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# NAFTA Code of Conduct Provides International Guidelines for Ethical Behavior<sup>1</sup>

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## I. Introduction

Several major events in international trade in recent years highlight the critical need for impartial, efficient and fair resolution of trade disputes. At the time it was negotiated, the North American Free Trade Agreement (NAFTA)<sup>4</sup> created the largest free trade area in the world<sup>5</sup> among the United States, Canada and Mexico. It builds upon the existing foundation of the United States-Canada Free Trade Agreement (CFTA).<sup>6</sup> The global trade pact creating the World

1. The views expressed in this Article are those of the authors and do not necessarily represent the views of the United States Department of Commerce or any other agency of the U.S., Canadian or Mexican governments. Portions of this article are drawn from "NAFTA Code of Conduct To Ensure Integrity of Dispute Settlement", in the Office of Government Ethics NEWSGRAM, June 1994 and *Focus Americas*, Volume 2, No. 4, July 1994 by Mr. Holbein and "The NAFTA Code of Conduct For Dispute Settlement Procedures Under Chapters 19 and 20" in *Commerce Speaks 1994*, Practising Law Institute (Washington, D.C., 1994) by Ms. Greenidge.
  2. Mr. Holbein is the United States Secretary of the NAFTA Secretariat, U.S. Department of Commerce, Washington, D.C. B.A., 1976, University of California at Santa Barbara; J.D., 1979, University of Arkansas. Admitted to State Bar of Arkansas, 1979.
  3. Ms. Greenidge is an Attorney-Adviser with the Office of the Chief Counsel for International Commerce, Office of the General Counsel at the U.S. Department of Commerce, B.A. 1982, C.W. Post College/Long Island University; M.A., 1986, The American University; J.D., 1992, Boston College Law School. Admitted to the District of Columbia Bar, 1992.
  4. The NAFTA entered into force on January 1, 1994; North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) [*hereinafter* NAFTA], reprinted in *North American Free Trade Agreements*, Treaties 1, Oceana Publications, (1994) compiled and edited by James R. Holbein and Donald J. Musch. For a summary of the NAFTA negotiations and the terms of the agreement see *1994 Trade Policy Agenda and 1993 Annual Report of the President of the United States on the Trade Agreements Program* (1994). The scholarly literature abounds with analyses of the treaty.
  5. Harry B. Endsley & Steven Baker, "A Practical Guide to Customs, Tariffs and Rules of Origin under NAFTA," *North American Free Trade Agreements*, Commentaries 1, Oceana Publications, (1994) compiled and edited by James R. Holbein and Donald J. Musch, at 1. Subsequent to the negotiation of NAFTA, the European Economic Area was created, merging the European Community and the European Free Trade Area into the largest commercial entity in the world.
  6. Done January 2, 1988, reprinted in 27 I.L.M. 281 (1988) (entered into force January 1, 1989); see United States-Canada Free Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112) [*hereinafter* CFTA], reprinted in *North American Free Trade Agreements*, Treaties 2, Oceana Publications, (1994) compiled and edited by James R. Holbein and Donald J. Musch.
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Trade Organization (WTO) and expanding upon the existing General Agreement on Tariffs and Trade (GATT) will also provide for a new system for dispute settlement.<sup>7</sup>; In addition, the announcement of the intention to negotiate expanded free trade at the Asia-Pacific Economic Cooperation (APEC) Summit meeting<sup>8</sup> and at the Summit of the Americas<sup>9</sup> means that the integrity of dispute settlement will be of crucial importance in an era of free trade expansion.

## II. NAFTA Code of Conduct

This article will attempt to outline the most important aspects of the Code of Conduct for Proceedings Under NAFTA Chapters Nineteen and Twenty (Code of Conduct or Code).<sup>10</sup> The Code of Conduct is a stringent guide to ethical behavior for NAFTA arbitrators, panelists and other individuals performing dispute settlement functions. It will guide the administration of disputes arising under Chapters 19 and 20, and certain disputes arising under Chapters 11 and 14 of the NAFTA.<sup>11</sup>

## III. NAFTA Dispute Settlement as a Model

One of the most important features of the NAFTA is inexpensive, expeditious and impartial resolution of trade disputes arising out of the operation of the agreement.<sup>12</sup> NAFTA creates a

7. Dispute Settlement Understanding MTN/FA II-A2, April 15, 1994. U.S. implementing legislation P.L. 103-465; 108 Stat. 4809. 1994. For early evaluations of the new system, see, Andreas F. Lowenfeld, *Remedies along with Rights: Institutional Reform in the New GATT*, 88 Am. J. Int'l. Law 477 (1994) and Palitha T.B. Kohona, *Dispute Resolution under the World Trade Organization, An Overview*, 28 J. World Trade 23 (1994).
8. *APEC Economic Leaders' Declaration of Common Resolve*, signed at Bogor, Indonesia, November 15, 1994 (copies available on USTR Auto-Fax, (202) 395-4809). For background on the Summit, see, *Achieving the APEC Vision, Free and Open Trade in the Asia Pacific*, Second Report of the Eminent Persons Group, Asia-Pacific Economic Cooperation, August 1994.
9. *Declaration of Principles and Plan of Action*, signed at Miami, Florida, December 11, 1994.
10. Article 1909 requires the Parties to establish a Code of Conduct for panelists and members of committees established pursuant to Articles 1903, 1904 and 1905. The Code was published in the United States at 59 *Fed. Reg.* 8720 (Feb. 23, 1994).
11. See Articles 1136(5), 1414, 2009(2), Annex 1901.2(6) and 1901.2(10). For analysis and evaluation of the CFTA and NAFTA dispute settlement mechanisms, see the following examples of the extensive literature in the area: James R. Holbein, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 C. W. R. J. Int'l. Law, 531 (Summer 1993); Stewart A. Baker & Mark A. Barnett, *United States-Canada Binational Panel Determinations: 1991-1994*, *North American Free Trade Agreements*, Commentary, Oceana Publications, (1994) compiled and edited by James R. Holbein and Donald J. Musch; Michael H. Greenberg, *Chapter 19 of the U.S.-Canada Free Trade Agreement & the NAFTA: Implications for the Court of International Trade*, 25 Law & Pol. in Int'l. Bus. 37 (1993); Judith H. Bello, et.al., *Midterm Report on Binational Dispute Settlement Under the United States-Canada Free Trade Agreement*, 25 Int'l. Law. 489 (1991); Homer E. Moyer, Jr., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 Int'l. Law. 707 (1993); and many other sources.
12. *Statement of Administrative Action*, House Doc. 103-159, Vol. 1, 699-700 (1993), [hereinafter *Statement*], reprinted in *North American Free Trade Agreements*, Treaties 2, Oceana Publications, (1994) compiled and edited by James R. Holbein and Donald J. Musch. This Statement provides sig-

system, modeled in large part on the CFTA, whereby non-governmental experts act on an ad-hoc basis to resolve a variety of different types of disputes. Chapters 19 and 20 provide the most important dispute settlement mechanisms in NAFTA. The dispute settlement provisions of NAFTA Chapter 19 closely parallel the provisions of the CFTA, but also offer a new process for safeguarding the panel process.<sup>13</sup> Chapter 20 incorporates most of the elements of CFTA Chapter 18,<sup>14</sup> but also includes several innovations in the areas of investment, alternative dispute resolution and technical issues such as the environment.<sup>15</sup> These unique systems will be elaborated upon in more detail below. They could potentially offer a model for other international trade agreements.

#### ***IV. Free Trade Commission***

Chapter 20 creates a Free Trade Commission to oversee the implementation, elaboration and operation of the agreement, including resolution of disputes and supervision of all committees and working groups created under the agreement.<sup>16</sup> The Commission is also responsible for the resolution of disputes which arise over the interpretation of the agreement.<sup>17</sup> The focus in Chapter 20 is on management of disputes through consultation and negotiation between the Parties to the agreement, e.g., the three national governments.<sup>18</sup> The Commission acts most frequently in the U.S. through interagency groups chaired by officials of the Office of the United States Trade Representative (USTR).

#### ***V. Chapter 20 Working Groups***

In the continental context, trilateral working groups are the typical mechanism used to guide the evolution of the agreement.<sup>19</sup> These working groups include officials from many executive agencies in each government and are generally led by officials from USTR, the Canadian Department of Foreign Affairs and International Trade (DFAIT) and the Mexican Ministry of Commerce and Industrial Development (SECOFI). When formal dispute settlement panels are

#### *Note 12, continued*

nificant administrative actions necessary to implement to NAFTA and was submitted with the implementing legislation, *supra* note 7.

13. Article 1905.

14. The only element eliminated from NAFTA Chapter 18 is Article 1806, which permitted binding arbitration. This provision was never used under the CFTA.

15. Chapter 11 provides for recourse to International Centre for the Settlement of Investment Disputes [*hereinafter* ICSID, Convention or ICSID Additional Facility] arbitration or *ad hoc* proceedings under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) for investment disputes; Article 2022 provides for an Advisory Committee on Private Commercial Disputes; Article 2015 provides for assistance to panels in technical areas by Scientific Review Boards to report on any factual issue concerning environmental, health, safety or other scientific matter raised by a NAFTA government in a panel proceeding.

16. Article 2001; *see also* Annex 2001.2.

17. *Id.*; *see also*, Articles 2004 and 2005.

18. Article 2003.

19. Annex 2001.2.

requested, some of these same officials act to select the panelists, argue the case and implement the results of the panel review.

## VI. Chapter 20 Panel Process

NAFTA Chapter 20 provides for five-member panels of experts to render advisory opinions and recommendations for settlement of disputes referred by the Parties.<sup>20</sup> It builds upon CFTA Chapter 18, but expands substantially the coverage of dispute settlement.<sup>21</sup> The agreement provides that the Parties must agree upon the terms of reference, select the panel and chairman, and agree upon a timetable for the conduct of the panel review.<sup>22</sup> The Parties normally follow the deadlines established in the agreement which provide for written submissions by each Party, oral argument, an initial report, comments on that report by the Parties and a final report, normally within 120 days of the formation of the panel.<sup>23</sup> The final report will normally be made public, unless the Parties agree to maintain its confidentiality.<sup>24</sup> Under CFTA Chapter 18, only five disputes reached the stage of binational panel review,<sup>25</sup> out of dozens of issues and disagreements referred to the Parties. No panel reviews were requested in 1994 under NAFTA Chapter 20.<sup>26</sup>

20. Articles 2016 (Initial Report) and 2017 (Final Report).

21. Chapter 20 incorporates most of CFTA Chapter 18, with the exception of binding arbitration from CFTA Article 1806, but expands substantially the purview of the chapter. For example: non-involved Parties may offer good offices, conciliation and mediation to the other Parties (Article 2007); third-Party participation is permitted (Article 2013); experts and Scientific Review Boards are permitted (Articles 2014 & 2015); a new cross-selection process for choosing panels has been added (Article 2011); and suspension of benefits is provided for non-compliance with panel findings (Article 2019).

22. Article 2011 & 2012.

23. Article 2016 provides for the panel to submit an initial report to the Parties within 90 days of the selection of the last panelist. Parties have 14 days to comment to the panel on that report. Article 2017 provides for the issuance of a final report 30 days after the submission of the initial report, affording the panel an opportunity to take into consideration the comments of the Parties on the initial report.

24. Article 2017 provides that final reports shall be published 15 days after transmission to the Commission, unless the Commission orders otherwise.

25. In the matter of: *Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Secretariat File No. CDA-89-1807-01 (Oct. 16, 1989); In the matter of: *Lobsters from Canada*, Secretariat File No. USA-89-1807-01 (May 25, 1990); In the matter of: *Article 304 and the Definition of Direct Cost of Processing or Direct Cost of Assembling*, Secretariat File No. USA-92-1807-01 (1992); In the matter of: *The Interpretation of and Canada's Compliance With Article 701.3 With Respect to Durum Wheat Sales*, Secretariat File No. CDA-92-1807-01 (1992); in the matter of: *Puerto Rico Regulations on the Import, Distribution, and Sale of Ultra-High Temperature Milk from Quebec*, Secretariat File No. USA-93-1807-01 (1993). All of these decisions are readily available from electronic legal services and from *North American Free Trade Agreements*, Dispute Settlement 1 & 2, *supra* note 7.

26. *Status Report of Active Cases*, March 1995. This report is prepared by the NAFTA Secretariat on a monthly basis. Copies are available by contacting the U.S. Section at (202) 482-5438.

## VII. Chapter 19 Review of AD/CVD Matters

Chapter 19 of the NAFTA closely parallels the CFTA mechanism for replacing judicial review of final antidumping (AD) and countervailing duty (CVD) determinations involving imports from Canada, Mexico, or the United States with review by independent, five-member, binational panels of experts drawn from an agreed roster developed by the signatories.<sup>27</sup> If requested, these panels will expeditiously review final determinations to determine whether they are consistent with the AD/CVD law of the importing country.<sup>28</sup> Panel reviews are conducted under a set of procedural rules which are designed to result in decisions of panels within 315 days after the filing of a request for panel review.<sup>29</sup> Fifty-one panel reviews were initiated under the CFTA and 12 have been requested under NAFTA.<sup>30</sup>

## VIII. Extraordinary Challenge Committees

Chapter 19 also provides that the NAFTA governments, as Parties to the agreement, may request review of panel decisions by three-member extraordinary challenge committees (ECC) composed of judges or former judges from the disputing countries.<sup>31</sup> Such committees will normally issue decisions in 90 days, rather than the 30 day time limit under the CFTA. ECC reviews are conducted under a trilaterally agreed set of procedural rules.<sup>32</sup> Three extraordinary challenge committees were convened under the CFTA, and none have been established under NAFTA.<sup>33</sup>

## IX. Article 1905 - Safeguarding the Panel System

A new process for safeguarding the panel review system has been added to NAFTA Chapter 19 to permit review, by three-member special committees, of allegations of one Party that another

27. Article 1901.2, Annex 1901.2, and Statement, at 643 ff., *supra* note 15.

28. Article 1904.2. *See also*, Article 1902, 1911 and Annex 1911.

29. *North American Free Trade Agreement: Rules of Procedure for Article 1904 Binational Panel Reviews*, 59 *Fed. Reg.* 8688, Feb. 23, 1994. For the rules under the CFTA, *see*, *United States-Canada Free Trade Agreement: Amendments to Rules of Procedure for Article 1904 Binational Panel Reviews*, 59 *Fed. Reg.* 5892, Feb. 8, 1994. *See also*, Stacy J. Ettinger, "NAFTA Chapter Nineteen: Rules of Procedure and Regulations," *The Commerce Department Speaks on International Trade and Investment*, 1994, Practising Law Institute, 1994 [*hereinafter* Ettinger, "NAFTA Chapter Nineteen Rules"].

30. *Status Report of Active Cases*, *supra* note 29, and *Status Report of Completed Cases*, March 1995.

31. Article 1904.13 and Annex 1904.13.

32. *North American Free Trade Agreement: Rules of Procedure for Article 1904 Extraordinary Challenge Committees*, 59 *Fed. Reg.* 8702, Feb. 23, 1994. For the CFTA rules *see*, *United States-Canada Free Trade Agreement: Amendments to Rules of Procedure for Article 1904 Extraordinary Challenge Committees*, 59 *Fed. Reg.* 5910, Feb. 8, 1994. *See also*, Ettinger, "NAFTA Chapter Nineteen Rules," *supra* note 29.

33. *In the Matter of Fresh, Chilled and Frozen Pork from Canada*, Secretariat File No. ECC-91-1904-01USA, decision issued June 14, 1991; *In the Matter of Live Swine from Canada*, Secretariat File No. ECC-93-1904-01USA, decision issued April 8, 1993; *In the Matter of Certain Softwood Lumber Products from Canada*, Secretariat File No. ECC-94-1904-01USA, decision issued August 3, 1994. Copies of decisions are available from the U.S. Section, *supra* note 29 and are reprinted in *North American Free Trade Agreements*, *supra* note 7.

er has interfered in the proper functioning of the panel system.<sup>34</sup> If a special committee makes an affirmative finding, the Parties will either negotiate a solution or the complaining Party may suspend the operation of the Chapter, subject to retaliatory suspension by the offending Party.<sup>35</sup> Article 1905 Special Committees will be bound by the terms of the Code of Conduct.

### **X. Persons Governed by Code of Conduct**

In accordance with the requirements of Articles 1909 and 2009 of NAFTA, the governments of Canada, Mexico, and the United States have negotiated a Code of Conduct.<sup>36</sup> The Code applies specifically to members and former members of panels established to review statutory amendments under Article 1903, AD/CVD determinations under Article 1904 or general disputes under Article 2008, including panels established pursuant to Article 1414 governing financial services issues.<sup>37</sup> The Code also applies to members and former members of special committees established pursuant to Article 1905 or extraordinary challenge committees formed under Annex 1904.13 of the Agreement.<sup>38</sup> In addition, the Code sets forth disclosure obligations for members of rosters established pursuant to Article 1414 (financial services), Article 2009 (general issues) or Annex 1901.2 (AD/CVD) or 1904.13 (special or extraordinary challenge committees) and for individuals not on a roster who are under consideration for appointment to a panel or committee.<sup>39</sup> Assistants and staff members of covered individuals are also bound by certain obligations.<sup>40</sup> The Code is based on the Code of Conduct existing under the CFTA,<sup>41</sup> "with certain changes made to better ensure the integrity and impartiality of the proceedings under the Agreement."<sup>42</sup>

### **XI. NAFTA Secretariat**

The NAFTA Secretariat is a unique organization created under Chapter 20 to administer binational panel review procedures to settle disputes under the NAFTA.<sup>43</sup> Consisting of "mirror-image" offices in Washington, Ottawa and Mexico City, the three Secretariat sections work

34. Article 1905. Special Committees will rely upon the *North American Free Trade Agreement: Rules of Procedure for Article 1905 Special Committees*, 59 *Fed. Reg.* 8714, Feb. 23, 1994.

35. Article 1905. See also, Ettinger, "NAFTA Chapter Nineteen Rules," *supra* note 29.

36. *North American Free Trade Agreement: Code of Conduct for Proceedings under Chapters 19 and 20*, 59 *Fed. Reg.* 8720, Feb. 23, 1994.

37. *Id.* at Interpretation, "candidate," "member" and "proceeding".

38. *Id.*

39. *Id.*

40. *Id.*, Section VII, Responsibilities of Assistants and Staff.

41. Copies of the *Code of Conduct for Proceedings under Chapters 18 and 19 of the United States-Canada Free Trade Agreement* are available from the NAFTA Secretariat at (202) 482-5438.

42. Supplementary Information to Code, 59 *Fed. Reg.* at 8720. It should be noted that the World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Article 7, paragraphs 2 and 9 provide that members of WTO panels should be selected with a view to ensuring independence. To supplement those provisions, the WTO Dispute Settlement Body is drafting rules of conduct to govern DSU proceedings and other relevant WTO proceedings. 12 *Int'l Trade Rep.* 295 (Feb. 15, 1995).

43. Article 2002.

together to provide administrative support to panels and maintains a file system for all case documents, functioning much like the Clerk of the Court in judicial reviews.<sup>44</sup> It has no substantive role in panel deliberations or the outcome of decisions.

## ***XII. The Secretariat's Role Under the Code***

The Secretariat acts as a buffer between the Parties, participants, the public and panelists to ensure that *ex parte* communications and political pressures do not influence panel actions.<sup>45</sup> To that end, the Secretariat handles all interactions among the participants, Parties, panelists and candidates concerning the Code of Conduct including:

- obtaining disclosure information from potential panelists;
- obtaining supplementary information once a panel is named;
- informing participants of the composition of the panel;
- receiving inquiries from panelists concerning changes in their circumstances and the possible impact on their further participation;
- referring questions to panelists from the Parties and funneling responses back for consideration;
- referring allegations from participants against panelists to the Parties for further instructions; and
- when a panelist withdraws from an active review, providing notice to all participants that the matter is suspended until a replacement panelist is named.<sup>46</sup>

## ***XIII. Independence and Impartiality Generally***

The Preamble to the Code states that “the Parties place prime importance on the integrity and impartiality of proceedings” under the dispute settlement provisions of the Agreement.<sup>47</sup> The general obligations are outlined below:

- Each member must avoid impropriety and the appearance of impropriety and must be independent and impartial.<sup>48</sup>
- Members must also avoid entering into any relationship or acquiring any financial or personal interest likely to affect his or her impartiality or that might reasonably create an appearance of impropriety or apprehension of bias.<sup>49</sup>
- Members of Article 1904 panels are prohibited from representing a participant in an administrative proceeding, domestic court proceeding or another Article 1904 panel proceeding involving the same goods.<sup>50</sup>

44. *Id.*, see also, Article 1908, which identifies specific Secretariat functions under Chapter 19.

45. By acting as an impartial intermediary for transmitting information among the governments, members and candidates, participants in the process and other interested parties, the Secretariat effectively prevents *ex parte* communications and thereby ensures the integrity of the process is maintained.

46. Annex 1901.2(9).

47. Code of Conduct, 59 *Fed. Reg.* at 8720.

48. *Id.*, Section IV.A, 59 *Fed. Reg.* at 8721.

49. *Id.*, Section IV.F.

50. *Id.*, Section V.B.



#### ***XIV. Test for Appearance of Impropriety or Apprehension of Bias***

The NAFTA Code further builds on the CFTA Code by supplying a test for the principle of appearance of impropriety or bias found in the U.S. and Mexico and in Canada (as "apprehension of bias"). The governing principle of the Code of Conduct is that a candidate under consideration for service on a panel or committee or a member of a panel or committee must disclose the existence of any interest, relationship or matter that is likely to affect the candidate's or member's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. An appearance of impropriety or an apprehension of bias is created

... where a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would conclude that a candidate's or member's ability to carry out the duties with integrity, impartiality and competence is impaired.<sup>51</sup>

The test is drawn from the "reasonable person" or "objective observer" test announced in the *Code of Conduct for United States Judges*,<sup>52</sup> which was considered by the NAFTA Parties to reflect appropriate elements of the test found in the jurisprudence of each country. Panels and committees in Chapter 19 proceedings replace judicial review in the courts of competent jurisdiction in the NAFTA countries. Like those under the CFTA, even though members serving on Chapter 19 panels should be generally familiar with international trade law, they are held to the standard articulated in Chapter 19 and the Code of Conduct. By adopting the reasonable person test, the NAFTA Parties emphasized the need for the public and litigants, particularly with respect to Chapter 19 proceedings, to have the same degree of confidence in the integrity and impartiality of the panel system as they would a court.<sup>53</sup> Similarly, the U.S. Judicial Conference commented in its *Code of Conduct for United States Judges* that "... violation of [the] Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law."<sup>54</sup> NAFTA requires that the roster include judges and former judges "to the fullest extent practicable."<sup>55</sup>

#### ***XV. Governing Principle of Disclosure***

The Code includes an Introductory Note to help clarify the duty of candidates for inclusion on a panel or members of existing panels. As this Note states:

51. Code of Conduct, 59 *Fed. Reg.* at 8720, Introductory Note.

52. Commentary to Canon 1, revised and adopted by the United States Judicial Conference, September 1992.

53. *Id.* at Chapter 19, A.4.

54. See Commentary to Canon 1, at I-1.

55. Annex 1901.2(1). In the U.S., USTR is required to submit lists of candidates for the U.S. roster to the House Committee on Ways and Means and the Senate Committee on Finance accompanied by a statement on their background. Statement at 200. If the candidate is an attorney or consultant, the statement would include a list of the candidate and firm clients. *Id.* The rationale for providing such background is "to improve the consultative process established in the statute and to avoid conflicts and appearances of conflicts of interest. *Id.* This initial check is done before a candidate is placed on the roster. It is separate from the disclosure requirements and conflicts concerns under the Code of Conduct once a roster member is selected as a candidate for a particular panel.

The governing principle of the Code is that candidates and members must disclose any interest or relationship or matter likely to affect their independence or impartiality or that might create an appearance of bias.<sup>56</sup>

### ***XVI. Disclosure of Financial Interests***

Specific requirements include disclosure of any financial interests of a candidate in a proceeding or in its outcome and in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the candidate is under consideration.<sup>57</sup> Additionally, a candidate must disclose such financial interests of a candidate's employer, partner, business associate or family members as well as past or existing financial, business, professional, family or social relationships with any interested parties in the proceeding, or their counsel, involving the candidate or a candidate's employer, partner, business associate or family member.<sup>58</sup>

### ***XVII. Duty to Disclose in Writing***

Candidates in Chapter 19 and 20 proceedings must make disclosures in writing by completing an initial disclosure statement.<sup>59</sup> This form is agreed upon by the three Parties to the agreement and is forwarded to the candidates by the Secretariat as part of the process for consideration of a candidate for appointment to a panel. After examining the complaint, members selected to review a final antidumping or countervailing duty determination must also complete a supplementary disclosure statement.<sup>60</sup>

### ***XVIII. Continuing Obligation to Disclose***

Candidates are required to become aware of and continue to disclose relevant interests.<sup>61</sup> These disclosure obligations continue throughout the course of a proceeding once a candidate is appointed to serve on a panel or committee. Candidates affirm in their initial disclosure that they will, once appointed, become aware of and continue to disclose relevant interests by submitting the disclosure in writing to the responsible Secretariat for consideration by the Parties which are represented by the United States Trade Representative, the Canadian Department of Foreign Affairs and International Trade and the Mexican Secretaria Comercio y Fomento Industrial (SECOFI).

### ***XXI. Issue Conflicts***

The Code requires disclosure of any interests that a member, his or her employer, partner, business associate or family member has in an administrative proceeding, domestic court proceeding or another panel or committee proceeding involving issues that may be before the

56. *Id.* at 8720, Introductory Note.

57. *Id.* at 8721, Paragraph, II.A.

58. *Id.* at 8721, Section II.A.

59. *Id.* Section II.A, C.

60. *Id.* Section II.B.

61. *Id.* Section II.C.

panel to which he or she has been selected.<sup>62</sup> Additionally, members must disclose public advocacy, legal or other representation on an issue disputed in the proceeding or involving the same goods.<sup>63</sup> The requirement that all members appointed in Chapter 19 proceedings review the complaints and complete a supplementary disclosure statement is imposed to ascertain at the earliest stage possible whether a panelist could be disqualified. One basis for such possible disqualification may be that the panelist representing a client in a matter before the agency whose determination is under review by the panel then advocates a position on an issue before the panel.

### ***XXII. Frequent Suspensions for Issue Conflicts***

A dozen panelists have withdrawn and panels have been suspended pending the selection of replacement panelists under the CFTA.<sup>64</sup> This problem with issues forcing the withdrawal of panelists has occurred more frequently than one might expect because so many of the panelists are active members of the trade bar.<sup>65</sup> They are prohibited from sitting on a panel while they are appearing in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the panelist has been selected.<sup>66</sup> NAFTA allows panelists to engage in other business during the proceeding, but they may not do so in contravention of the Code of Conduct.<sup>67</sup>

### ***XXIII. Performance of Duties***

Panelists, committee members and their assistants are required by the Code to fairly and diligently perform their panel duties, including being available or easily contacted, avoiding ex parte communications, maintaining the confidentiality of the proceeding and participating fully in the process.<sup>68</sup> For a period of one year after the completion of an Article 1904 proceeding, a former member shall not personally advise or represent any participant in the proceeding with regard to antidumping or countervailing duty matters.<sup>69</sup> A former member must also avoid

62. *Id.*, Section II.A(1)(b) and (2)(b).

63. *Id.*, Section II.A(4).

64. When such an issue conflict arises and a member withdraws, the panel is suspended until a replacement member can be selected. See *NAFTA Article 1904 Rules of Procedure for Binational Panel Review*, paragraph 81. 59 *Fed. Reg.* 8686, 8698 (Feb. 23, 1994).

65. In most instances the withdrawal of a panelist on these grounds has delayed the proceeding, but normally for less than 60 days. On at least one occasion, a panel has extended its schedule to allow the Parties to investigate allegations of member conflicts on issues in other litigation. The Parties have the discretion to determine whether the alleged conflict requires the withdrawal of the member.

66. While not a formal rule, this interpretation by the Parties of the Code has applied equally to all panel reviews conducted under both the CFTA and NAFTA.

67. Annex 1901.2(10).

68. On occasion, some members have been extremely difficult to contact for such panel actions as dealing with motions to extend filing dates and other such procedural necessities. In general, the members are extraordinarily conscientious and fulfill completely their commitments to be available for all panel business.

69. Code at 8721, Paragraph V.A.

actions that may create the appearance that the member was biased in carrying out the member's duties or would benefit from the decision of the panel or committee.<sup>70</sup>

#### ***XXIV. Independence and Impartiality of Members***

The Code requires panelists and committee members to be independent, impartial, act in a fair manner, and to not be influenced by self-interest, outside pressure, political considerations, public clamor, loyalty to a Party or fear of criticism.<sup>71</sup> In addition, they must avoid, directly or indirectly, incurring any obligation or accepting any benefit that would in any way interfere, or appear to interfere, with the proper performance of their duties.<sup>72</sup> They may not use their positions on panels or committees to advance any personal or private interests.<sup>73</sup> A member cannot allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the member's conduct or judgment.<sup>74</sup> Finally, a panelist or committee member must avoid entering into any relationship, or acquiring any financial interest, that is likely to affect the member's impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias.<sup>75</sup>

#### ***XXV. Maintenance of Confidentiality***

The Code contains specific provisions concerning member and former member obligations for maintaining the confidentiality of non-public information, including the NAFTA requirement that members not disclose which members are associated with majority or minority opinions.<sup>76</sup> This duty extends to maintaining the confidentiality of a panel or committee decision until its release by the Secretariat.

#### ***XXVI. Duties of Former Members***

After completion of an Article 1904 proceeding, former members of such proceeding may not for a period of one year advise or represent any participant in the proceeding on antidumping or countervailing duty issues.<sup>77</sup> Like members, former members of Article 1904 panels may not represent a participant in an administrative proceeding, domestic court proceeding or another 1904 proceeding involving the same goods.<sup>78</sup> Former members must avoid any actions that might create the appearance that he or she was biased while serving on a panel or committee.<sup>79</sup>

70. *Id.*, at paragraph V.C.

71. *Id.*, at paragraph IV.B.

72. *Id.*, at paragraph IV.C.

73. *Id.*, at paragraph IV.D.

74. *Id.*, at paragraph IV.E.

75. *Id.*, at paragraph IV.F.

76. *Id.*, at Section VI.

77. *Id.*, at paragraph V.A.

78. *Id.*, at paragraph V.B.

79. *Id.*, at paragraph V.C.

### **XXVII. Assistants and Staff**

The Code provisions concerning responsibilities to the process, disclosure obligations and maintenance of confidentiality also apply to assistants and staff.<sup>80</sup> Members have an additional duty to ensure that their assistants and staff observe those obligations.<sup>81</sup>

### **XXVIII. Disqualification and Violations of the Code**

The NAFTA provides that if a disputing Party believes that a panelist has violated the Code of Conduct, the disputing Parties must consult.<sup>82</sup> If the disputing Parties are in agreement that there has been a violation, the panelist must be removed and a new panelist selected.<sup>83</sup> Annex 1901.2(6) mirrors the same provision in the CFTA. By inserting Article 2011(4), the NAFTA Parties improved on the CFTA predecessor to Chapter 20 (Chapter 18) which did not include a Code violation provision. The NAFTA Chapter 19 rules also provide that where a participant believes that a panelist or assistant has violated the Code they must make the allegation in writing to the responsible Secretary.<sup>84</sup> The responsible Secretary will then promptly notify the Parties of the allegation for further investigation.<sup>85</sup>

As noted earlier, candidates or members are not required to disclose "trivial" matters<sup>86</sup> and the Code does not determine under what circumstances the Parties will disqualify a candidate or member based on a particular disclosure made. Under CFTA practice, the Parties generally agreed on the removal and replacement of panelists, or conversely on the retention of panelists, after evaluating a disclosed conflict or appearance of conflict. In most instances where panels were suspended and new panelists selected, panelists recused themselves *sua sponte* once a conflict or appearance of bias arose.

### **XXIX. Extraordinary Challenge Committees**

Like the CFTA, Chapter 19 of NAFTA also provides for formation of extraordinary challenge committees if a panel member is alleged to be guilty of gross misconduct, bias or had a serious conflict of interest or in some other respect is alleged to have materially violated the Code of Conduct.<sup>87</sup> The violations must also have materially affected the panel decision and threaten the integrity of the binational review process.<sup>88</sup> Chapter 20 does not contain an extraordinary challenge procedure. In only one instance has a Party alleged that any panelist has materially violated the Code of Conduct, as outlined in the next section.

80. *Id.*, at Section VII.

81. *Id.*, at paragraph III.G.

82. Annex 1901.2(6) and Article 2011(4).

83. *Id.*

84. Rule 43 of the *Article 1904 Panel Rules*.

85. *Id.*; *See also*, Code paragraph III.I.

86. *Id.* at 8720, Introductory Note.

87. Article 1904.13.

88. *Id.*

### **XXX. Softwood Lumber Dispute**

The Softwood Lumber dispute<sup>89</sup> between the United States and Canada was the first case where an extraordinary challenge was requested alleging material violation of the CFTA Code of Conduct and a serious conflict of interest. The United States requested an extraordinary challenge committee alleging, in addition to substantive claims, that two Canadian panelists in the panel review below materially violated the CFTA Code of Conduct and that one of them also had an undisclosed serious conflict of interest. A majority of the Committee upheld the panel decisions below and did not find there to be any material violations of the Code of Conduct.<sup>90</sup>

### **XXXI. Application to Chapter 11 (Investment) Proceedings**

Chapter 11 of the NAFTA provides for investor-State dispute resolution, which includes arbitration.<sup>91</sup> The Code of Conduct only applies to a Chapter 11 dispute when Chapter 20 arbitration has been invoked under Article 1136(5). This Article states that when a disputing Party fails to comply with a final award issued by an arbitral tribunal established in accordance with Chapter 11, the NAFTA Commission must convene a Chapter 20 arbitral panel when requested by a Party whose investor was party to the Chapter 11 arbitration.

### **XXXII. Application to Chapter 14 (Financial Services) Proceedings**

Chapter 14 provides Chapter 20 dispute settlement to resolve NAFTA financial services disputes.<sup>92</sup> Therefore, the Code of Conduct will apply to members serving on financial services panels established pursuant to those provisions.<sup>93</sup> Article 1414 provides that NAFTA financial services disputes will be resolved in accordance with Chapter 20 procedures. However, it sets forth special rules for financial services rosters and the constitution of panels.<sup>94</sup> In addition, special rules may be invoked to decide on the merits of an Article 1410 (Exceptions) defense raised in a Chapter 11 investment dispute settlement proceeding.<sup>95</sup> If no decision is made in accordance with those procedures, the disputing Party may submit the issue to Chapter 20 dispute settlement.<sup>96</sup>

89. *In the Matter of Certain Softwood Lumber Products from Canada*, Secretariat File No. ECC-94-1904-01USA, decision issued August 3, 1994.

90. *Id.* The two Canadian Committee members, Judge Herbert Morgan and Judge Gordon Hart constituted the majority decision on the Committee. The Chairman of the Committee, an American, Judge Malcolm Wilkey, dissented, urging that the panel decision be overturned and the panelists disqualified for materially violating the Code of Conduct and, with respect to one of the panelists, for a serious conflict of interest as well.

91. Chapter 11, Section B cover this right of action, with procedural norms outlined in Articles 1115 through 1138 and Annexes 1120.1, 1137.2 and 1137.4. Exceptions are outlined in Annex 1138.2.

92. Article 1414.1.

93. Code at Interpretation of "member" and "proceeding".

94. Article 1414.2, 1414.3 and 1414.4.

95. Article 1415.

96. *Id.*

### ***XXXIII. Application to Chapter 20 Experts and Scientific Review Board Members***

Chapter 20 provides that a panel, on its own initiative or at the request of a disputing Party, may consult experts or establish a Scientific Review Board to provide the panel with technical advice.<sup>97</sup> The Code of Conduct will not apply to experts and Scientific Review Board members. Because experts and Scientific Review Board members are called upon to supply technical advice, they are not considered members of a panel established under Article 2008 to decide the disposition of a case. Although the Code will not apply, the Rules of Procedure for Chapter 20 panel proceedings will include provisions that require experts and Scientific Review Board members to be independent.

### ***XXXIV. Conclusion***

The CFTA and NAFTA Codes of Conduct establish a high standard for professional and ethical conduct of individuals serving as non-government experts in politically sensitive trade disputes. The area of conflict of interest and appearance of bias or misconduct is problematic for all individuals involved in these systems. The definition of appearance of bias or misconduct is sometimes difficult to apply to individuals explicitly permitted to perform other business while serving on NAFTA panels or committees. The depth of the search conducted by candidates and the ability to identify actual or perceived conflicts on often sketchy information is both difficult and expensive for many candidates, especially those in large firms. The system is functioning due in no small part to the integrity of those individuals who have served and the detailed requirements of the Code of Conduct. In the drafting process of the NAFTA Code of Conduct, the Parties intended to tighten existing central CFTA Code provisions concerning impartiality, disclosure, appearances of bias and issue conflicts. To provide guidance and further clarify candidate and member obligations, the Parties added a test for appearance of bias, emphasized issue conflict prohibitions, revised the disclosure statement and added a supplementary disclosure statement requirement for Article 1904 proceedings. Because the NAFTA Parties were interested in continuing the CFTA dispute settlement procedures as an efficient and effective mechanism, the Code of Conduct was prepared to foster that goal. It is incumbent upon candidates, members and former members of Chapter 19 and 20 panels or committees to adhere to the letter of the Code of Conduct, particularly the Code's disclosure obligations. The Parties rely on such disclosures in order to exercise their right under the NAFTA dispute settlement mechanism to accept or reject a candidate. Since Chapter 19 dispute settlement replaces judicial review of antidumping and countervailing duty cases in Canada, Mexico and the United States, it is imperative that all safeguards to ensure that panelists adhere to the principle of impartiality and the appearance of impartiality in the conduct of those proceedings. The Code of Conduct is a central safeguard of that principle. Only time and experience under this intense form of scrutiny of those serving in dispute settlement roles will tell whether this mechanism will be applicable to other international agreements.

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# Appendix A

## *Department of Commerce*

### *International Trade Administration*

#### ***North American Free Trade Agreement: Code of Conduct for Proceedings Under Chapters Nineteen and Twenty***

**AGENCY:** North American Free Trade Agreement, NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

**ACTION:** Code of Conduct for Proceedings Under NAFTA Chapters Nineteen and Twenty.

**SUMMARY:** Canada, Mexico, and the United States have negotiated a Code of Conduct for proceedings under Chapters Nineteen and Twenty of the North American Free Trade Agreement ("Agreement"). The Code applies to members of panels established pursuant to Article 1903, 1904 or 2008, including Article 2008 panels established pursuant to Article 1414, and to members of committees established pursuant to Article 1905 or Annex 1904.13 of the Agreement. In addition, the Code establishes disclosure obligations for members of rosters established pursuant to Article 1414 or 2009 or Annex 1901.2 or 1904.13 of the Agreement and for individuals not on a roster who are under consideration for appointment to a panel or committee.

**EFFECTIVE DATE:** January 1, 1994, the date of entry into force of the North American Free Trade Agreement.

**FOR FURTHER INFORMATION CONTACT:** James R. Holbein, United States Secretary, NAFTA Secretariat, room 2061, U.S. Department of Commerce, 14th and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-5438; fax: (202) 482-0148.

**SUPPLEMENTARY INFORMATION:** To ensure the integrity and impartiality of proceedings conducted pursuant of Articles 1903, 1904, 1905, and 2008 of the North American Free Trade Agreement ("Agreement"), which entered into force on January 1, 1994, Canada, Mexico, and the United States have negotiated a Code of Conduct pursuant to Articles 1909 and 2009 of the Agreement. The Code of Conduct governs the conduct of members of panels established pursuant to Article 1903, 1904 or 2008, including Article 2008 panels established pursuant to Article 1414, and to members of committees established pursuant to Article 1905 or Annex 1904.13 of the Agreement. In addition, the Code of Conduct establishes disclosure obligations for members of rosters established pursuant to Article 1414 or 2009 or Annex 1901.2 or 1904.13 of the Agreement and for individuals not on a roster who are under consideration for appointment to a panel or committee. It is based on the Code of Conduct existing under the United States-Canada Free Trade Agreement, with certain changes made to better ensure the integrity and impartiality of the proceedings under the Agreement.

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## ***Code of Conduct for Dispute Settlement Procedures Under Chapters 19 and 20 of the North American Free Trade Agreement***

### *Preamble*

Whereas the Parties place prime importance on the integrity and impartiality of proceedings conducted pursuant to Chapters 19 and 20 of the North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, this Code of Conduct is hereby established to ensure that these principles are respected.

### *Interpretation*

A. In this Code of Conduct, "Agreement" means the North American Free Trade Agreement;

"assistant" means a person who, under the terms of appointment of a member, conducts research or provides support for the member;

"candidate" means

(a) an individual whose name appears on a roster or list established under Article 1414, Annex 1901.2 or 1904.13 or Article 2009,

(b) an individual who is under consideration for appointment as a member of a panel pursuant to Annex 1903, 1904 or 2011, or

(c) an individual who is under consideration for appointment as a member of a committee pursuant to Annex 1904.13 or Article 1905;

"member" means

(a) a member of a panel constituted pursuant to Annex 1901.2 or Article 1414, 1903, 1904, 2008 or 2011,

(b) a member of an extraordinary challenge committee constituted pursuant to Annex 1904.13, or

(c) a member of a special committee constituted pursuant to Article 1905;

"participant" has the meaning assigned in the Rules of Procedure for Article 1904 Binational Panel Reviews;

"Party" means a Party to the Agreement;

"proceeding", unless otherwise specified, means

(a) a panel review under Article 1903 or 1904;

(b) an extraordinary challenge proceeding under Annex 1904.13,

(c) a special committee proceeding under Article 1905,

(d) a panel proceeding under Chapter 20, or

(e) a proceeding in a dispute arising under Chapter 11 or 14 to which Chapter 20 applies;

"Secretariat" means the Secretariat established pursuant to Article 2002; and

"staff", in respect of a member, means persons under the direction and control of the member, other than assistants.

B. Any reference made in this Code of Conduct to an Article, Annex or Chapter is a reference to the appropriate Article, Annex or Chapter of the Agreement.

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## I. RESPONSIBILITIES TO THE PROCESS

Every candidate, member and former member shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved.

## II. DISCLOSURE OBLIGATIONS

*[Introductory Note: The governing principle of this Code of Conduct is that a candidate or member must disclose the existence of any interest, relationship or matter that is likely to affect the candidate's or member's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. An appearance of impropriety or an apprehension of bias is created where a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would conclude that a candidate's or member's ability to carry out the duties with integrity, impartiality and competence is impaired.]*

*These disclosure obligations, however, should not be interpreted so that the burden of detailed disclosure makes it impractical for persons in the legal or business community to serve as members, thereby depriving the Parties and participants of the services of those who might be best qualified to serve as members. Thus, candidates and members should not be called upon to disclose interests, relationships or matters whose bearing on their role in the proceeding would be trivial.*

*Throughout the proceeding, candidates and members have a continuing obligation to disclose interests, relationships and matters that may bear on the integrity or impartiality of the dispute settlement process.*

*This Code of Conduct does not determine whether or under what circumstances the Parties will disqualify a candidate or member from being appointed to, or serving as a member of, a panel or committee on the basis of disclosures made.]*

A. A candidate shall disclose any interest, relationship or matter that is likely to affect the candidate's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters. The candidate shall disclose such interests, relationships and matters by completing an Initial Disclosure Statement provided by the Secretariat and sending it to the Secretariat.

Without limiting the generality of the foregoing, candidates shall disclose the following interests, relationships and matters:

- (1) any financial interest of the candidate
  - (a) in the proceeding or in its outcome, and
  - (b) in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the candidate is under consideration;
- (2) any financial interest of the candidate's employer, partner, business associate or family member
  - (a) in the proceeding or in its outcome, and
  - (b) in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the candidate is under consideration;
- (3) any past or existing financial, business, professional, family or social relationship with any interested parties in the proceeding, or their counsel, or any such relationship involving a candidate's employer, partner, business associate or family member; and

(4) public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same goods.

B. A member in an Article 1904 proceeding shall, after receiving the complaint, disclose any interests, advocacy or representation referred to in paragraph A(1)(b) or (2)(b) or subsection (4) by completing a Supplementary Disclosure Statement provided by the Secretariat and sending it to the Secretariat for consideration by the appropriate Parties.

C. Once appointed, a member shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in section A and shall disclose them. The obligation to disclose is a continuing duty which requires a member to disclose any such interests, relationships and matters that may arise during any state of the proceeding.

The member shall disclose such interests, relationships and matters by communicating them in writing to the Secretariat for consideration by the appropriate Parties.

### **III. THE PERFORMANCE OF DUTIES BY CANDIDATES AND MEMBERS**

A. A candidate who accepts an appointment as a member shall be available to perform, and shall perform, a member's duties thoroughly and expeditiously throughout the course of the proceeding.

B. A member shall ensure that the Secretariat can, at all reasonable times, contact the member in order to conduct panel or committee business.

C. A member shall carry out all duties fairly and diligently.

D. A member shall comply with the provisions of Chapter 19 or 20 and the applicable rules.

E. A member shall not deny other members the opportunity to participate in all aspects of the proceeding.

F. A member 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 applicable rules.

G. A member shall take all reasonable steps to ensure that the member's assistance and staff comply with Parts I, II and VI of this Code of Conduct.

H. A member shall not engage in *ex parte* contacts concerning the proceeding.

I. A candidate or member shall not communicate matters concerning actual or potential violations of this Code of Conduct unless the communication is to the Secretariat or is necessary to ascertain whether that candidate or member has violated or may violate the Code.

### **IV. INDEPENDENCE AND IMPARTIALITY OF MEMBERS**

A. A member shall be independent and impartial. A member shall act in a fair manner and shall avoid creating an appearance of impropriety or an apprehension of bias.

B. A member shall not be influenced by self-interest, outside pressure, political considerations, public clamor, loyalty to a Party or fear of criticism.

C. A member shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of the member's duties.

D. A member shall not use the member's position on the panel or committee to advance any personal or private interests. A member shall avoid actions that may create the impression that others are in a special position to influence the member. A member shall make every effort to prevent or discourage others from representing themselves as being in such a position.

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E. A member shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the member's conduct or judgment.

F. A member shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect the member's impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias.

#### **V. DUTIES IN CERTAIN SITUATIONS**

A. For a period of one year after the completion of an Article 1904 proceeding, a former member shall not personally advise or represent any participant in the proceeding with regard to antidumping or countervailing duty matters.

B. In the case of an Article 1904 proceeding, a member or a former member shall not represent a participant in an administrative proceeding, a domestic court proceeding or another Article 1904 proceeding involving the same goods.

C. A former member shall avoid actions that may create the appearance that the member was biased in carrying out the member's duties or would benefit from the decision of the panel or committee.

#### **VI. MAINTENANCE OF CONFIDENTIALITY**

A. A member or former member shall not at any time disclose or use any non-public information concerning the proceeding or acquired during the proceeding except for the purposes of the proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of another.

B. A member shall not disclose a declaratory opinion under Article 1903 or a panel or extraordinary challenge committee order or decision under Article 1904 prior to its issuance by the panel or committee.

C. A member shall not disclose a special committee report or decision under Article 1905 prior to its public release by the Secretariat. A member or former member shall not at any time disclose which members are associated with majority or minority opinions in an Article 1905 proceeding.

D. A member shall not disclose a panel report issued under Chapter 20 prior to its publication by the Commission. A member or former member shall not at any time disclose which members are associated with majority or minority opinions in a proceeding under Chapter 20.

E. A member or former member shall not at any time disclose the deliberations of a panel or committee, or any member's view, except as required by law.

#### **VII. RESPONSIBILITIES OF ASSISTANTS AND STAFF**

Parts I (Responsibilities to the Process), II (Disclosure Obligations) and VI (Maintenance of Confidentiality) of this Code of Conduct apply also to assistants and staff.

Dated: February 10, 1994.

Timothy J. Hauser,  
Deputy Under Secretary for International Trade.