

DECISION No 2/2014 OF THE EU-COLOMBIA-PERU TRADE COMMITTEE

**Adoption of the Rules of Procedure and Code of Conduct for arbitrators
referred to in point (h) of Article 13(1) and Article 315 of the Trade Agreement
between the European Union and its Member States, of the one part,
and Colombia and Peru, of the other part**

THE TRADE COMMITTEE,

Having regard to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part ("the Agreement"), signed in Brussels on 26 June 2012, and in particular point (h) of Article 13(1) and Article 315 thereof,

Whereas:

- (1) The Trade Committee shall adopt at its first meeting the Rules of Procedure and the Code of Conduct for arbitrators.
- (2) The Trade Committee has the exclusive authority to evaluate and adopt decisions as envisaged in the Agreement regarding any subject matter which is referred to it by the specialised bodies established according to the Agreement,

HAS ADOPTED THIS DECISION:

1. The Rules of Procedure and the Code of Conduct for arbitrators are established as set out in the Annex.
2. This Decision shall enter into force on 7 October 2014

Done at Lima on 16 May 2014

For the Trade Committee

Minister for Trade, Industry and Tourism of Colombia *Commissioner for Trade of the European Commission* *Minister for Foreign Trade and Tourism of Peru*

RULES OF PROCEDURE

General Provisions

1. Pursuant to Title XII (Dispute Settlement) and under these rules:
 - (a) "the Agreement" means the Trade Agreement between Peru and Colombia, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on June 26 2012;
 - (b) "adviser" means a person retained by a disputing party to advise or assist that party in connection with the proceedings before an arbitration panel;
 - (c) "arbitrator" means a member of an arbitration panel effectively established under Article 303 (Establishment of an Arbitration Panel) of the Agreement;
 - (d) "assistant" means a person who, under the terms of appointment by an arbitrator, conducts, researches or provides assistance to that arbitrator;
 - (e) "complaining Party" means any Party that requests the establishment of an arbitration panel under Article 302 (Initiation of the Arbitration Proceedings) of the Agreement;
 - (f) "Party complained against" means the Party that is alleged to be in violation of the provisions referred to in Article 299 (Scope of Application) of the Agreement;
 - (g) "arbitration panel" means a panel established under Article 303 (Establishment of an Arbitration Panel) of the Agreement;
 - (h) "representative of a Party" means an employee or any person appointed by a government department or agency or any other public entity of a party to the dispute;
 - (i) "day" means a calendar day;
 - (j) "third party" means a Party that is not a disputing party, but who participates in the consultations and/or arbitration proceedings, as the case may be, in accordance with Articles 301 (Consultations), paragraph 10, and/or 302 (Initiation of Arbitration

Proceedings), paragraph 4 of the Title XII (Dispute Settlement) of the Agreement.

2. The Party complained against shall be in charge of the logistical administration of dispute settlement proceedings, in particular the organization of hearings, unless otherwise agreed. However, both disputing Parties shall share the costs derived from the organization of the arbitration procedures, including the expenses of the arbitrators. The arbitration panel may, however, decide that these administrative costs, with the exception of the expenses of the arbitrators, be distributed differently taking into account the particulars of the case and other circumstances that may be deemed relevant.

Notifications

3. The parties to the dispute and the arbitration panel shall transmit any request, notice, written submission or other document by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof.
4. Each disputing party shall provide the other disputing party, any third party in the dispute and each of the arbitrators with a copy of each of its written submissions. A copy of the document shall also be provided in electronic format.
5. All notifications shall be addressed to the Agreement Coordinators.
6. Minor errors of a clerical nature in any request, notice, written submission or other document related to the arbitration panel proceedings may be corrected by delivery of a new document clearly indicating the changes.
7. If the last day for delivery of a document falls on a legal holiday of Colombia, Peru or of the EU, the document may be delivered on the next business day.

Initiation of Arbitration Procedures

8. When asserting that a measure constitutes a violation of the provision of the Agreement, in accordance with Article 302(2) (Initiation of Arbitration Proceedings), the complaining party shall explain how that measure constitutes a violation of the provisions of the Agreement in a manner that clearly presents the legal grounds for the complaint so as to allow the respondent to present its defense.

Third Parties

9. In accordance with Article 302(4) (Initiation of Arbitration Proceedings) of the Agreement, any third party may file a written submission to the arbitration panel, with a copy to the parties to the dispute and any third party.
10. Any third party may also participate in the hearing(s) of the arbitration panel and they shall be invited in writing by the arbitration panel to present their opinions during such hearing(s).

List of Arbitrators

11. When a Party nominates candidates for the list of arbitrators under Article 304 (List of Arbitrators) of the Agreement, the other Parties may only object to such nominations if such nominees do not comply with the requirements set out in Article 304(3) (List of Arbitrators) of the Agreement and the Code of Conduct for members of an arbitration panel.
12. When any candidate nominated by a Party is no longer part of the list, such Party shall nominate a new candidate. In case of candidates for president of the arbitration panel, the Parties shall agree on a replacement.

Establishment of an Arbitration Panel

13. If pursuant to Article 303 (Establishment of an Arbitration Panel) of the Agreement any member of the arbitration panel is selected by lot, representatives of both disputing parties shall be invited with due anticipation to be present when lots are drawn. In any event, the lot shall be carried out with any disputing party present at the time, and within 5 days following the request for the selection of the arbitrator by the Chairperson of the Trade Committee.
14. The disputing parties shall notify arbitrators of their appointment.
15. An arbitrator who has been appointed according to the procedure established under Article 303 (Establishment of an Arbitration Panel) of the Agreement shall notify his/her acceptance to the Trade Committee within 5 days of the date in which he/she was informed of his/her appointment.

16. Unless the disputing parties agree otherwise, these parties shall meet with the arbitration panel within 7 days of its establishment in order to determine such matters that the disputing parties or the arbitration panel deem appropriate. In case the Trade Committee has not established the remuneration and the expenses to be paid to the arbitrators, such remuneration and expenses shall be determined in conformity with WTO practice.
17. (a) Unless the disputing parties agree otherwise, within 5 days from the date of the selection of the arbitrators, the terms of reference of the arbitration panel shall be:

"to examine, in the light of the relevant provisions of the Agreement invoked by the disputing parties, the matter referred to in the request for establishment of the arbitration panel, to rule on the compatibility of the measure in question with the provisions referred to in Article 299 (Scope of Application) and to make a ruling in accordance with Article 307 (Arbitration Panel Ruling) of the Agreement."
- (b) The disputing parties must notify the agreed terms of reference to the arbitration panel within 2 days after reaching the agreement.

Initial Submissions

18. The complaining Party shall deliver its initial written submission no later than 20 days after the date of establishment of the arbitration panel. The Party complained against shall deliver its written counter-submission no later than 20 days after the date of delivery of the initial written submission.

Operation of Arbitration Panels

19. The chairperson of the arbitration panel shall preside at all its meetings. An arbitration panel may delegate to the chairperson authority to make administrative decisions regarding the proceedings.
20. Unless otherwise provided in the Agreement or in these Rules of Procedure, the arbitration panel may conduct its activities by any means, including telephone, facsimile transmissions or computer links.
21. Only arbitrators may take part in the deliberations of the arbitration panel, but the arbitration panel may authorize its assistants to be present at its deliberations.
22. The drafting of any arbitration panel ruling shall remain the exclusive responsibility of the

arbitration panel and may not be delegated.

23. Where a procedural question arises that is not covered by the provisions of the Agreement and its Annexes, an arbitration panel may adopt an appropriate procedure that is compatible with those provisions.
24. When the arbitration panel considers it is necessary to modify any period of time applicable to the proceedings or to make any other procedural or administrative adjustment, it shall inform the disputing parties in writing of the reasons for the change or adjustment, indicating the period of time or adjustment needed. The time limits set out in Article 307(2) (Arbitration Panel Ruling) shall not be modified.

Objection, Removal and Substitution

25. A request by a disputing party for the recusal or removal of an arbitrator as provided for in Article 305(1) (Objection, Removal and Substitution) of the Agreement, shall be made in writing and shall include the basis as well as the evidence that sustains the material violation by the arbitrator of the Code of Conduct. That request shall be transmitted to the other disputing party, with a copy to the Trade Committee within 10 days from the date in which the Party obtained evidence of the circumstances that gave rise to the request for recusal of the arbitrator.
26. Within 5 days after the receipt of the request, the disputing parties shall consult each other. In case of agreement, a new arbitrator shall be selected according to the procedure set out in Article 303 (Establishment of an Arbitration Panel) of the Agreement.
27. In the absence of an agreement between the disputing parties on the need to have an arbitrator removed, any of those parties may request that the matter be decided by the chairperson of the arbitration panel, whose decision shall be final.
28. If the chairperson of the arbitration panel or his/her delegate finds that an arbitrator does not comply with the requirements of the Code of Conduct, he/she shall select a new arbitrator by lot. If the original arbitrator was selected by the disputing parties in accordance with Article 303(2) (Establishment of the arbitration panel) of the Agreement the replacement shall be selected by lot from the members of the list referred to in Article 304 (List of Arbitrators) of the Agreement, which were proposed by the Party which selected the original arbitrator. If, to the contrary, the original arbitrator was selected by the disputing parties in accordance with Article 303(5) (Establishment of the Arbitration panel) of the Agreement, the lot shall be made from all the members of the referred list.

The selection shall be made in accordance with Rule 12, *mutatis mutandis*, and within 5 days following the date of the request to the chairperson of the arbitration panel.

29. If the disputing parties fail to agree on the need to replace the chairperson of the arbitration panel, any of those parties may request that such matter be referred to one of the remaining members of the list of individuals selected to act as chairpersons under Article 304(1) (List of Arbitrators) of the Agreement. Her or his name shall be drawn by lot by the Chair of the Trade Committee or the Chair's delegate. This selection shall be made in accordance with rule 12 and within 5 days following the date of the request to the Chair of the Trade Committee. The decision by such person on the need to replace the chairperson shall be final.
30. If this person decides that the original chairperson does not comply with the requirements of the Code of Conduct, she or he shall select a new chairperson by lot among the remaining pool of individuals referred to in Article 304 (List of the arbitrators) of the Agreement who may act as chairperson. This selection of the new chairperson shall be done in accordance with Rule 12, *mutatis mutandis* and within 5 days following the date on which the designated person has taken the decision on the recusal.
31. The arbitration panel proceedings and the applicable time limits shall be suspended while a request for recusal of an arbitrator, and his/her removal and replacement are being decided, as the case may be.

Hearings

32. The chairperson shall fix the date and time of the hearing, in consultation with the disputing parties and the other members of the arbitration panel, and shall notify them in writing to the Parties accordingly. The Party in charge of the logistical administration of the proceedings shall make such information publicly available unless the hearing is closed to the public.
33. Unless the disputing parties agree otherwise, the hearing shall be held in Brussels if the complaining Party is Colombia or Peru and in Bogota or Lima, as the case may be, if the complaining Party is the EU.
34. The arbitration panel may convene additional hearings if the Parties so agree.
35. All arbitrators shall be present during the entirety of any hearing.

36. The following persons may attend the hearing, irrespective of whether the hearing is closed to the public or not:
- (a) representatives of the disputing parties and any third party; (b) advisers to the disputing parties and any third party;
 - (c) administrative staff, interpreters, translators and court reporters and arbitrators' assistants.
37. Only the representatives and advisers of the disputing parties and any third party may address the arbitration panel.
38. No later than 5 days before the date of a hearing, each disputing party shall deliver to the arbitration panel a list of the names of persons who will make oral arguments or presentations at the hearing on behalf of that party and of other representatives or advisers who will be attending the hearing.
39. Subject to Rules 46, 47, 48 and 49, the hearings of the arbitration panels shall be open to the public, unless the disputing parties decide that the hearings shall be partially or completely closed to the public.
40. The arbitration panel shall conduct the hearing in the following manner, ensuring that the complaining Party and the Party complained against are afforded equal time:
- Argument
- (a) argument of the complaining Party;
 - (b) argument of the Party complained against. Rebuttal Argument
- (a) argument of the complaining Party;
 - (b) counter-reply of the Party complained against.
41. The arbitration panel may direct questions to either disputing party at any time during the hearing.
42. The arbitration panel shall arrange for a transcript of each hearing to be prepared and

delivered as soon as possible to the disputing parties.

43. Each disputing party may deliver a supplementary written submission concerning any matter that may have arisen during the hearing within 10 days of the date of the hearing.

Questions in Writing

44. The arbitration panel may at any time during the proceedings address questions in writing to one or both disputing parties and to any third party. The disputing parties and any third party shall receive a copy of any questions put forward by the arbitration panel. When answering a question is not possible within a hearing, Arbitration Panels should provide the disputing parties with the appropriate time to answer those questions.
45. Each disputing party or any third party shall also provide a copy of its written response to the arbitration panel's questions to the other disputing party and any third party. Disputing parties shall be given the opportunity to provide written comments on the reply of the other disputing party and to the replies of any third party within 5 days of the date of delivery.

Confidentiality

46. Each disputing party, any third party and their advisors shall treat as confidential any information submitted by the other disputing party to the arbitration panel which that party has designated as confidential.
47. Where a disputing party submits a confidential version of its written submissions to the arbitration panel, it shall also, upon request of the other disputing party, provide a non-confidential summary of the information contained in its submissions no later than 15 days after the date of either the request or the submission of the confidential version, whichever is later.
48. Written submissions made to the arbitration panel shall be considered confidential but shall be provided to the disputing parties and any third party. Nothing in these Rules of Procedure shall preclude a disputing party from disclosing statements of its own positions to the public to the extent that they do not contain confidential information.
49. The arbitration panel shall meet in closed session when the submission and arguments of any disputing party contain confidential information.
50. The disputing parties and their advisers shall maintain the confidentiality of the arbitration

panel hearings where the hearings are held in closed session, in accordance with Rule 39.

Ex Parte Contacts

51. The arbitration panel shall not meet or contact a disputing party in the absence of the other disputing party.
52. No member of the arbitration panel may discuss any aspect of the subject matter of the proceedings with one or both disputing parties or any third party in the absence of the other arbitrators.

Amicus curiae submissions

53. Any interested non-governmental persons established in the territory of a disputing party and which is not part of the government of any of the disputing parties, may make a written request to the arbitration panel, with a copy to the parties to the dispute, to be authorised to submit an *amicus curiae* brief within 10 days from the date of establishment of the arbitration panel. Such request shall:
 - (a) contain a description of the person making the submission, including its place of establishment and other contact information, the nature of its activities and, in the case of a juridical person, information on its members, its legal status and its general objectives;
 - (b) identify the specific factual and legal issues which will be addressed in the submission;
 - (c) specify the nature of its interest and its relevance for the proceedings and how the submission would assist the arbitration panel in the determination of a factual or legal issue related to the dispute;
 - (d) disclose any direct or indirect relationship that the person making the submission has or has had with a disputing party, as well as its source of financing;
 - (e) state whether it has received or will receive any financial or other kind of support from a disputing Party, a person or other organisation, in the preparation of the request for authorisation to submit a brief or the preparation of the brief itself.

- (f) not be longer than 5 pages typed with double space; and
 - (g) be written in the languages of the procedure.
54. The arbitration panel shall establish an appropriate date by which the disputing parties can comment on the application for authorization.
55. The arbitration panel shall review and take into consideration the application for authorization, the veracity of the information provided therein and any comment made by the disputing parties and shall take a decision without delay about granting authorization for making a written submission by an interested non-governmental persons. An authorization by an arbitration panel to make a written submission does not imply that the arbitration panel shall examine in its ruling the legal arguments presented in the submission.
56. *Amicus curiae* submissions shall be transmitted to the arbitration panel, with a copy to the disputing parties, within 5 days following the date of the authorisation by the arbitration panel to make such submission. The submission shall:
- (a) be dated and signed by the person making the submission or his/her representative;
 - (b) be concise and in no case longer than 15 pages typed at double space, including any annexes;
 - (c) not introduce new issues to the dispute, and cover only those issues relevant to the issues of fact and law subject to the consideration of the arbitration panel and identified by in the request for authorization to make a submission, explaining how the submission helps the arbitration panel in the determination of those issues;
 - (d) be submitted in the languages of the procedure.
57. The arbitration panel shall ensure that the disputing parties have the opportunity to reply in writing to any *amicus curiae* submissions before the date of the hearing.
58. The arbitration panel shall include in its ruling a list of all the *amicus curiae* submissions that it has received. The arbitration panel shall not be obliged to address in its ruling the arguments made in those submissions.
59. In taking into consideration requests for authorisation to make a submission or *amicus curiae* submissions themselves, the arbitration panel shall avoid interrupting the

proceedings and shall ensure the equality of the disputing parties.

Information and Technical Advice

60. The arbitration panel shall notify to the disputing parties of its intention to seek information or technical advice from experts as set out in Article 316 (1) (Information and Technical Advice) of the Agreement.
61. The arbitration panel shall provide to the disputing parties with a copy of the information or technical advice received and shall grant a reasonable time for the disputing parties to present their comments. The opinion of the experts shall have a merely consultative nature.
62. When the arbitration panel takes under consideration the received information or technical advice, it shall also take into consideration any comment or observation presented by the disputing parties in relation to such information or technical advice.
63. The arbitration panel shall ensure that when gathering information and seeking technical advice it shall do so from accredited persons with experience in the relevant field. In addition, the experts shall be independent, impartial, shall not be affiliated to or be directly or indirectly dependent on any of the disputing parties, and shall not receive instructions from them or any organization.

Cases of Urgency

64. In cases of urgency referred to in Article 307(2) (Arbitration Panel Ruling) of the Agreement, the arbitration panel shall adjust the time limits referred to in these Rules of Procedure, as appropriate.

Translation and Interpretation

65. The disputing parties shall have the right to present and receive written submissions, and to present and hear oral arguments in the language of their choice. Each disputing party shall expeditiously arrange for and bear the costs of the translation of its written submissions into the language chosen by the other disputing Party. The Party complained against shall arrange for the interpretation of oral submissions into the languages chosen by the disputing parties.

66. Arbitration panel rulings shall be notified in the languages chosen by the disputing parties.
67. The costs incurred for translation of an arbitration ruling shall be borne equally by the disputing parties.
68. Any disputing party may provide comments on any translated version of a document drawn up in accordance with these Rules of Procedure.

Computation of Time Limits

69. Where, by reason of the application of Rule 7, a disputing party receives a document on a date other than the date on which this document is received by the other disputing Party, any period of time that is calculated on the basis of the date of receipt of that document shall be calculated from the last date of receipt of that document.

Other Procedures

70. These Rules of Procedure are also applicable to procedures established under Article 308(3) (Implementation of the Arbitration Ruling); Article 309(2) (Review of Any Measure adopted to Comply with the Arbitration Panel Ruling); Article 310(4) (Temporary remedies in case of Non-Compliance); and Article 311(2) (Review of Any Measure Adopted After the Suspension of Benefits of compensation for Non-Compliance). However, the time-limits laid down in these Rules of Procedure shall be adjusted in line with the special time-limits provided for the adoption of a ruling by the arbitration panel in those other procedures.

CODE OF CONDUCT

Definitions

1. For purposes of this Code of Conduct:
 - (a) "arbitrator" means a member of an arbitration panel effectively established under Article 303 (Establishment of the Arbitration Panel) of the Agreement;
 - (b) "mediator" means a person who conducts a mediation procedure in accordance with Article 322 (Mediation Mechanism) and the Annex XIV (Mediation Mechanism on Non-Tariff Barriers) of the Agreement;

- (c) "candidate" means an individual whose name is on the list of arbitrators referred to in Article 304 (List of Arbitrators) of the Agreement and who is under consideration for selection as a member of an arbitration panel under Article 303 (Establishment of the Arbitration Panel) of the Agreement;
- (d) "expert" means any person with technical knowledge or specialised in certain areas covered by the different Titles of the Agreement;
- (e) "assistant" means a person who, under the terms of appointment of an arbitrator, conducts, researches or provides assistance to the arbitrator;
- (f) "proceedings", unless otherwise specified, means an arbitration panel proceedings under the Agreement; and
- g) "staff", in respect of an arbitrator, means persons under the direction and control of the arbitrator, other than assistants.

Responsibilities to the process

2. Every candidate and arbitrator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Former arbitrators must comply with the obligations established in paragraphs 15, 16, 17 and 18 of this Code of Conduct.

Disclosure obligations

3. Prior to confirmation of her or his selection as an arbitrator under the Agreement, a candidate shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceedings. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.
4. Once selected, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 3 of this Code of Conduct and shall disclose them. The disclosure obligation is a continuing duty which requires an arbitrator to disclose any such interests, relationships or matters that may arise during any

stage of the proceedings.

5. A candidate or arbitrator shall communicate matters concerning actual or potential violations of this Code of Conduct to the Trade Committee for consideration by the Parties.

Duties of arbitrators

6. Upon selection an arbitrator shall perform her or his duties thoroughly and expeditiously throughout the course of the proceedings, and with fairness and diligence.
7. An arbitrator shall consider only those issues raised in the proceedings and necessary for a ruling and shall not delegate this duty to any other person.
8. An arbitrator shall be responsible of taking all appropriate steps to ensure that his or her assistant and staff are aware of, and comply with, this Code of Conduct, as applicable.
9. An arbitrator shall not engage in *ex parte* contacts concerning the proceedings.

Independence and impartiality of arbitrators

10. An arbitrator must be independent and impartial and avoid creating an appearance of impropriety or bias and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, and loyalty to a Party or fear of criticism.
11. An arbitrator 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 her or his duties.
12. An arbitrator may not use her or his position on the arbitration panel to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence her or him.
13. An arbitrator may not allow financial, business, professional, family, personal or social relationships or responsibilities to influence her or his conduct or judgement.
14. An arbitrator must avoid entering into any relationship or acquiring any financial interest that is likely to affect her or his impartiality or that might reasonably create an appearance of impropriety or bias.

Obligations of former arbitrators

15. All former arbitrators must avoid actions that may create the appearance that they were biased in carrying out their duties or derive advantage from the decision or ruling of the arbitration panel.

Confidentiality

16. No arbitrator or former arbitrator shall at any time disclose or use any non-public information concerning proceedings or acquired during proceedings except for the purposes of those proceedings and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.
17. No arbitrator shall disclose any arbitration panel ruling or parts thereof prior to its publication in accordance with Article 318(4) (Arbitration Panel Decisions and Rulings) of the Agreement.
18. No arbitrator or former arbitrator shall disclose at any time the deliberations of an arbitration panel, or any arbitrator's views.

Mediators, experts

19. The provisions described in this Code of Conduct as applying to arbitrators or former arbitrators shall apply, *mutatis mutandis*, to mediators and experts.
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