

## **Arbitration Board Operating Guidelines**

### **1. Chair Appointment**

- a. Within 10 calendar days of the appointment of the second Board Member<sup>1</sup> by a competent authority, the Board Members shall contact each other to discuss appointment of a third Board Member, who will serve as Chair.
- b. Within 60 calendar days of the appointment of the second Board Member by a competent authority, the two Board Members shall appoint a third member, who will serve as a Chair. If the two Board Members are unable to appoint a Chair within 60 days, they must immediately inform the competent authorities.
- c. The competent authorities will provide to their appointed Board Members a list of persons who the competent authorities have agreed may potentially serve as Chair of the board. The competent authorities expect the Board Members to select a person from the list, particularly because of issues regarding governmental contracting.
- d. If the two Board Members believe a person not on the list should be selected as Chair, the Board Members must inform the competent authorities, in writing, prior to making the appointment. If they select a person not on the list, the selection should be consistent with paragraph 6 of the memorandum of understanding regarding arbitration between the competent authorities of Canada and the United States, effective on November 12, 2010.
- e. The Chair shall write to both competent authorities to inform them of his or her acceptance, providing the statement described in paragraph 2, below, and providing the Chair's contact information. The date of the Chair's letter of acceptance shall be deemed the date of appointment.

### **2. Non-disclosure**

Pursuant to paragraph 14 of Annex A of the Diplomatic Note of September 21, 2007, of the Protocol, each Board Member must agree in a notarized statement to abide by and be subject to the confidentiality and non-disclosure provisions of Articles XXVI and XXVII of the Convention and of the applicable domestic laws of the Contracting States.

### **3. Operating Procedures**

- a. To the extent needed, the board may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Article XXVI

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<sup>1</sup> In these guidelines, the term Board Member includes the Chair, unless the context requires otherwise.

of the Convention, the Protocol, or any other related agreement between Canada and the U.S.

- b. If the board adopts any additional procedures, the Chair shall provide a written copy of them to the competent authorities.

#### 4. Communication

- a. Before the Chair is appointed, the competent authorities will send any correspondence concurrently to both Board Members.
- b. After the Chair is appointed, the competent authorities will send any correspondence to the Chair. Similarly, the Chair will send any correspondence concurrently to both competent authorities.
- c. No Board Member will have any ex parte communications, except for administrative or logistical matters, with one competent authority.
- d. All communication, except for logistical matters, between the board and the competent authorities must be in writing. Written communication by facsimile or email is allowed, however, no information that may identify the taxpayer(s) may be included in an email or facsimile. Express or priority mail or a courier service shall be used for all correspondence other than that sent via facsimile or email.
- e. The Board Members may communicate by telephone, videoconference, email, facsimile, or face-to-face meetings; however, they must not include any taxpayer information in an email or facsimile
- f. No substantive discussions may take place without all three Board Members present.
- g. No Board Member shall have communications regarding the issues or matters before the board with the Concerned Persons involved in the case or their representatives or agents during or subsequent to the arbitration proceedings.

#### 5. Position Resolution and Supporting Papers

- a. Within 60 calendar days of the appointment of the Chair, each competent authority shall submit four copies of the following documents to the Chair:
  - i. A proposed resolution paper not to exceed five pages, and
  - ii. A supporting position paper not to exceed 30 pages, plus annexes.
- b. Any annex to a position paper must be a document that was provided by one competent authority to the other, or by a Concerned Person to both competent authorities, for use in the negotiation of the case.
- c. The Chair will send a copy of each competent authority's proposed resolution and supporting position paper to the other Board Members and the other competent authority within 5 calendar days of receipt of the later submission by the Chair.

- d. In the event that only one competent authority submits a proposed resolution and supporting position paper within the allotted time, then that proposed resolution shall be deemed to be the determination of the board in that case and the arbitration proceedings shall be terminated. If this subparagraph applies, then the Chair will notify the competent authorities on the 61<sup>st</sup> calendar day after the appointment of the Chair.

6. Reply Submissions

- a. Within 120 calendar days of the appointment of the Chair, each competent authority may submit four copies of a reply submission not to exceed 10 pages, to address any points raised by the proposed resolution or supporting position paper submitted by the other competent authority.
- b. The Chair will send a copy of each competent authority's reply submission paper to the other Board Members and the other competent authority within 5 calendar days of receipt of the later reply by the Chair.

7. Requesting additional information

- a. The competent authorities may not submit to the Chair any additional information, unless the Chair so requests.
- b. The Chair may request additional information only from the competent authorities and only information that consists of existing documents and may not request new or additional analyses. Such a request shall be in writing and include a response deadline. On the date the Chair issues the request, the Chair shall send a copy of the request to the other competent authority.
- c. The Chair shall send a copy of a competent authority's response to the other Board Members and the other competent authority within 5 calendar days.

8. Board meetings

- a. The competent authorities encourage the Board Members to use tele- and videoconferencing. If a face-to-face meeting is necessary, the Chair will contact the competent authority responsible for the logistical coordination and ask it to arrange facilities for the meeting. The competent authorities will inform the board of the competent authority responsible for logistical coordination.
- b. The competent authority will arrange meeting facilities in a location that minimizes the board's travel time and expenses. Each competent authority may arrange a meeting in the other's meeting facilities, as needed.

9. A Board Member's use of staff
  - a. The competent authorities anticipate that Board Members will be able to perform their duties without the use of additional staff.
  - b. If a Board Member uses staff,
    - i. that staff member must sign the confidentiality statement referred to in paragraph 2 above and the Chair must send the notarized statement to both competent authorities prior to the staff member's involvement;
    - ii. the staff member cannot have access to taxpayer specific information; and
    - iii. the competent authorities will not compensate in respect of any work performed by a staff member

10. Payment of Board Members

- a. The fees and expenses of Board Members shall be set in accordance with the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators, as in effect on the date on which the arbitration proceeding begins. With regard to travel expenses, Board Members will be reimbursed for economy class travel.
- b. With respect to fees, each Board Member will be compensated for no more than three days of preparation, for two meeting days and for travel days.
- c. If the Board Members feel they require additional time to properly consider the case, the Chair will contact the competent authorities to request additional time.

11. Inability of a Board Member to fulfill duties

- a. If a Board Member is unable to fulfill his or her duties the Chair will notify the competent authorities. The competent authority that selected the Board Member who is unable to fulfill his or her duties will select a substitute Board Member within 14 calendar days of having been notified.
- b. If the Chair is unable to fulfill his or her duties, the remaining Board Members will contact their respective appointing competent authorities and the competent authorities will ask the Board Members to appoint a new chair within 30 calendar days of having been asked to select a substitute.
- c. If any Board Member is unable to fulfill his or her duties the competent authorities will consult with the Chair after the appointment of the new Board Member to determine whether a new timetable is necessary.
- d. Should it come to light that a Board Member has a conflict of interest which would have prevented that member's original appointment, the Board Member must recuse himself or herself from

consideration of the case and inform the other Board Members and both competent authorities.

12. Permanent establishment cases

- a. The procedures in this paragraph apply to a case that includes issues as a result of the application of both Article V (Permanent Establishment) and Article VII (Business Profits) of the Convention. The other provisions of the Board Operating Guidelines also apply, as appropriate, with such modification as necessary. If a case involves only Article V or only Article VII, then the general provisions of the Board Operating Guidelines apply and not the provisions of this paragraph.
- b. If the competent authorities have not reached an agreement on both the existence of a permanent establishment (Article V) and the allocation of income (Article VII), each competent authority will submit separate Proposed Resolutions, Position Papers, and Reply Submissions for the Article V (Permanent Establishment) issue and for the Article VII (Business Profits) issue.
- c. The competent authorities will submit their Proposed Resolution and Position Paper for the Article VII issue in a sealed envelope.
- d. The Chair will send a copy of each competent authority's Article V and Article VII Proposed Resolutions and Position Papers to the other competent authority and a copy of each competent authority's Article V Proposed Resolution and Position Paper to the other Board Members within 5 calendar days of receipt of the later submission by the Chair.
- e. Within 120 calendar days of the appointment of the Chair, each competent authority may submit four copies of separate Reply Submissions, not to exceed 10 pages, to address any points raised by the Proposed Resolutions or Position Papers submitted by the other competent authority. The Reply Submission relating to the Article VII issue must be in a sealed envelope.
- f. The Chair will send a copy of each competent authority's Article V Reply Submission to the other Board Members and a copy of the Article V and VII Reply Submission to the other competent authority within 5 calendar days of receipt of the later reply by the Chair.
- g. Board Members must first determine whether a permanent establishment exists under Article V of the Convention.
- h. If the board determines that a permanent establishment does not exist, then the arbitration proceeding is terminated and the Chair will inform the competent authorities of the board's determination.
- i. If the board determines that a permanent establishment exists, the Chair will send a copy of each competent authority's Article VII Proposed Resolution and Position Paper and Reply Submissions, if any, to the other board members. The Board Members must then

choose one of the two Article VII Proposed Resolutions to determine the amount of profits attributable to the permanent establishment.

- j. The board will endeavor to reach its determination(s) on the Article V and VII issues within six months of the appointment of the Chair. On or before the expiry of the six months the Chair may advise the competent authorities that the board will require an additional 30 calendar days to reach its determination on the Article VII issue.

### 13. Board's Determination

- a. With respect to each issue presented by one of the competent authorities the board must make a determination by adopting one of the Proposed Resolutions submitted by the competent authorities.
- b. The board's determination will be decided on the basis of a majority vote
- c. Each Board Member must choose one of the Proposed Resolutions. If the case contains more than one issue as contemplated by paragraph 11 of the Memorandum of Understanding between the Competent Authorities effective on November 12, 2010, each Board Member must make separate determinations on the issues as presented (unless a different presentation has been agreed upon by the competent authorities). Thus, the final decision of the board may be comprised of the proposed resolutions submitted by each of the competent authorities.
- d. The board will not determine the treatment of any associated interest or penalties; rather that treatment will be determined by applicable domestic law of Canada and the United States, as the case may be.
- e. The written determination shall not include any rationale or analysis.
- f. The determination of the board will have no precedential value.
- g. No information relating to the arbitration proceedings (including the board's determination) may be disclosed by Board Members or their staffs or by either competent authority, except as permitted by the Convention and the domestic laws of Canada or the United States.

### 14. Upon Termination of the Arbitration Proceedings

At the termination of the arbitration proceedings each Board Member must immediately destroy all documents or other information received in connection with the proceedings.