

AUSTRALIA-CHILE FREE TRADE AGREEMENT

RULES OF PROCEDURE

Application

1. These Rules of Procedure are established pursuant to Article 21.13 of the Australia-Chile Free Trade Agreement (“the Agreement”) and shall apply to arbitral panels established under Chapter 21 of the Agreement, unless the Parties otherwise agree.

Definitions

2. In these Rules of Procedure:

- (a) **administrative personnel** in respect of a panelist, means persons under the direction and control of the panelist other than panelists’ assistants;
- (b) **arbitral panel** means an arbitral panel established pursuant to Article 21.5 of the Agreement;
- (c) **chair of the arbitral panel** means the third panelist referred to in Article 21.7 of the Agreement;
- (d) **complaining Party** means the Party that requests the establishment of an arbitral panel under Article 21.5 of the Agreement;
- (e) **day** means a calendar day;
- (f) **deliver** means to convey a document to the other Party and the panelists, using electronic means wherever possible;
- (g) **document** includes any written matter related to the panel proceeding, whether in printed or electronic form;
- (h) **legal holiday** means every Saturday and Sunday and any other day designated by a Party as a holiday in accordance with the laws and regulations of that Party and notified by that Party to the other Party;
- (i) **panelist** means a panelist of an arbitral panel appointed pursuant to Article 21.7 of the Agreement;
- (j) **panelist’s assistant** means a person who conducts research or provides support for a panelist;
- (k) **Parties** means the Parties to the Agreement;
- (l) **Party** means a Party to the Agreement;
- (m) **Party complained against** means the Party other than the complaining Party;
- (n) **proceeding** means a proceeding of an arbitral panel; and

- (o) **representatives of a Party** means officials of the Government of a Party and other personnel authorised by a Party to represent that Party.

Code of Conduct of Panelists

3. Pursuant to Article 21.7.5(d) of the Agreement, panelists, panelists' assistants and administrative personnel shall comply with the Code of Conduct appended to these Rules. Each person appointed to serve as a panelist, panelist's assistant or administrative personnel shall receive a copy of these Rules of Procedure and the Code of Conduct from the Parties upon their appointment.

4. If the Parties agree that a panelist has failed to comply with the Code of Conduct pursuant to Article 21.7.5(d), they may remove the panelist, waive the violation or request the panelist to take steps within a specified time period to ameliorate the violation. If the Parties agree to waive the violation or determine that, after amelioration, the violation has ceased, the panelist may continue to serve.

Procedures to Choose a Panelist by Lot

5. The procedures to choose a panelist by lot pursuant to Article 21.7.4 shall be as follows:

- a) the Party to preside over the lot (hereinafter referred to as "the presiding Party") shall be:
 - i. for the purposes of choosing a panelist who has not been appointed by a Party pursuant to Article 21.7.2, the other Party;
 - ii. for the purposes of choosing the third panelist where the Parties have failed to agree on that panelist pursuant to Article 21.7.3, the Party complained against; and
 - iii. for the purposes of choosing both the third panelist and a panelist who has not been appointed by a Party pursuant to Article 21.7.2, the other Party;
- b) the presiding Party shall give the other Party five days advance notice of the date and place in which the lot will take place, and invite representatives of the other Party to be present. Unless the Parties agree otherwise, the lot shall take place in Canberra or in Santiago;
- c) the presiding Party shall prepare a container with sealed envelopes, with each envelope containing the name of one of the candidates proposed pursuant to Article 21.7.2, so that there is exactly one envelope corresponding to each of the candidates;
- d) one of the representatives of the non-presiding Party shall remove from the container one envelope, randomly and without being able to discern the identity of the candidate to whom the envelope corresponds until the envelope is unsealed and opened;
- e) the candidate to whom that envelope corresponds shall be the panelist chosen;
- f) in the case of subparagraph (a)(iii), the procedures under subparagraphs (d) and (e) shall be repeated and the first candidate chosen shall be the third panelist; and

- g) after the lot the container and the envelopes remaining therein shall be made available for verification by the representatives of the non-presiding Party in the presence of the representatives of the presiding Party.

6. If, following notification under paragraph 5(b), no representative of the non-presiding Party is present at the appointed time for the lot, the presiding Party may conduct the lot by itself.

Remuneration and Expenses of Panelists

7. The chair of an arbitral panel shall be remunerated for each full day devoted to his or her duties on an arbitral panel according to the WTO pay scale for non-governmental panelists in a WTO dispute. He or she shall also receive a per diem for attendance at an arbitral panel hearing according to the relevant government rate for the location of the hearing, as well as return business class travel to the location of the hearing. In accordance with Article 21.8.8, these costs shall be borne by the Parties in equal shares.

8. As provided for in Article 21.8.8, each Party shall bear responsibility for the costs and expenses of its appointed panelist, including any panelist chosen by lot pursuant to Article 21.7.4 where a Party has not appointed a panelist.

Written Submissions and other Documents

9. A Party shall deliver a copy of each of its written submissions and any other documents to the other Party and each of the panelists.

10. The complaining Party shall deliver its initial written submission no later than 15 days after the date of establishment of the arbitral panel. The Party complained against shall deliver its written counter-submission no later than 30 days after the date of receipt of the initial written submission of the complaining Party.

11. Where an initial written submission is not delivered in the native language of the recipient Party, the time-limit for the written counter-submission shall not commence until the other Party also delivers the written submission in the recipient Party's native language.

12. Written submissions and other documents shall be delivered by electronic means wherever possible. A recipient of a written submission or other document shall acknowledge receipt to the sender immediately upon receiving the document.

13. Minor errors of a clerical nature in any written submission or other document may be corrected by delivery of a new document clearly indicating the changes.

14. If the last day of a time-limit for delivery of a document falls on a legal holiday in a Party or on any other day on which the offices of the Government of a Party are officially or by *force majeure* closed, the document may be delivered on the next working day.

Operation of Arbitral Panels

15. The chair of the arbitral panel shall preside at all of its meetings. The arbitral panel may delegate to the chair authority to make administrative and procedural decisions.
16. Except as otherwise provided in these Rules and the Agreement, the arbitral panel may perform its functions by any means, including by telephone, facsimile transmissions or computer links.
17. The arbitral panel may permit panelist's assistants, administrative personnel, interpreters or translators to be present during its deliberations.
18. The arbitral panel may seek from the Parties such relevant information as it considers necessary and appropriate. The Parties shall respond promptly and fully to any request by the arbitral panel for such information.
19. Where a procedural question arises that is not covered by these Rules, the arbitral panel may adopt an appropriate additional rule of procedure pursuant to Article 21.13 that is not inconsistent with the Agreement or these Rules.
20. An arbitral panel may, in consultation with the Parties, modify any time period applicable in the proceeding or make other procedural or administrative adjustments as may be required in the proceeding.

Hearings

21. The chair shall fix the date and time of the hearing in consultation with the Parties and the other members of the arbitral panel.
22. Unless the Parties otherwise agree, the hearing shall be held in Canberra, where the complaining Party is the Republic of Chile, or in Santiago, where the complaining Party is Australia. The Party in whose capital a hearing is held shall be responsible for making the administrative arrangements for a hearing, with the costs borne by the Parties in equal shares in accordance with Article 21.8.8.
23. The arbitral panel may convene additional hearings if the Parties so agree.
24. All panelists shall be present at hearings.
25. The following persons may attend a hearing:
 - (a) representatives of a Party;
 - (b) administrative personnel, interpreters and translators of the arbitral panel; and
 - (c) panelists' assistants.
26. 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 who will be attending the hearing.

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

Argument

- (a) Argument of the complaining Party.
- (b) Argument of the Party complained against.

Rebuttal Argument

- (a) Reply of the complaining Party.
- (b) Counter-reply of the Party complained against.

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

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

Burden of Proof

30. A Party asserting that a measure of the other Party is inconsistent with its obligations under the Agreement, that a Party has otherwise failed to carry out its obligations under the Agreement, or that a benefit the Party could reasonably have expected to accrue to it is being nullified or impaired in the sense of Article 21.1(c), shall have the burden of establishing such inconsistency.

31. A Party asserting that a measure is justified by an affirmative defence under the Agreement shall have the burden of establishing that the defence applies.

Ex Parte Contacts

32. The arbitral panel shall not meet with or contact one Party in the absence of the other Party.

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

Language and Translation

34. Unless otherwise agreed by the Parties, the proceedings of the arbitral panel shall be conducted in English and Spanish. This shall apply to all oral and written submissions.

35. A Party shall bear the cost of translating its own written submission into the native language of the other Party. The Parties shall share bear in equal shares the costs of interpretation at a hearing.

36. Unless the Parties agree otherwise, the Party in whose capital a hearing is held shall be responsible for organising interpretation services for a hearing.

37. Final reports and draft reports of arbitral panels shall be issued in English and Spanish. The Parties shall share bear in equal shares the costs of any required translation of these reports.

Computation of Time

38. Where anything under the Agreement or these Rules is to be done, or the arbitral panel requires anything to be done, within a number of days after or before a specified date or event, the specified date or the date on which the specified event occurs shall not be included in calculating that number of days.

39. Where one Party receives a document on a date other than the date on which the same document is received by the other Party, any period of time the calculation of which is dependent on such receipt shall be calculated from the later date of receipt of such document.

Suspension of Benefits and Compliance Panels

40. These Rules shall apply to an arbitral panel established under Article 21.11 or 21.12, except that:

- (a) the Party that requests the establishment of the arbitral panel shall deliver its initial written submission to the other Party within 10 days after the reconvening of the arbitral panel, or if it is not possible to have the same panelists, five days after the last panelist is appointed; and
- (b) the other Party shall deliver its written counter-submission within 20 days after the date of delivery of the initial written submission.

APPENDIX

CODE OF CONDUCT

FOR THE AUSTRALIA-CHILE FREE TRADE AGREEMENT

I. Scope

This Code of Conduct shall apply to each person serving as a panelist, panelist's assistant or administrative personnel involved in the proceedings of an arbitral panel (hereinafter referred to as "covered person"). Each panelist shall take all reasonable measures to ensure that his or her assistant or administrative personnel comply with Parts IV to VII of this Code of Conduct. The Parties may agree to exempt any covered person, other than a panelist, from application of a part or all of this Code of Conduct.

II. Governing Principle

Each panelist shall be independent and impartial, and shall avoid direct or indirect conflicts of interest. Furthermore, each panelist and former panelist shall respect the confidentiality of proceedings of the arbitral panel. Through the observance of such standards of conduct the integrity and impartiality of dispute settlement proceedings conducted pursuant to Chapter 21 of the Australia-Chile Free Trade Agreement are preserved.

III. Observance of the Governing Principle

To ensure the observance of the Governing Principle of this Code of Conduct, each panelist is expected:

- (i) to adhere strictly to the provisions of Chapter 21 of the Agreement and the Rules of Procedure;
- (ii) to maintain confidentiality;
- (iii) to disclose the existence or development of any interest, relationship or matter that the panelist could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that panelist's independence or impartiality; and
- (iv) to take due care in the performance of his or her duties to fulfil these expectations, including through avoidance of any direct or indirect conflicts of interest in respect of the subject matter of the proceedings.

IV. Obligation of Self-Disclosure

1. Each person appointed to serve as a panelist shall disclose any information relevant to the matter under dispute, such as:

- (a) financial interests (e.g. investments, loans, shares, interests, other debts), business interests (e.g. directorship or other contractual interests) and property interests relevant to

the dispute in question;

- (b) professional interests relevant to the dispute in question (e.g. any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
- (c) other active interests relevant to the dispute in question (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);
- (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements); and
- (e) employment or family interests relevant to the dispute in question (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).

2. The obligation of self-disclosure shall apply to the panelist immediately upon his or her appointment and throughout the proceedings. During the course of proceedings, the panelist shall disclose in writing to the Parties any information relevant to paragraph 1 above at the earliest time they become aware of it.

3. The fulfilment and interpretation of these disclosure requirements shall respect personal privacy and shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve as panelists.

V. Performance of Duties

1. In performing his or her duties, each panelist shall recognise that prompt settlement of disputes is essential to the effective functioning of the Agreement.

2. A panelist shall carry out all duties fairly and diligently.

3. To ensure transparency and impartiality, no panelist may discuss any aspect of subject matter referred to the arbitral panel, in the absence of either Party or in the absence of the other panelists.

4. A panelist shall consider only those issues raised in the proceeding and necessary to a decision and shall not delegate the duty to decide to any other person, except as provided in the Rules of Procedure.

5. A panelist shall not communicate matters concerning actual or potential violations of this Code of Conduct unless the communication is to both Parties or is necessary to ascertain whether that panelist has violated or may violate the code.

VI. Independence and Impartiality of Panelists

1. A panelist shall be independent and impartial. A panelist shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgment, and shall not be influenced by self-interest, outside pressure, political considerations and loyalty to a Party or fear of criticism.

2. A panelist shall avoid entering into any relationship or acquiring any financial interests that are likely to affect the panelist's impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias.
3. A panelist shall not accept any benefit that would in any way affect, or appear to affect, the panelist's duties.
4. A panelist shall not use the panelist's position on the arbitral panel to advance any personal or private interests. A panelist shall avoid actions that may create the impression that others are in a special position to influence the panelist. A panelist shall make every effort to prevent or discourage others from representing themselves as being in such position.

VII. Confidentiality

1. Each covered person shall at all times maintain the confidentiality of non-public information acquired during deliberations and proceedings of the arbitral panel. No covered person shall at any time use such information to gain personal advantage or advantage for others.
2. No covered person shall disclose the report of the arbitral panel, or make any statements on the arbitral panel's proceedings or the issues in dispute, until the final report is made available to the public.
3. A covered person shall not at any time disclose which panelists are associated with any majority or minority opinions in a report issued in proceedings under Chapter 21 of the Agreement.