals.

46. The Arbitral Tribunal may direct questions to either Party at any time during the hearing.

47. The Arbitral Tribunal shall arrange for a transcript of each hearing to be prepared and shall, as soon as possible, deliver a copy to each Party.

48. Each Party may deliver a supplementary written submission concerning any matter that arose during the hearing within 10 days from the date of the conclusion of the hearing.

Evidence

49. The Parties shall provide all evidence as soon as possible, and preferably with the initial submission and the counter-submission, but no later than during the course of the first hearing, except with respect to evidence related to rebuttals, answers to questions and comments on answers provided by the other Party. Exceptions to this procedure shall be granted upon a showing of good cause. In such cases, the other Party shall be granted a period of time for comment, as the Arbitral Tribunal deems appropriate, on newly submitted evidence.

50. All the evidence submitted by the Parties shall be kept in the files of the dispute to be maintained by the chair of the Arbitral Tribunal.

51. In case the Parties so request, the Arbitral Tribunal shall hear witnesses or experts, in the presence of the Parties, during the hearings.

Questions in Writing

52. The Arbitral Tribunal may at any time during the proceedings address questions in writing to one or both Parties and set a time-limit for submission of the responses. The Parties shall receive a copy of any question put by the Arbitral Tribunal.

53. A Party shall submit its response to the Arbitral Tribunal in writing and shall provide a copy of its response to the other Party. A Party shall be given the opportunity to provide written comments on the other Party's response within 10 days after the date of receipt thereof.

54. Whenever a Party fails to submit in due time its initial written submission, is absent from a scheduled hearing or in any other way breaches the procedures without good and sufficient cause, the Arbitral Tribunal shall, upon assessment of the aforesaid circumstances, decide on their effect on the future course of the proceedings.

Arbitral Award

55. The arbitral award shall contain the following details, in addition to the elements provided in Article 12.13.5 and any other element as the Arbitral Tribunal may consider appropriate:

- (a) the Parties to the dispute;
- (b) the name of each of the arbitrators and the date of establishment of the arbitration tribunal;
- (c) the names of the representatives of the Parties;
- (d) the measures subject to the proceedings;
- (e) a report on the development of the arbitration procedure, including a summary of the arguments of each of the Parties;
- (f) the decision reached, indicating its factual and legal grounds;
- (g) the date and place of issuance;
- (h) the signature of all the arbitrators.

"Ex parte" Contacts

56. The Arbitral Tribunal shall not meet or contact a Party in the absence of the other Party.

57. No arbitrator may discuss any aspect of the subject matter of the proceedings with one or both Parties in the absence of the other arbitrators.

Language

58. All proceedings shall be conducted in the English language.

59. Any document submitted for use in any proceedings shall be in the English language. If any original document is not in the English language, the Party submitting such document shall provide an English translation thereof.

Compliance and Suspension of Benefits

60. These rules shall apply to proceedings established under Article 12.17 except for the following:

- (a) the Party that requests the establishment of the Arbitral Tribunal shall deliver its initial written submission to the other Party and each of the arbitrators within five days after the date of the establishment of the Arbitral Tribunal;
- (b) the responding Party shall deliver its written counter-submission within 10 days after the date of delivery of the initial written submission;
- (c) the Arbitral Tribunal shall fix the time limit for delivering any further written submissions; and
- (d) unless the Parties disagree, the Arbitral Tribunal may decide not to convene a hearing.

61. The time-periods provided in rule 60 shall be doubled whenever the request for establishment of an Arbitral Tribunal pursuant to Article 12.17.1 concerns both subparagraphs (a) and (b) of the said Article.

Cases of Urgency

62. In cases of urgency, referred to in Article 12.13.8, the Arbitral Tribunal shall, after consulting the Parties, modify the time-limits referred to in these rules as appropriate and shall notify the Parties of any such adjustments.

Remuneration and Payment of Expenses

63. The remuneration of arbitrators, their assistants, and experts shall be determined by the Joint Committee.

64. Unless the Parties otherwise agree, the expenses of the Arbitral Tribunal, the remuneration of the arbitrators and their assistants, their travel and lodging expenses, remuneration of the experts and all general expenses customarily incurred by the routine functioning of the Arbitral Tribunal shall be borne in equal shares between the Parties.

65. Each arbitrator, assistant and expert shall keep a record and render a final account to the Parties of his or her time sheet and expenses and the Arbitral Tribunal shall keep a record and render a final account to the Parties of all general expenses.