

# Rules of Procedure for Article 1904 Extraordinary Challenge Committees

## *Preamble*

The Parties,

Having regard to Chapter Nineteen of the North American Free Trade Agreement between Canada, the United Mexican States and the United States of America;

Acting pursuant to paragraph 2 of Annex 1904.13 to Chapter Nineteen of the Agreement;

Adopted the Rules of Procedure, which shall come into force on the same day as the Agreement enters into force and from that day shall govern all extraordinary challenge committee proceedings conducted pursuant to Article 1904 of the Agreement.

## *Short Title*

1. These rules may be cited as the *NAFTA Extraordinary Challenge Committee Rules*.

## *Statement of General Intent*

2. These rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to extraordinary challenges conducted pursuant to Article 1904 of the Agreement and are designed to result in decisions within 90 days after the establishment of the committee. Where a procedural question arises that is not covered by these rules, a committee may adopt an appropriate procedure that is not inconsistent with the Agreement. In the event of any inconsistency between the provisions of these Rules and the Agreement, the Agreement shall prevail.

## *Interpretation*

3. In these rules,

**"Agreement"** means the North American Free Trade Agreement; (*Accord*) (*Tratado*)

**"Code of Conduct"** means the code of conduct established by the Parties pursuant to Article 1909 of the Agreement; (*Code de conduite*) (*Código de Conducta*)

**"committee"** means an extraordinary challenge committee established pursuant to Annex 1904.13 to Chapter Nineteen of the Agreement; (*comité*) (*comite*)

**"counsel"** means

- (a) with respect to an extraordinary challenge of a panel review of a final determination made in Canada, a person entitled to appear as counsel before the Federal Court of Canada,
- (b) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico, a person entitled to appear as counsel before the Tribunal Fiscal de la Federación, and

(c) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, a person entitled to appear as counsel before a federal court in the United States; (*avocat*) (*representante*)

**"counsel of record"** means a counsel referred to in subrule 12(1); (*avocat au dossier*) (*representante legal acreditado*)

**"Deputy Minister"** means the Deputy Minister of National Revenue for Customs and Excise, or the successor thereto, and includes any person authorized to perform a power, duty or function of the Deputy Minister under the *Special Import Measures Act*, as amended; (*sous-ministre*) (*Deputy Minister*)

**"final determination"** means, in the case of Canada, a definitive decision within the meaning of subsection 77.01(1) of the *Special Import Measures Act*, as amended; (*décision définitive*) (*resolución definitiva*)

**"investigating authority"** means the competent investigating authority that issued the final determination that was the subject of the panel review to which an extraordinary challenge relates and includes, in respect of the issuance, amendment, modification or revocation of a Proprietary Information Access Order, any person authorized by the investigating authority; (*autorité chargée de l'enquête*) (*autoridad investigadora*)

**"involved Secretariat"** means the section of the Secretariat located in the country of an involved Party; (*Secrétariat en cause*) (*Secretariado implicado*)

**"legal holiday"** means

(a) with respect to the Canadian Section of the Secretariat, every Saturday and Sunday, New Year's Day (January 1), Good Friday, Easter Monday, Victoria Day, Canada Day (July 1), Labour Day (first Monday in September), Thanksgiving Day (second Monday in October), Remembrance Day (November 11), Christmas Day (December 25), Boxing Day (December 26), any other day fixed as a statutory holiday by the Government of Canada or by the province in which the Section is located and any day on which the offices of the Canadian Section of the Secretariat are officially closed in whole or in part,

(b) with respect to the Mexican Section of the Secretariat, every Saturday and Sunday, New Year's Day (January 1), Constitution Day (February 5), Benito Juárez's Birthday (March 21), Labor Day (May 1), Battle of Puebla (May 5), Independence Day (September 16), Congressional Opening Day (November 1), Revolution Day (November 20), Transmission of the Federal Executive Branch (every six years on December 1), Christmas Day (December 25), any day designated as a statutory holiday by the Federal Laws or, in the case of Ordinary Elections, by the Local Electoral Laws and any day on which the offices of the Mexican Section of the Secretariat are officially closed in whole or in part, and

(c) with respect to the United States Section of the Secretariat, every Saturday and Sunday, New Year's Day (January 1), Martin Luther King's Birthday (third Monday in January), Presidents' Day (third Monday in February), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Columbus Day (second Monday in October), Veterans' Day (November 11), Thanksgiving Day (fourth Thursday in November), Christmas Day (December 25), any other day designated as a holiday by the President or the Congress of the United States and any day on which the offices of the Government of the United States located in the District of Columbia or the offices of the United States Section of the Secretariat are officially closed in whole or in part; (*jour férié*) (*días inhábiles*)

**"Mexico"** means the United Mexican States; (*Mexique*)

**"official publication"** means

- (a) in the case of the Government of Canada, the *Canada Gazette*,
- (b) in the case of the Government of Mexico, the *Diario Oficial de la Federación*, and
- (c) in the case of the Government of the United States, the *Federal Register*; (*journal officiel*) (*publicación oficial*)

**"panel"** means a binational panel established pursuant to Annex 1901.2 to Chapter Nineteen of the Agreement, the decision of which is the subject of an extraordinary challenge; (*groupe spécial*) (*panel*)

**"participant"** means a Party who files a Request for an Extraordinary Challenge Committee or any of the following persons who files a Notice of Appearance pursuant to these rules:

- (a) the other involved Party,
- (b) a person who participated in the panel review that is the subject of the extraordinary challenge, and
- (c) a panelist against whom an allegation referred to in Article 1904.13(a)(i) of the Agreement is made; (*participant*) (*participante*)

**"Party"** means the Government of Canada, the Government of Mexico or the Government of the United States; (*Partie*) (*Parte*)

**"person"** means

- (a) an individual,
- (b) a Party,
- (c) an investigating authority,
- (d) a government of a province, state or other political subdivision of the country of a Party,
- (e) a department, agency or body of a Party or of a government referred to in paragraph (d), or
- (f) a partnership, corporation or association; (*personne*) (*persona*)

**"personal information"** means, with respect to an extraordinary challenge proceeding in which an allegation is made that a member of the panel was guilty of gross misconduct, bias or a serious conflict of interest or otherwise materially violated the rules of conduct, the information referred to in subrule 39(2) and rule 41; (*renseignements personnels*) (*información personal*)

**"pleading"** means a Request for an Extraordinary Challenge Committee, a Notice of Appearance, a Change of Service Address, a Notice of Change of Counsel of Record, a Notice of Motion, a brief or any other written submission filed by a participant; (*acte de procédure*) (*promoción*)

**"privileged information"** means

- (a) with respect to an extraordinary challenge of a panel review of a final determination made in Canada, information of the investigating authority that is subject to solicitor-client privilege under the laws of Canada, or that constitutes part of the deliberative process with respect to the final determination, with respect to which the privilege has not been waived,
- (b) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico,

- (i) information of the investigating authority that is subject to attorney-client privilege under the laws of Mexico, or
  - (ii) internal communications between officials of the Secretaría de Comercio y Fomento Industrial in charge of antidumping and countervailing duty investigations or communications between those officials and other government officials, where those communications constitute part of the deliberative process with respect to the final determination, and
- (c) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, information of the investigating authority that is subject to the attorney-client, attorney work product or government deliberative process privilege under the laws of the United States and with respect to which the privilege has not been waived; (*renseignements protégés*) (*información privilegiada*)

**"proof of service"** means

- (a) with respect to an extraordinary challenge of a panel review of a final determination made in Canada or Mexico,
- (i) an affidavit of service stating the name of the person who served the document, the date on which it was served, where it was served and the manner of service, or
  - (ii) a written acknowledgement of service by counsel for a participant stating the name of the person who served the document, the date on which it was served and the manner of service and, where the acknowledgement is signed by a person other than the counsel, the name of that person followed by a statement that the person is signing as agent for the counsel, and
- (b) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, a certificate of service in the form of a statement of the date and manner of service and of the name of the person served, signed by the person who made service; (*preuve de signification*) (*comprobante de envío*)

**"proprietary information"** means

- (a) with respect to an extraordinary challenge of a panel review of a final determination made in Canada, information referred to in subsection 84(3) of the *Special Import Measures Act*, as amended, or subsection 45(3) of the *Canadian International Trade Tribunal Act*, as amended, and with respect to which the person who designated or submitted the information has not withdrawn the person's claim as to the confidentiality of the information,
- (b) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico, *información confidencial*, as defined under article 80 of the *Ley de Comercio Exterior* and its regulations, and
- (c) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, business proprietary information under section 777(f) of the *Tariff Act of 1930*, as amended, and any regulations made under that Act; (*renseignements de nature exclusive*) (*información confidencial*)

**"Proprietary Information Access Application"** means

- (a) with respect to an extraordinary challenge of a panel review of a final determination made in Canada, a disclosure undertaking in the prescribed form, which form
- (i) in respect of a final determination by the Deputy Minister, is available from the Deputy Minister, and
  - (ii) in respect of a final determination by the Tribunal, is available from the Tribunal,
- (b) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico, a disclosure undertaking in the prescribed form, which form is available

the from Secretaría de Comercio y Fomento Industrial, and  
(c) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, a Protective Order Application  
(i) in respect of a final determination by the International Trade Administration of the United States Department of Commerce, in a form prescribed by, and available from, the International Trade Administration of the United States Department of Commerce, and  
(ii) in respect of a final determination by the United States International Trade Commission, in a form prescribed by, and available from, the United States International Trade Commission; (*demande relative à la communication de renseignements*) (*compromiso de confidencialidad*)

**"Proprietary Information Access Order"** means

(a) in the case of Canada, a Disclosure Order issued by the Deputy Minister or the Tribunal pursuant to a Proprietary Information Access Application,  
(b) in the case of Mexico, a Disclosure Order issued by the Secretaría de Comercio y Fomento Industrial pursuant to a Proprietary Information Access Application, and  
(c) in the case of the United States, a Protective Order issued by the International Trade Administration of the United States Department of Commerce or the United States International Trade Commission pursuant to a Proprietary Information Access Application; (*ordonnance relative à la communication de renseignements*) (*autorización de acceso a la información confidencial*)

**"responsible Secretariat"** means, with respect to an extraordinary challenge of a panel review, the section of the Secretariat located in the country in which the final determination reviewed by the panel was made; (*Secrétariat responsable*) (*Secretariado responsable*)

**"responsible Secretary"** means the Secretary of the responsible Secretariat; (*secrétaire responsable*) (*Secretario responsable*)

**"Secretariat"** means the Secretariat established pursuant to Article 2002 of the Agreement; (*Secrétariat*) (*Secretariado*)

**"Secretary"** means the Secretary of the United States Section of the Secretariat, the Secretary of the Mexican Section of the Secretariat or the Secretary of the Canadian Section of the Secretariat and includes any person authorized to act on behalf of that Secretary; (*secrétaire*) (*Secretario*)

**"service address"** means

(a) with respect to a Party or panelist, the address filed with the Secretariat as the service address of the Party or panelist, including any facsimile number submitted with that address,  
(b) with respect to a participant other than a Party or panelist, the service address of the participant in the panel review, or  
(c) where a Change of Service Address has been filed by a Party, panelist or participant, the address set out as the new service address of the participant in that form, including any facsimile number submitted with that address; (*adresse aux fins de signification*) (*domicilio para oír y recibir notificaciones*)

**"Tribunal"** means the Canadian International Trade Tribunal or its successor and includes any person authorized to act on its behalf. (*Tribunal*) (*Tribunal*)

**"United States"** means the United States of America. (*États-Unis*) (*Estados Unidos*)

4. The definitions set forth in Article 1911 of the Agreement and Annex 1911 to Chapter 19 of the Agreement are hereby incorporated into these rules.

## **PART I GENERAL**

5. An extraordinary challenge proceeding commences on the day on which a Request for an Extraordinary Challenge Committee is filed with the Secretariat and terminates on the day on which a Notice of Completion of Extraordinary Challenge is effective.

6. The general legal principles of the country in which a final determination was made apply in an extraordinary challenge of the decision of a panel with respect to the final determination.

7. A committee may review any part of the record of the panel review relevant to the extraordinary challenge.

### *Internal Functioning of Committees*

8. (1) For routine administrative matters governing its own internal functioning, a committee may adopt procedures not inconsistent with these rules or the Agreement.

(2) Subject to subrule 34(b), meetings of a committee may be conducted by means of a telephone conference call.

9. Only committee members may take part in the deliberations of a committee, which shall take place in private and remain secret. Staff of the involved Secretariats and assistants to committee members may be present by permission of the committee.

### *Computation of Time*

10. (1) In computing any time period fixed in these rules or by an order or decision of a committee, the day from which the time period begins to run shall be excluded and, subject to subrules (2) and (3), the last day of the time period shall be included.

(2) Where the last day of a time period computed in accordance with subrule (1) falls on a legal holiday of the responsible Secretariat, that day and any other legal holidays of the responsible Secretariat immediately following that day shall be excluded from the computation.

(3) In computing any time period of five days or less fixed in these rules or by an order or decision of a committee, any legal holiday that falls within the time period shall be excluded from the computation.

11. A committee may extend any time period fixed in these rules if

(a) the extension is made in the interests of fairness and justice; and

(b) in fixing the extension, the committee takes into account the intent of the rules to secure just, speedy and inexpensive final resolutions of challenges to decisions of panels.

### *Counsel of Record*

12. (1) Subject to subrule (2), the counsel of record for a participant in an extraordinary challenge proceeding shall be

(a) the counsel for the participant in the panel review; or

(b) in the case of a Party who was not a participant in the panel review or of a panelist, the counsel who signs any document filed on behalf of the Party or panelist in the extraordinary challenge proceeding.

(2) A participant may change its counsel of record by filing with the responsible Secretariat a Notice of Change of Counsel of Record signed by the new counsel, together with proof of service on the former counsel and other participants.

### *Costs*

13. Each participant shall bear the costs of, and incidental to, its own participation in an extraordinary challenge proceeding.

### *Proprietary Information and Privileged Information*

14. (1) Where proprietary information has been filed in a panel review that is the subject of an extraordinary challenge proceeding, every member of a committee, assistant to a committee member, court reporter, interpreter and translator shall provide the responsible Secretariat with a Proprietary Information Access Application.

(2) Upon receipt of a Proprietary Information Access Application, the responsible Secretary shall file with the appropriate investigating authority the Proprietary Information Access Application and any additional copies of those documents required by the investigating authority.

(3) The investigating authority shall issue the Proprietary Information Access Order and provide the responsible Secretariat with the original and any additional copies of those documents required by the responsible Secretariat.

(4) Upon receipt of a Proprietary Information Access Order, the responsible Secretary shall transmit the original Proprietary Information Access Order to the appropriate member of a committee, assistant to a committee member, court reporter, interpreter or translator.

15. (1) A member of a committee, assistant to a committee member, court reporter, interpreter or translator who amends or modifies a Proprietary Information Access Application shall provide a copy of the amendment or modification to the responsible Secretariat.

(2) Upon receipt of an amendment or modification to a Proprietary Information Access Application, the responsible Secretary shall file with the appropriate investigating authority that document and any additional copies of that document required by the investigating authority.

(3) Upon receipt of an amendment or modification to a Proprietary Information Access Application, the investigating authority shall, as appropriate, amend, modify or revoke the Proprietary Information Access Order and provide the responsible Secretariat with the original of the amendment, modification or notice of revocation and any additional copies of the document required by the responsible Secretariat.

(4) Upon receipt of an amendment or modification to a Proprietary Information Access Order or a

notice of revocation, the responsible Secretary shall transmit the amendment, modification or notice of revocation to the appropriate member of a committee, assistant to a committee member, court reporter, interpreter or translator.

16. The responsible Secretary shall serve Proprietary Information Access Orders granted to members of a committee, assistants to committee members, court reporters, interpreters or translators, and any amendments or modifications thereto or notices of revocation thereof, on all participants other than the investigating authority.

17. (1) A counsel of record, or a professional retained by, or under the control or direction of, a counsel of record, who has not been issued a Proprietary Information Access Order in the panel review or in these proceedings and who wishes disclosure of proprietary information in the file of an extraordinary challenge proceeding, shall file a Proprietary Information Access Application, as follows:

(a) with the responsible Secretariat, four copies; and

(b) with the investigating authority, one original and any additional copies that the investigating authority requires.

(2) A Proprietary Information Access Application referred to in subrule (1) shall be served on all participants.

(3) The investigating authority shall, within 10 days after a Proprietary Information Access Application is filed with it in accordance with subrule (1), serve on the person who filed the Proprietary Information Access Application

(a) a Proprietary Information Access Order; or

(b) a notification in writing setting out the reasons why a Proprietary Information Access Order is not issued.

18. (1) Where

(a) an investigating authority refuses to issue a Proprietary Information Access Order to a counsel of record or to a professional retained by, or under the control or direction of, a counsel of record, or

(b) an investigating authority issues a Proprietary Information Access Order with terms unacceptable to a counsel of record,

the counsel of record may file with the responsible Secretariat a Notice of Motion requesting that the committee review the decision of the investigating authority.

(2) Where, after consideration of any response made by the investigating authority referred to in subrule (1), the committee decides that a Proprietary Information Access Order should be issued or that the terms of a Proprietary Information Access Order should be amended or modified, the committee shall so notify counsel for the investigating authority.

(3) Where the final determination was made in the United States and the investigating authority fails to comply with the notification referred to in subrule (2), the committee may issue such orders as are just in the circumstances, including an order refusing to permit the investigating authority to make certain arguments in support of its case or striking certain arguments from its pleadings.

19. (1) Where a Proprietary Information Access Order is issued to a person in an extraordinary



challenge proceeding, the person shall file with the responsible Secretariat a copy of the Proprietary Information Access Order.

(2) Where a Proprietary Information Access Order is revoked, amended or modified by an investigating authority, the investigating authority shall provide to the responsible Secretariat and to all participants a copy of the Notice of Revocation, amendment or modification.

20. In an extraordinary challenge proceeding that commences with a Request for an Extraordinary Challenge Committee pursuant to Article 1904.13(a)(i) of the Agreement, personal information shall be kept confidential

(a) where a Notice of Motion is filed pursuant to subrule 41(1)(c),

(i) until the committee makes an order referred to in subrule 45(1)(a), or

(ii) where the committee makes an order referred to in subrule 45(1)(b), indefinitely, unless otherwise ordered by the committee; and

(b) in any other case, until the day after the expiration of the time period fixed, pursuant to rule 41, for filing a Notice of Motion referred to in subrule 41(1)(c).

21. Where a person alleges that the terms of a Proprietary Information Access Application or Proprietary Information Access Order have been violated, the committee shall refer the allegations to the investigating authority for investigation and, where applicable, the imposition of sanctions in accordance with section 77.034 of the *Special Import Measures Act*, as amended, section 777(f) of the *Tariff Act of 1930*, as amended, or article 93 of the *Ley de Comercio Exterior*.

#### ***Violation of Code of Conduct***

22. Where a participant believes that a committee member or an assistant to a committee member is in violation of the Code of Conduct, the participant shall forthwith notify the responsible Secretary in writing of the alleged violation. The responsible Secretary shall promptly notify the other involved Secretary and the involved Parties of the allegations.

#### ***Pleadings and Simultaneous Translation of Extraordinary Challenge Proceedings in Canada***

23. Rules 24 to 26 apply with respect to an extraordinary challenge of a panel review of a final determination made in Canada.

24. Either English or French may be used by any person, panelist or member of a committee in any document or oral proceeding.

25. (1) Subject to subrule (2), any order or decision including the reasons therefor, issued by a committee shall be made available simultaneously in both English and French where

(a) in the opinion of the committee, the order or decision is in respect of a question of law of general public interest or importance; or

(b) the proceedings leading to the issuance of the order or decision were conducted in whole or in part in both English and French.

(2) Where

(a) an order or decision issued by a committee is not required by subrule (1) to be made available simultaneously in English and French, or

(b) an order or decision is required by subrule (1)(a) to be made available simultaneously in both English and French but the committee is of the opinion that to make the order or decision available simultaneously in both English and French would occasion a delay prejudicial to the public interest or result in injustice or hardship to any participant,

the order or decision, including the reasons therefor, shall be issued in the first instance in either English or French and thereafter at the earliest possible time in the other language, each version to be effective from the time the first version is effective.

(3) Nothing in subrule (1) or (2) shall be construed as prohibiting the oral delivery in either English or French of any order or decision or any reasons therefor.

(4) No order or decision is invalid by reason only that it was not made or issued in both English and French.

26. (1) Any oral proceeding conducted in both English and French shall be translated simultaneously.

(2) Where a participant requests simultaneous translation of an extraordinary challenge proceeding, the request shall be made as early as possible in the proceedings.

(3) Where a committee is of the opinion that there is a public interest in the extraordinary challenge proceedings, the committee may direct the responsible Secretary to arrange for simultaneous translation of the oral proceedings, if any.

## **PART II WRITTEN PROCEEDINGS**

27. Where these rules require that notice be given, it shall be given in writing.

### *Filing, Service and Communications*

28. (1) No document is filed with the Secretariat until one original and five copies of the document are received by the responsible Secretariat during its normal business hours and within the time period fixed for filing.

(2) The responsible Secretariat shall accept, date and time stamp and place in the appropriate file every document submitted to the responsible Secretariat.

(3) Receipt, date and time stamping or placement in the file of a document by the responsible Secretariat does not constitute a waiver of any time period fixed for filing or an acknowledgement that the document has been filed in accordance with these rules.

29. (1) All documents filed by a participant, other than documents required by rule 58 to be served by the responsible Secretary and documents referred to in subrule 38(2), rule 39, subrule 40(2)(a) and rule 41 shall be served by the participant on the counsel of record of each of the other participants or, where another participant is not represented by counsel, on the other participant.

(2) Subject to subrule 34(a), a document may be served by

- (a) delivering a copy of the document to the service address of the participant;
- (b) sending a copy of the document to the service address of the participant by facsimile transmission or by expedited delivery courier or expedited mail service, such as express mail in the United States or Priority Post in Canada; or
- (c) personal service on the participant.

(3) A proof of service shall appear on, or be affixed to, all documents referred to in subrule (1).

(4) Where a document is served by expedited delivery courier or expedited mail service, the date of service set out in the affidavit of service or certificate of service shall be the day on which the document is consigned to the expedited delivery courier or expedited mail service.

30. (1) Where, under these rules, a document containing proprietary information, privileged information or personal information is required to be filed under seal with the Secretariat or is required to be served under seal, the document shall be filed or served in accordance with this rule and, where applicable, in accordance with rule 32.

(2) A document filed or served under seal shall be

- (a) bound separately from all other documents;
- (b) clearly marked
  - (i) with respect to an extraordinary challenge of a panel review of a final determination made in Canada,
    - (A) in the case of a document containing proprietary information, "Proprietary", "Confidential", "De nature exclusive" or "Confidentiel", and
    - (B) in the case of a document containing privileged information, "Privileged" or "Protégé", and
    - (C) in the case of a document containing personal information, "Personal Information" or "Renseignements personnels",
  - (ii) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico,
    - (A) in the case of a document containing proprietary information, "Confidencial",
    - (B) in the case of a document containing privileged information, "Privilegiada", and
    - (C) in the case of a document containing personal information, "Información Personal", and
  - (iii) with respect to an extraordinary challenge of a panel review of a final determination made in the United States,
    - (A) in the case of a document containing proprietary information, "Proprietary", and
    - (B) in the case of a document containing privileged information, "Privileged", and
    - (C) in the case of a document containing personal information, "Personal Information"; and
- (c) contained in an opaque inner wrapper and an opaque outer wrapper.

(3) An inner wrapper referred to in subrule (2)(c) shall indicate

(a) that proprietary information, privileged information or personal information is enclosed, as the case may be; and

(b) the Secretariat file number of the extraordinary challenge proceeding.

31. Filing or service of proprietary information, privileged information or personal information with the Secretariat does not constitute a waiver of the designation of the information as proprietary information, privileged information or personal information.

32. (1) Where a participant files a pleading that contains proprietary information, the participant shall file two sets of the pleading in the following manner:

(a) one set containing the proprietary information shall be filed under seal and

(i) with respect to an extraordinary challenge of a panel review of a final determination made in Canada, shall be labelled "Proprietary", "Confidential", "Confidentiel" or "De nature exclusive", with the top of each page that contains proprietary information marked with the word "Proprietary", "Confidential", "Confidentiel" or "De nature exclusive" and with the proprietary information enclosed in brackets,

(ii) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico, shall be labelled "Confidential", with the top of each page that contains proprietary information marked with the word "confidential" and with the proprietary information enclosed in brackets, and

(iii) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, shall be labelled "Proprietary", with the top of each page that contains proprietary information marked with the word "Proprietary" and with the proprietary information enclosed in brackets; and

(b) no later than one day following the day on which the set of pleadings referred to in subrule (a) is filed, another set not containing proprietary information shall be filed and

(i) with respect to an extraordinary challenge of a panel review of a final determination made in Canada, shall be labelled "Non-Proprietary", "Non-Confidential", "Non confidentiel" or "De nature non exclusive",

(ii) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico, shall be labelled "No-confidential", and

(iii) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, shall be labelled "Non-Proprietary",

with each page from which proprietary information has been deleted marked to indicate the location from which the proprietary information was deleted.

(2) Where a participant files a pleading that contains privileged information, the participant shall file two sets of the pleading in the following manner:

(a) one set containing the privileged information shall be filed under seal and

(i) with respect to an extraordinary challenge of a panel review of a final determination made in Canada, shall be labelled "Privileged" or "Protégé", with the top of each page that contains privileged information marked with the word "Privileged" or "Protégé" and with the privileged information enclosed in brackets,

(ii) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico, shall be labelled "Privilegiada", with the top of each page that contains privileged information marked with the word "Privilegiada" and with the privileged information enclosed in brackets, and

(iii) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, shall be labelled "Privileged", with the top of each page that contains privileged information marked with the word "Privileged" and with the privileged information enclosed in brackets; and

(b) no later than one day following the day on which the set of pleadings referred to in subrule (a) is filed, another set not containing privileged information shall be filed and

(i) with respect to an extraordinary challenge of a panel review of a final determination made in Canada, shall be labelled "Non-Privileged" or "Non protégé",

(ii) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico, shall be labelled "No-privilegiada", and

(iii) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, shall be labelled "Non-Privileged",

with each page from which privileged information has been deleted marked to indicate the location from which the privileged information was deleted.

(3) Where a participant files a pleading that contains personal information, the pleading shall be filed under seal and

(a) with respect to an extraordinary challenge of a panel review of a final determination made in Canada, shall be labelled "Personal Information" or "Renseignements personnels", with the top of each page that contains personal information marked with the words "Personal Information" or "Renseignements personnels" and with the personal information enclosed in brackets;

(b) with respect to an extraordinary challenge of a panel review of a final determination made in Mexico, shall be labelled "Información Personal", with the top of each page that contains personal information marked with the words "Información personal" and with the personal information enclosed in brackets; and

(c) with respect to an extraordinary challenge of a panel review of a final determination made in the United States, shall be labelled "Personal Information", with the top of each page that contains personal information marked with the words "Personal Information" and with the personal information enclosed in brackets.

33. (1) Subject to subrule (2), a document containing proprietary or privileged information shall be filed under seal in accordance with rule 30 and shall be served only on the investigating authority and on those participants who have been granted access to the information under a Proprietary Information Access Order.

(2) Where all proprietary information contained in a document was submitted to the investigating authority by one participant, the document shall be served on that participant even if that participant has not been granted access to proprietary information under a Proprietary Information Access Order.

(3) A document containing personal information shall be filed under seal in accordance with rule 30 and shall be served only on persons or participants who have been granted access to the information under an order of the committee.

34. Where proprietary information, privileged information or personal information is disclosed to a person in an extraordinary challenge proceeding, the person shall not

- (a) file, serve or otherwise communicate the information by facsimile transmission; or
- (b) communicate the information by telephone.

35. Service on an investigating authority does not constitute service on a Party and service on a Party does not constitute service on an investigating authority.

### ***Form and Content of Pleadings***

36. (1) Every pleading filed in an extraordinary challenge proceeding shall contain the following information:

- (a) the title of, and any Secretariat file number assigned for, the extraordinary challenge proceeding;
- (b) a brief descriptive title of the pleading;
- (c) the name of the participant filing the pleading;
- (d) the name of counsel of record for the participant;
- (e) the service address, as defined in rule 3; and
- (f) the telephone number of the counsel of record of the participant or, where the participant is not represented by counsel, the telephone number of the participant.

(2) Every pleading filed in an extraordinary challenge proceeding shall be on paper 8 1/2 X 11 inches (216 millimetres by 279 millimetres) in size. The text of the pleading shall be printed, typewritten or reproduced legibly on one side only with a margin of approximately 1 1/2 inches (40 millimetres) on the left-hand side with double spacing between each line of text, except for quotations of more than 50 words, which shall be indented and single-spaced. Footnotes, titles, schedules, tables, graphs and columns of figures shall be presented in a readable form. Briefs and appendices shall be securely bound along the left-hand margin.

(3) Every pleading filed on behalf of a participant in an extraordinary challenge proceeding shall be signed by counsel for the participant or, where the participant is not represented by counsel, by the participant.

### ***Requests for an Extraordinary Challenge Committee***

37. (1) Where a Party, in its discretion, files with the responsible Secretary a Request for an Extraordinary Challenge Committee referred to in Article 1904.13(a)(ii) or (iii) of the Agreement, the Party shall file the Request (model form available from the Secretariat) within 30 days after the issuance, pursuant to rule 77 of the *NAFTA Article 1904 Panel Rules*, of the Notice of Final Panel Action in the panel review that is the subject of the Request.

(2) Where a Party, in its discretion, files with the responsible Secretary a Request for an Extraordinary Challenge Committee referred to in Article 1904.13(a)(i) of the Agreement, the Party shall file the Request (model form available from the Secretariat)

- (a) within 30 days after the issuance, pursuant to rule 77 of the *NAFTA Article 1904 Panel Rules*, of the Notice of Final Panel Action in the panel review that is the subject of the Request; or

(b) subject to subrule (3), where the Party gained knowledge of the action of the panelist giving rise to the allegation more than 30 days after the panel issued a Notice of Final Panel Action, no more than 30 days after gaining knowledge of the action of the panelist.

(3) No Request for an Extraordinary Challenge Committee referred to in subrule (2) may be filed if two years or more have elapsed since the effective date of the Notice of Completion of Panel Review.

(4) Notwithstanding subrules (1) to (3), the running of the time periods referred to in this section

(a) shall be suspended in the circumstances set out in Article 1905.11 of the Agreement; and

(b) where suspended under subrule (a), shall be resumed in the circumstances set out in Articles 1905.12 and 1905.13 of the Agreement.

38. (1) Subject to subrule (2), every Request for an Extraordinary Challenge Committee shall be in writing and shall

(a) include a concise statement of the allegations relied on, together with a concise statement of how the actions alleged have materially affected the panel's decision and the way in which the integrity of the panel review process is threatened;

(b) contain the name of the Party in the panel review, name of counsel, service address and telephone number; and

(c) where the panel decision was made in Canada, state whether the Party filing the Request for an Extraordinary Challenge Committee

(i) intends to use English or French in pleadings and oral proceedings before the committee, and

(ii) requests simultaneous translation of any oral proceedings.

(2) Where a Request for an Extraordinary Challenge Committee contains an allegation referred to in Article 1904.13(a)(i) of the Agreement, the identity of the panelist against whom such an allegation is made shall be revealed only in a confidential annex filed together with the Request and shall be disclosed only in accordance with rule 60.

39. (1) Every Request for an Extraordinary Challenge Committee (model form available from the Secretariat) shall be accompanied by

(a) those items of the record of the panel review relevant to the allegations contained in the Request; and

(b) an Index of the items referred to in subrule (a).

(2) Where a Request contains an allegation referred to in Article 1904.13(a)(i) of the Agreement, the Request shall be accompanied by, in addition to the requirements of subrule (1),

(a) any other material relevant to the allegations contained in the Request; and

(b) if the Request is filed more than 30 days after the panel issued a Notice of Final Panel Action pursuant to rule 77 of the *NAFTA Article 1904 Panel Rules*, an affidavit certifying that the Party gained knowledge of the action of the panelist giving rise to the allegation no more than 30 days preceding the filing of the Request.

### *Notices of Appearance*

40. (1) Within 10 days after the Request for an Extraordinary Challenge Committee is filed, a Party or participant in the panel review who proposes to participate in the extraordinary challenge proceeding shall file with the responsible Secretariat a Notice of Appearance (model form available from the Secretariat) containing the following information:

- (a) the name of the Party or participant, name of counsel, service address and telephone number;
- (b) a statement as to whether appearance is made
  - (i) in support of the Request, or
  - (ii) in opposition to the Request; and
- (c) where the extraordinary challenge is in respect of a panel review of a final determination made in Canada, a statement as to whether the person filing the Notice of Appearance
  - (i) intends to use English or French in pleadings and oral proceedings before the committee, and
  - (ii) requests simultaneous translation of any oral proceedings.

(2) Where a Party or participant referred to in subrule (1) proposes to rely on a document in the record of the panel review that is not specified in the Index filed with the Request for an Extraordinary Challenge Committee, the Party or participant shall file, with the Notice of Appearance,

- (a) the document; and
- (b) a statement identifying the document and requesting its inclusion in the extraordinary challenge record.

(3) On receipt of a document referred to in subrule (2), the responsible Secretary shall include the document in the extraordinary challenge record.

41. (1) Within 10 days after a Request for an Extraordinary Challenge Committee referred to in Article 1904.13(a)(i) of the Agreement is filed, a panelist against whom an allegation contained in the Request is made and who proposes to participate in the extraordinary challenge proceeding

- (a) shall file a Notice of Appearance;
- (b) may file, under seal, documents to be included in the extraordinary challenge record relevant to the panelist's defense against the allegation; and
- (c) may file an *ex parte* motion requesting that the extraordinary challenge proceeding be conducted *in camera*.

(2) Where a committee issues an order pursuant to subrule 45(1)(a), a panelist who filed documents described in subrule (1)(b) may, within five days after issuance of the order, withdraw any of those documents.



(3) Where a panelist withdraws documents pursuant to subrule (2), the committee shall not consider those documents.

### ***Filing and Content of Briefs and Appendices***

42. (1) The Party who has filed the Request for an Extraordinary Challenge Committee and every participant who has filed a Notice of Appearance under subrule 40(1)(b)(i) shall file a brief, setting forth grounds and arguments in support of the Request, no later than 21 days after the Request for an Extraordinary Challenge Committee is filed.

(2) Every participant who has filed a Notice of Appearance under subrule 40(1)(b)(ii) shall file a brief, setting forth grounds and arguments in opposition to the Request for an Extraordinary Challenge Committee, no later than 21 days after the expiration of the time period for filing of briefs referred to in subrule (1).

(3) The Party who has filed the Request for an Extraordinary Challenge Committee and every participant who has filed a Notice of Appearance under subrule 40(1)(b)(i) may file a brief, replying to the grounds and arguments set forth in the briefs filed pursuant to subrule (2), no later than 10 days after the expiration of the time period for filing of briefs referred to in subrule (2). Reply briefs shall be limited to rebuttal of matters raised in the briefs filed pursuant to subrule (2).

(4) Every brief filed under this rule shall be in the form required by rule 43.

(5) Appendices shall be filed with the briefs.

43. (1) Briefs shall contain information, in the following order, divided into five parts:

#### **Part I:**

(a) A table of contents; and

(b) A table of authorities cited:

The table of authorities shall contain references to all treaties, statutes and regulations cited, any cases primarily relied on in the briefs, set out alphabetically, and all other documents referred to except documents from the administrative record. The table of authorities shall refer to the page(s) of the brief where each authority is cited and mark, with an asterisk in the margin, those authorities primarily relied on.

#### **Part II:A statement of the case:**

This part shall contain a concise statement of the relevant facts with references to the panel record by page and, where applicable, by line.

#### **Part III:A statement of the issues:**

(a) In the brief of the Party who files the Request for an Extraordinary Challenge Committee, this part shall contain a concise statement of the issues.

(b) In the brief of any other participant, this part shall contain a concise statement of the position of the participant with respect to the issues.

#### **Part IV:Argument:**

This part shall consist of the argument, setting out concisely the points of law relating to the issues, with applicable citations to authorities and the panel record.

**Part V:Relief:**

This part shall consist of a concise statement precisely identifying the relief requested.

(2) Paragraphs in Parts I to V of a brief may be numbered consecutively.

(3) Authorities referred to in the briefs shall be included in an appendix, which shall be organized as follows: a table of contents, copies of all treaty and statutory references, references to regulations, cases primarily relied on in the briefs, set out alphabetically, all documents relied on from the panel record and all other materials relied on.

***Motions***

44. (1) Motions, other than motions referred to in subrule 41(1)(c), may be considered at the discretion of the committee.

(2) A committee may dispose of a motion based upon the pleadings filed on the motion.

(3) A committee may hear oral argument in person or, subject to subrule 34(b), direct that a motion be heard by means of a telephone conference call with the participants.

**PART IV  
RESPONSIBILITIES OF THE SECRETARY**

49. The normal business hours of the Secretariat, during which the offices of the Secretariat shall be open to the public, shall be from 9:00 a.m. to 5:00 p.m. on each weekday other than

(a) in the case of the Canadian Section of the Secretariat, legal holidays of that Section;

(b) in the case of the Mexican Section of the Secretariat, legal holidays of that Section;  
and

(c) in the case of the United States Section of the Secretariat, legal holidays of that Section.

50. On the completion of the selection of the members of a committee, the responsible Secretary shall notify the participants and the other involved Secretary of the names of the members of the committee.

51. The responsible Secretary shall provide administrative support for each extraordinary challenge proceeding and shall make the arrangements necessary for meetings and any oral proceedings, including, if required, interpreters to provide simultaneous translation.

52. Each involved Secretary shall maintain a file for each extraordinary challenge, comprised of either the original or a copy of all documents filed, whether or not filed in accordance with these

rules.

53. The responsible Secretary shall forward to the other involved Secretary a copy of all documents filed with the responsible Secretary and of all orders and decisions issued by a committee.

54. Where under these rules a notice or other document is required to be published, the responsible Secretary and the other involved Secretary shall each cause the document to be published in the official publication of the country in which that section of the Secretariat is located.

55. (1) Where a document containing proprietary information or privileged information is filed with the involved Secretariats, each involved Secretary shall ensure that

(a) the document is stored, maintained, handled, and distributed in accordance with the terms of an applicable Proprietary Information Access Order;

(b) the inner wrapper of the document is clearly marked to indicate that it contains proprietary information or privileged information; and

(c) access to the document is limited to

(i) in the case of proprietary information, officials of, and counsel for, the investigating authority, the person who submitted the proprietary information to the investigating authority and counsel of record for that person, and any persons who have been granted access to the information under a Proprietary Information Access Order, and

(ii) in the case of privileged information relied upon in an extraordinary challenge of a decision of a panel with respect to a final determination made in the United States, committee members and their assistants and persons with respect to whom the panel ordered disclosure of the privileged information under rule 52 of the *NAFTA Article 1904 Panel Rules*, if those persons have filed with the responsible Secretariat a Proprietary Information Access Order with respect to the document.

(2) Where a document containing personal information is filed with the involved Secretariats, each involved Secretary shall ensure that

(a) the document is stored, maintained, handled, and distributed in accordance with the terms of any applicable Proprietary Information Access Order;

(b) the inner wrapper of the document is clearly marked to indicate that it contains personal information; and

(c) access to the document is limited to persons granted access to the information pursuant to subrule 45(1)(b).

56. No document filed in an extraordinary challenge proceeding shall be removed from the offices of the Secretariat except in the ordinary course of the business of the Secretariat or pursuant to the direction of a committee.

57. (1) Each involved Secretary shall permit access by any person to information in the file of an extraordinary challenge proceeding that is not proprietary information, privileged information or personal information.

(2) Each involved Secretary shall, in accordance with the terms of any applicable Proprietary Information Access Order or order of a panel or committee, permit access to proprietary

information, privileged information or personal information in the file of an extraordinary challenge proceeding.

(3) Each involved Secretary shall, on request and on payment of the prescribed fee, provide copies of information in the file of an extraordinary challenge proceeding to any person who has been given access to that information.

58. (1) Where a Request for an Extraordinary Challenge Committee pursuant to Article 1904.13(a)(ii) or (iii) of the Agreement is filed with the responsible Secretariat, the responsible Secretary shall, upon receipt thereof,

(a) forward a copy of the Request and Index to the other involved Secretary; and

(b) serve a copy of the Request and Index on the other involved Party and on the participants in the panel review, together with a statement setting out the date on which the Request was filed and stating that all briefs of

(i) the Party who has filed the Request and of every participant who files a Notice of Appearance in support of the Request shall be filed no later than 21 days after the date of filing of the Request,

(ii) every participant who files a Notice of Appearance in opposition to the Request shall be filed no later than 21 days after the expiration of the time period, referred to in subrule (i), for filing of briefs, and

(iii) the Party who has filed the Request and of every participant who files a brief under subrule (i) in reply to the grounds and arguments set forth in the briefs filed pursuant to subrule (ii) shall be filed no later than 10 days after the expiration of the time period, referred to in subrule (ii), for filing of briefs.

(2) Where a Request for an Extraordinary Challenge Committee pursuant to Article 1904.13(a)(i) of the Agreement is filed, the responsible Secretary shall, upon receipt thereof,

(a) forward a copy of the Request, Index and annex to the other involved Secretary; and

(b) serve a copy of the Request, Index and annex on the other involved Party, on the panelist against whom the allegation contained in the Request is made and on the participants in the panel review, together with a statement setting out the date on which the Request was filed and stating that all briefs of

(i) the Party who has filed the Request and of every participant who files a Notice of Appearance in support of the Request shall be filed no later than 21 days after the date of filing of the Request,

(ii) every participant who files a Notice of Appearance in opposition to the Request shall be filed no later than 21 days after the expiration of the time period, referred to in subrule (i), for filing of briefs, and

(iii) the Party who has filed the Request and of every participant who files a brief under subrule (i) in reply to the grounds and arguments set forth in the briefs filed pursuant to subrule (ii) shall be filed no later than 10 days after the expiration of the time period, referred to in subrule (ii), for filing of briefs.

(3) The responsible Secretary shall serve orders and decisions of a committee and Notices of Completion of Extraordinary Challenge on the participants.

(4) Where the decision of a committee referred to in subrule (3) relates to a panel review of a final determination made in Canada, the decision shall be served by registered mail.

59. The responsible Secretary shall cause notice of a final decision of a committee issued pursuant

to rule 63, and any order that the committee directs the Secretary to publish, to be published in the official publications of the involved Parties.

60. Where the time period fixed, pursuant to rule 41, for filing an *ex parte* motion referred to in subrule 41(1)(c) has expired, the responsible Secretary shall serve on all participants

- (a) where no motion is filed pursuant to that subrule, the documents referred to in rules 39 and 41;
- (b) where the committee issues an order referred to in subrule 45(1)(a), the documents referred to in rules 39 and 41 in accordance with any order of the committee; and
- (c) where the committee issues an order referred to in subrule 45(1)(b), the documents referred to in rules 39 and 41, in accordance with subrule 45(1)(b)(ii) and any order made by the committee.

## **PART V ORDERS AND DECISIONS**

61. All orders and decisions of a committee shall be made by a majority of the votes of all members of the committee.

62. (1) Where a Notice of Motion requesting dismissal of an extraordinary challenge proceeding is filed by a participant, the committee may issue an order dismissing the proceeding.

(2) Where the motion referred to in subrule (1) is consented to by all the participants and an affidavit to that effect is filed, or where all participants file Notices of Motion requesting dismissal, the extraordinary challenge proceeding is terminated.

63. (1) A final decision of a committee shall

- (a) affirm the decision of the panel;
- (b) vacate the decision of the panel; or
- (c) remand the decision of the panel to the panel for action not inconsistent with the final decision of the committee.

(2) Every final decision of a committee shall be issued in writing with reasons, together with any dissenting or concurring opinions of the members of the committee.

(3) Subrule (2) shall not be construed as prohibiting the oral delivery of the decision of a committee.

## **PART VI COMPLETION OF EXTRAORDINARY CHALLENGES**

64 Where all participants consent to the termination of the proceeding pursuant to rule 62, the responsible Secretary shall cause to be published in the official publications of the involved Parties a Notice of Completion of Extraordinary Challenge, effective on the day after the day on which the requirements of rule 62 have been met.

65. Where a committee issues its final decision, the responsible Secretary shall cause to be published in the official publications of the involved Parties a Notice of Completion of Extraordinary Challenge, effective on the day after the day on which

- (a) the committee affirms the decision of the panel;
- (b) the committee vacates the decision of the panel; or
- (c) where the committee remands the decision of the panel, the day the responsible Secretary gives notice to the committee that the panel has given notice that it has taken action not inconsistent with the committee's decision.

66. The members of the committee are discharged from their duties on the day on which a Notice of Completion of Extraordinary Challenge is effective.

67. (1) A Party may make a request, pursuant to Article 1905.11(a)(ii) of the Agreement, that an ongoing extraordinary challenge proceeding be stayed by filing the request with the responsible Secretariat.

(2) A Party who files a request under subrule (1) shall forthwith give written notice of the request to the other involved Party and to the other involved Secretariat.

(3) On receipt of a request under subrule (1), the responsible Secretary shall

- (a) immediately give written notice of the stay of the extraordinary challenge proceedings to all participants in the extraordinary challenge proceedings; and
- (b) publish a notice of the stay of the extraordinary challenge proceedings in the official publications of the involved Parties.

68. On receipt of a report containing an affirmative finding with respect to a ground specified in Article 1905.1 of the Agreement, the responsible Secretary for extraordinary challenge proceedings referred to in Article 1905.11(a)(i) of the Agreement shall

- (a) immediately give notice in writing to all participants in those proceedings; and
- (b) publish a notice of the affirmative finding in the official publications of the involved Parties.

69. (1) A Party who intends to suspend the operation of Article 1904 of the Agreement pursuant to Article 1905.8 or 1905.9 of the Agreement shall endeavour to give written notice of that intention to the other involved Party and to the involved Secretaries at least five days prior to the suspension.

(2) On receipt of a notice under subrule (1), the involved Secretaries shall publish a notice of the suspension in the official publications of the involved Parties.