

1996

Dispute Resolution under the North American Agreement on Environmental Cooperation

Jay M. Vogelsohn

Recommended Citation

Jay M. Vogelsohn, *Dispute Resolution under the North American Agreement on Environmental Cooperation*, 30 INT'L L. 198 (1996)
<https://scholar.smu.edu/til/vol30/iss1/10>

This Section Recommendation and Reports is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

plan on corruption to be endorsed at the upcoming Summit of the Americas in December, 1994.¹⁶ At the heads of government meeting of the Group of Rio on September 7-11, 1994, the Venezuelan government proposed international criminal cooperation in combatting crimes against the public trust.

V. Recommended Action

Corrupt practices in the conduct of international business activity lead to the creation of inefficiencies, distort the allocation of resources, and hinder the process of development. It is therefore in the interest of both the developed and the developing world to take effective measures to deter such practices. International cooperation of the type that has begun to evolve can make an important contribution to this process. Such cooperation can increase consensus on the specific types of conduct to be proscribed, provide for enforcement modalities, and establish uniform mechanisms for enforcement.

The international action to date, however, represents the evolution of "soft" rather than "hard" law. The obligations stated in the OECD Recommendation and other instruments will only be converted into binding obligations on states not currently having such obligations and private persons doing business in such states if national governments and the international community are committed to making the development and enforcement of proper national and international laws a priority. The ABA can play an important role in supporting this process, and in assisting in the development of effective mechanisms to prevent bribery and related conduct.

Respectfully submitted,
Jay M. Vogelson
Chair

February 1995

II. Dispute Resolution under the North American Agreement on Environmental Cooperation*

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that the Council of the Commission for Environmental Cooperation consider the Model Rules

16. Established in the spring of 1993 as an NGO registered in Germany, Transparency International serves as a coalition against corruption in international business transactions. It is composed of leading current and former political leaders, international business executives, and experts in international development.

*John H. Knox was principally responsible for this Report.

of Procedure for dispute resolution under the North American Agreement on Environmental Cooperation dated February 1995, with a view to their adoption.

REPORT

In 1993, the United States, Mexico, and Canada negotiated the North American Agreement on Environmental Cooperation (NAAEC), the environmental side agreement to the North American Free Trade Agreement (NAFTA). The NAAEC created a Commission for Environmental Cooperation (CEC), which has a Council composed of the chief environmental officials of the United States, Mexico, and Canada and an international Secretariat headed by an Executive Director. The Council has named Victor Lichtinger of Mexico to be the first Executive Director.

The CEC has a broad mandate to address environmental concerns throughout North America. The CEC Council will promote and facilitate cooperation between the Parties with respect to environmental matters, as well as carry out a large number of specific mandates.

The CEC depends primarily upon cooperation between the Parties, but the NAAEC also creates a system for resolving disputes—in particular, disputes over whether a Party has engaged in a persistent pattern of failure to effectively enforce its environmental law.¹ If a Party believes that another Party is failing to enforce its environmental law, the first step under the NAAEC is to request consultations with the other Party. If consultations do not resolve the issue, a Party may request the Council to attempt to resolve the dispute.²

If the Council does not resolve the dispute, it may decide by a two-thirds vote to convene a five-person arbitral panel to consider the Parties' arguments and issue a report.³ After receiving the report, the disputing Parties may agree on a mutually satisfactory action plan to remedy the problem.⁴ If they do not agree, or if one Party believes the other is not implementing an action plan, the panel may impose an action plan and/or fines on the recalcitrant Party. If the Party does not pay the fine, the other Parties may suspend NAFTA benefits.⁵

The NAAEC provides that the Council shall establish Model Rules of Procedure for the arbitral panels and that the Model Rules shall govern panel proceedings unless the disputing Parties otherwise agree.⁶

The CEC is still in the process of beginning its work and has not yet drafted

1. The NAAEC obligates each Party to "effectively enforce its environmental laws and regulations through appropriate governmental action." Article 5(1).

2. Articles 22, 23.

3. Articles 24(1), 31, 32.

4. Article 33.

5. Articles 34, 36. Canada, however, did not agree to suspension of trade benefits against it; instead, the NAAEC provides that decisions of arbitral panels may be enforced directly in Canadian court. Annex 36A.

6. Article 28.

Model Rules of Procedure. To facilitate and expedite its work, Victor Lichtinger suggested that the Bar Associations of the three countries propose draft Model Rules.

As a result, the ABA/CBA/Barra Mexicana Joint Working Group on the Settlement of International Disputes, which had undertaken similar tasks during the NAFTA negotiation, agreed to draft Model Rules for the CEC. At its October 1 session in Dallas, under the chairmanship of Henry T. King, Jr., the Joint Working Group approved draft Model Rules prepared by John Knox.

The goal of the draft Model Rules, which are attached, is to provide for the prompt, effective resolution of disputes in accordance with the NAAEC, through:

(a) *Ensuring the efficient operation of panels.* For example, the Model Rules provide for the prompt replacement of panelists where necessary, and require the panel to fix a timetable for the proceedings, including precise deadlines for submissions.⁷

(b) *Facilitating the presentation of information.* The Model Rules provide detailed guidance on written and oral submissions to the panel, including with respect to expert testimony and other evidence. In addition, the Rules provide for translation and interpretation into all of the official languages of the CEC.⁸ The Rules also provide for the protection of confidential and proprietary information.⁹

(c) *Providing for transparency and public participation.* The Model Rules provide that hearings will be public unless the panel decides otherwise, and that interested persons or organizations may, with the panel's permission, make written and oral presentations.¹⁰

The draft Model Rules draw from rules of procedure of other international dispute resolution mechanisms, notably the Rules of Procedure of the International Centre for Settlement of Investment Disputes and the Rules of Court of the International Court of Justice.

The Joint Working Group considered that the draft Model Rules might also be useful to the Commission for Labor Cooperation, the organization created by the North American Agreement on Labor Cooperation (the labor side agreement to NAFTA), whose provisions on dispute resolution are very similar to those of the NAAEC.

*Model Rules of Procedure for Dispute Resolution under the
North American Agreement on Environmental Cooperation
Part I—General*

1. These Rules supplement, and shall be construed in accordance with, the North American Agreement on Environmental Cooperation.

7. Rules 5, 6, 16, 18.

8. Rules 24, 33.

9. Rule 37.

10. Rules 25, 31, 34.

2. A panel shall be established and conduct its proceedings in accordance with these Rules, unless the disputing Parties otherwise agree within 15 days after the Council convenes the panel.

Part II—Definitions

3. In these Rules:

“Agreement” means the North American Agreement on Environmental Cooperation between the Governments of Canada, the United Mexican States, and the United States of America;

“Commission” means the Commission for Environmental Cooperation created by the Agreement;

“complaining Party” means a Party that has requested a panel under Article 24(1) of the Agreement, or that has joined such a Party under Article 24(2) of the Agreement;

“confidential or proprietary information of a Party” means information the disclosure of which would impede the Party’s law enforcement, or that is protected from disclosure by its law governing business or proprietary information, personal privacy, or the confidentiality of governmental decision making;

“disputing Party” means a complaining Party or a responding Party;

“Executive Director” means the head of the Secretariat of the Commission;

“official language” means an official language of the Commission, *i. e.*, English, French, or Spanish;

“panel” means an arbitral panel convened in accordance with Part Five of the Agreement;

“participating Party” means a disputing Party or a third Party;

“responding Party” means a Party complained against under Part V of the Agreement;

“Party” means a Party to the Agreement;

“Secretariat” means the Secretariat of the Commission; and

“third Party” means a Party that delivers a written notice to the disputing Parties and to the Secretariat under Article 29 of the Agreement.

Part III—Constitution of Panels

4. Panelists shall be selected in accordance with Article 27 of the Agreement.
5. (a) A disputing Party that exercises a preemptory challenge under Article 27(3) of the Agreement against an individual proposed as a panelist shall so notify the other disputing Party or Parties and the Secretariat within 30 days after the individual has been proposed.
 - (b) Disputing Parties shall promptly notify the Secretariat of any agreement to remove a panelist under Article 27(4) of the Agreement.
 - (c) The Secretariat shall promptly notify the disputing Parties of the death, disability, or resignation of a panelist.

6. (a) In the event of the death, disability, or resignation of a panelist, or the removal of a panelist under Article 27(4) of the Agreement, the place of the panelist shall be taken by a new panelist selected in accordance with Article 27 of the Agreement, except that the disputing Parties shall have 15 days from the date of notification of the vacancy to select the new panelist.
- (b) When the death, disability, resignation, or removal of a panelist occurs, the proceedings of the panel shall be suspended until the new panelist is selected. As soon as the new panelist is selected, the proceedings shall continue from the point they had reached at the time they were suspended.
- (c) If a panelist is replaced, all or part of a hearing may be repeated at the discretion of the panel.

Part IV—Operation of the Panel

7. The chair of the panel shall preside at its meetings.
8. (a) The Secretariat, under the direction of the Executive Director, shall provide technical, administrative, and operational support to the panel.
- (b) The Secretariat shall be the regular channel of communications to and from the panel. To that end, it shall issue public statements announcing the commencement of proceedings before the panel and shall deal with inquiries concerning the panel and its work.
9. (a) Panel meetings involving administrative matters may be conducted by means of telephone conference call. All other panel meetings, including hearings, shall take place at the headquarters of the Commission, unless the panel decides otherwise after consulting the disputing Parties and the Secretariat.
- (b) The chair of the panel shall fix the date and hour of its meetings, after consulting the other panelists and the Secretariat.
10. All panelists must be present during panel meetings, including hearings.
11. The decisions of the panel shall be taken by a majority of the votes of all its members.
12. (a) The deliberations of the panel shall take place in private and remain confidential.
- (b) Only panelists may take part in the deliberations. Assistants to the panelists and any necessary staff may be present by permission of the panel.
13. There shall be no *ex parte* communications with the panel, or with any panelist concerning matters under consideration by the panel. Questions concerning administrative matters shall be directed to the Secretariat.
14. Subject to these Rules and the Agreement, the panel may conduct the proceedings in such manner as it considers appropriate, provided that the disputing Parties are treated with equality at all times.

*Part V—Proceedings**Section A—General*

15. (a) Each participating Party shall inform the Secretariat of the name of its representative in the matter.
- (b) The Secretariat shall immediately transmit the information to the panelists and to the other participating Parties.
16. After consulting the disputing Parties, the panel shall, as soon as possible and whenever possible within 7 days after the last panelist is selected, fix the timetable for the proceedings, taking into account Article 31(2) of the Agreement.
17. Any Party that wishes to participate as a third Party shall so notify the disputing Parties and the Secretariat within 7 days after the last panelist is selected.

Section B—Written Proceedings

18. The timetable shall set precise deadlines by which written submissions shall be received.
19. (a) The written submissions of the disputing Parties shall consist, in the following order, of: a Memorial by the complaining Party; a Counter-Memorial by the responding Party; a Reply by the complaining Party; and a Rejoinder by the responding Party.
- (b) The Memorial shall contain a statement of the relevant facts, a statement of law, and a description of the remedy sought. The Counter-Memorial shall contain an admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the statement of law in the Memorial; and a statement of law in answer thereto. The Reply and Rejoinder shall not merely repeat the contentions previously made, but shall be directed to the issues that divide the Parties.
- (c) The panel shall also allow any third Party to make a written submission.
- (d) The panel may allow the participating Parties to make further written submissions, provided that it allows the disputing Parties to make the same number of written submissions.
20. In the event that there is more than one complaining Party, the complaining Parties may make their written submissions jointly or separately.
21. (a) Copies of supporting documents shall be annexed to, and considered part of, the written submission to which they relate.
- (b) After a participating Party has made its written submissions, it may not submit any further documents to the panel except by leave of the panel. If the panel gives such leave, the other participating Parties shall have an opportunity to submit written comments upon the new document.

22. (a) The original of each written submission shall be signed by the representative of the Party and dated.
- (b) Each participating Party shall deposit the original of its written submission and as many copies as the Secretariat may require with the Secretariat, within the deadline set by the timetable.
- (c) The panel may allow a participating Party to correct an accidental error in any of its written submissions at any time before the panel presents its final report.
23. (a) The Secretariat shall keep the original of each written submission on file and immediately transmit copies to the panelists and to the other participating Parties.
- (b) The Secretariat shall, subject to Rule 37, make copies of the written submissions available to the public.
24. (a) Written submissions and any other documents submitted to the panel shall be in any official language.
- (b) At the request of any panelist or disputing Party, the Secretariat shall promptly provide a translation of the submission or other document into any other official language.
25. (a) Any person or organization residing or established in the territory of a Party may make a concise written submission to the Secretariat concerning the matter before the panel.
- (b) The Secretariat shall transmit such submissions to the panelists:
 - (1) if they are accompanied by the written consent of the disputing Parties; or
 - (2) by leave of the panel.
- (c) The submission may be conditionally filed with a request for leave of the panel or for consent of the disputing Parties. The request shall concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the participating Parties and their relevance to the matter before the panel.
- (d) The submission shall be in an official language. The panel or the disputing Parties may condition the receipt of such submissions on the applicant's providing a translation into another official language.

Section C—Hearings

26. (a) The panel shall hold at least one hearing, at which the disputing Parties shall be able to present their cases and any third Party shall be able to make an oral submission.
- (b) The panel may decide to hold additional hearings, if it decides they are necessary. The panel may decide to limit an additional hearing to any aspect or aspects of the matters in issue.

- (c) At least 30 days before the hearing, the panel shall give the participating Parties notice of the date, time, and place thereof.
27. After consulting with the disputing Parties, the panel shall determine the order and method of presentation of arguments and evidence, provided that:
- (a) in the event there is one complaining Party, the complaining Party and the responding Party shall each be allocated an equal amount of time;
 - (b) in the event there is more than one complaining Party, the complaining Parties together shall be allocated an amount of time equal to that of the responding Party and, unless the complaining Parties decide otherwise, they shall divide their allocated time equally between them;
 - (c) each disputing Party shall have an opportunity to make an initial argument and a rebuttal;
 - (d) the complaining Party or Parties shall make their initial argument before the responding Party makes its initial argument; and
 - (e) the disputing Parties shall have the right to comment upon any evidence presented.
28. (a) The panel may at any time prior to or during the hearing indicate any points or issues to which it would like the participating Parties specially to address themselves, or on which it considers that there has been sufficient argument.
- (b) During the hearing, each panelist may put questions to the participating Parties and ask them for explanations. The participating Parties may answer either immediately or within a time-limit fixed by the chair.
29. (a) At least 15 days before the hearing, each disputing Party shall deliver written notice to the Secretariat of any evidence which it intends to produce at the hearing. This notice shall include a list of the names, descriptions, and places of residence of the witnesses and experts whom the disputing Party intends to call, with indications in general terms of the point or points to which their evidence will be directed.
- (b) The Secretariat shall immediately transmit copies of the notice to the panelists and to the other participating Parties.
- (c) The disputing Parties may call any witnesses or experts appearing on the list.
- (d) A disputing Party may only call a witness or expert whose name was not included in that list if the other disputing Party or Parties do not object or if the panel is satisfied that the evidence is likely to prove relevant and that the failure to include the witness or expert on the list was justifiable.
30. (a) Witnesses and experts shall be examined by the participating Parties, under the control of the chair. Each panelist may put questions to them.

- (b) Each witness shall make the following declaration before giving any evidence:
 “I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.”
- (c) Each expert shall make the following declaration before making any statement:
 “I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth, and that my statement will be in accordance with my sincere belief.”
31. The hearing shall be public, unless the panel decides otherwise on the basis of a request by the disputing Parties. Such a decision or request may concern either the whole or part of the hearing.
32. (a) A verbatim record shall be made by the Secretariat of every hearing.
 (b) Copies of the transcript of the verbatim record shall be circulated to the panelists and to the participating Parties. The panelists and participating Parties may correct the transcripts of their respective statements, but in no case may such corrections affect the sense and bearing thereof.
 (c) Each witness and expert shall be shown the transcript of his or her statements, and may correct it in the same manner as the panelists and the participating Parties.
 (d) The corrected transcript shall constitute the record of the hearing. The record of a public hearing shall be printed and published by the Court.
33. (a) All statements made during a hearing shall be in one of the official languages.
 (b) At the request of any panelist or disputing Party, the Secretariat shall provide for interpretation into any other official language.
34. A person or organization that has made a written submission which has been transmitted to the panelists pursuant to Rule 25 may appear at a hearing upon such terms and conditions as the panel may establish.

Section D—Evidence

35. The panel shall determine the admissibility, relevance, materiality, and weight of the evidence offered.
36. On request of a disputing Party, or on its own initiative, the panel may:
 (a) call upon the disputing Parties to produce such evidence or to give such explanations as it may consider to be necessary for the elucidation of any aspect of the matters in issue;
 (b) seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree; and

- (c) visit any place connected with the dispute or conduct inquiries there, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree. The disputing Parties may participate in any such visit or inquiry.

Section E—Confidential and Proprietary Information

37. (a) Confidential or proprietary information of a Party provided by the Party to a panel shall be clearly marked as such.
- (b) The panel, the other Parties, and the Secretariat shall treat such confidential or proprietary information on the same basis as the Party providing the information.
- (c) Before any written submission or other document containing confidential or proprietary information of a Party may be made public, the confidential or proprietary information shall be replaced with a non-confidential and non-proprietary summary of the information, prepared by the Party.

Part VI—Report

38. (a) The panel shall present to the disputing Parties an initial report in accordance with Article 31 of the Agreement.
- (b) After considering any written comments from a disputing Party to the panel on the initial report and taking any further steps in accordance with Article 31(5) of the Agreement, the panel shall present a final report to the disputing Parties in accordance with Article 32(1) of the Agreement.
39. (a) In the initial and final reports, panelists may furnish separate opinions on matters not unanimously agreed.
- (b) The panel may not disclose which panelists are associated with majority or minority opinions.
40. Five days after the disputing Parties transmit the final report of the panel to the Council in accordance with Article 32(2) of the Agreement, the Secretariat shall make the report publicly available in each official language.

Part VII—Further Proceedings

41. (a) A request by a disputing Party to reconvene a panel in accordance with Article 34, 35, or 36 of the Agreement shall briefly set out the reasons for the request and the relief sought.
- (b) The Secretariat shall promptly deliver the request to the panelists.
42. As soon as possible, and after consulting the disputing Parties, the reconvened panel shall:
- (a) determine the number and order of written submissions;
- (b) determine whether to hold a hearing; and
- (c) fix a timetable for the proceedings.

43. A third Party that participated in the proceedings before the panel presented its initial report may continue to participate in the proceedings of the reconvened panel.
44. In accordance with Articles 34, 35, and 36 and their corresponding Annexes, the reconvened panel shall present a report to the disputing Parties and to the Council containing:
 - (a) findings of fact;
 - (b) its determination; and
 - (c) as appropriate, any recommendations, the approval or establishment of an action plan, and/or the imposition of a monetary enforcement assessment.
45. The Secretariat shall make the report publicly available in each official language.
46. In any further proceedings after the issuance of a final report in accordance with Article 32 of the Agreement, questions of procedure, including questions concerning replacement of panelists, operation of the panel, written and oral proceedings, evidence, confidential and proprietary information, and settlement, which are not resolved by reference to the Rules in this Part shall be resolved by reference to the other Rules, *mutatis mutandis*.

Part VIII—Settlement

47. The disputing Parties may agree to settle the dispute and thereby terminate the proceedings at any time.
48. The disputing Parties shall provide written notification of a settlement to the Secretariat, which shall promptly transmit the notification to the panelists and the other participating Parties, and shall make the notification publicly available.

Part IX—Final Provisions

49. The Council may amend these Rules at any time. An amendment shall not have effect with respect to an ongoing proceeding unless the Council expressly so decides.
50. The texts of these Rules in each official language shall be equally authentic.

Respectfully submitted,

Jay M. Vogelson

Chair

February 1995