

CHAPTER 16

DISPUTE SETTLEMENT

Article 1 Objectives

The objective of this Chapter is to provide an effective, efficient and transparent process for consultations and the settlement of disputes arising under this Agreement.

Article 2 Scope and Coverage

1. Except as otherwise provided in this Agreement, this Chapter shall apply:

- (a) with respect to the avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement;
- (b) wherever a Party considers that an actual measure of the other Party is not or would not be in conformity with the obligations of this Agreement or that the other Party has otherwise failed to carry out its obligations under this Agreement; or
- (c) wherever a Party considers that any benefit it could reasonably have expected to accrue to it under any provision of this Agreement is being nullified or impaired as a result of the application of any actual measure that is not inconsistent with this Agreement.

2. For the avoidance of doubt, the Parties agree that this Agreement shall be interpreted in accordance with the customary rules of treaty interpretation of public international law and consistently with the objectives set out in Article 2 (Objectives) of Chapter 1 (Initial Provisions).

Article 3 Choice of Forum

1. Where a dispute regarding any matter arises under this Agreement and under another agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.
2. Once the complaining Party has selected a particular forum, the forum selected shall be used to the exclusion of other possible fora in respect of the dispute.
3. For the purposes of this Article, the complaining Party shall be deemed to have selected a forum when it has requested the establishment of, or referred a matter to, a dispute settlement panel or arbitral tribunal.
4. Except as provided in this Article, this Chapter is without prejudice to the rights of the Parties to have recourse to dispute settlement procedures available under other agreements to which they are party.

Article 4 Consultations

1. Each Party shall accord adequate opportunity for consultations with respect to any matter affecting the implementation, interpretation or application of this Agreement. Any differences shall, as far as possible, be settled by consultation between the Parties.
2. A request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of any actual measure or other matter at issue and an indication of the legal basis for the complaint. The complaining Party shall deliver the request to the other Party.

3. If a request for consultations is made, the Party to which the request is made shall reply to the request in writing within seven days after the date of its receipt and shall enter into consultations in good faith, with a view to reaching a mutually satisfactory solution within a period of no more than:

- (a) 15 days after the date of receipt of the request for urgent matters, including those concerning perishable goods; or
- (b) 30 days after the date of receipt of the request for all other matters.

4. The Parties shall make every effort to reach a mutually satisfactory resolution of any matter through consultations. In conducting the consultations, the Parties shall:

- (a) provide sufficient information to enable a full examination of how the actual measure or other matter might affect the operation or application of this Agreement; and
- (b) treat any information exchanged in the course of consultation which is designated by a Party as confidential or proprietary in nature on the same basis as the Party providing the information.

5. If the responding Party does not reply within the required seven days, or does not enter into consultations within the timeframes specified in Paragraph 3(a) or (b), or a period otherwise mutually agreed by the Parties, the complaining Party may proceed directly to request the establishment of an arbitral tribunal under Article 6.

6. The consultations shall be confidential, and without prejudice to the rights of either Party in any further proceedings.

7. The complaining Party may request the responding Party to make available for the consultations personnel from its government agencies or other regulatory bodies who have expertise in the matter under consultation.

Article 5
Good Offices, Conciliation or Mediation

1. The Parties may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the Parties during those proceedings, shall be confidential and without prejudice to the rights of either Party in any further proceedings.

Article 6
Establishment of an Arbitral Tribunal

1. The complaining Party may request, by means of a written notification addressed to the other Party, the establishment of an arbitral tribunal if:

- (a) the consultations fail to settle a dispute within:
 - (i) 30 days after the date of receipt of the request for consultations regarding urgent matters, including those concerning perishable goods; or
 - (ii) 60 days after the date of receipt of the request for consultations regarding all other matters; or
- (b) Paragraph 5 of Article 4 applies.

2. The Parties may agree during the consultations to vary the periods set out in Paragraph 1(a).

3. The request to establish an arbitral tribunal shall identify:
 - (a) the specific measures at issue;
 - (b) the legal basis of the complaint sufficient to present the problem clearly including, where applicable:
 - (i) any provisions of this Agreement alleged to have been breached;
 - (ii) whether there is a claim for nullification and impairment; and
 - (iii) any other relevant provisions; and
 - (c) the factual basis for the complaint.
4. Unless otherwise agreed by the Parties, the arbitral tribunal shall be established and perform its functions in a manner consistent with this Chapter.

Article 7

Composition of Arbitral Tribunals

1. The arbitral tribunal shall consist of three members.
2. Each Party shall appoint an arbitrator within 21 days of the receipt of the request to establish an arbitral tribunal.
3. The Parties shall appoint by common agreement the third arbitrator within 30 days of the receipt of the request to establish an arbitral tribunal. The arbitrator thus appointed shall chair the arbitral tribunal.
4. The chair shall be a national of a non-Party who shall not have his or her usual place of residence in the Area of either of the Parties.

5. If all three members of the arbitral tribunal have not been appointed within 30 days of receipt of the request to establish an arbitral tribunal, the Director-General of the WTO shall, at the request of either Party, make the necessary appointments within 30 days of the request to the Director-General of the WTO.

6. All arbitrators shall:

- (a) have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements;
- (b) be chosen strictly on the basis of objectivity, reliability, and sound judgment;
- (c) be independent of, and not be affiliated with or take instructions from, either Party;
- (d) not have dealt with the matter under dispute in any capacity; and
- (e) comply with the code of conduct for panellists established under the *WTO Dispute Settlement Understanding*.

7. The date of establishment of the arbitral tribunal shall be the date on which the last arbitrator is appointed.

8. If an arbitrator appointed under this Article resigns or becomes unable to act, a successor arbitrator shall be appointed, within 21 days from the date written notice is received by the Parties of the need for a successor, in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator. The work of the arbitral tribunal shall be suspended pending the appointment of the successor arbitrator.

9. Where an arbitral tribunal is established under Articles 12, 13 or 15, it shall, where possible, have the same arbitrators as the original arbitral tribunal. Where this is not possible, any replacement arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and shall have all the powers and duties of the original arbitrator. Where special circumstances warrant, the arbitral tribunal may comprise only the chair of the original arbitral tribunal if the Parties so agree.

Article 8 **Functions of Arbitral Tribunals**

1. The function of an arbitral tribunal is to make an objective assessment of the dispute before it, including an objective assessment of the facts of the case and the applicability of and conformity with this Agreement, and make such other findings and rulings necessary for the resolution of the dispute referred to it as it thinks fit.
2. The arbitral tribunal shall, apart from the matters set out in Article 9, make decisions in order to regulate its own procedures in relation to the rights of the Parties to be heard and its deliberations, in consultation with the Parties.
3. The arbitral tribunal shall make its decisions to which Paragraph 2 applies and its findings and rulings by consensus, provided that where an arbitral tribunal is unable to reach consensus these may be made by majority vote. The arbitral tribunal shall not disclose which arbitrators are associated with majority or minority opinions.
4. The findings and rulings of the arbitral tribunal cannot add to or diminish the rights and obligations provided in this Agreement.

Article 9

Proceedings of Arbitral Tribunals

1. The arbitral tribunal proceedings shall be conducted in accordance with this Chapter and, unless the Parties agree otherwise, the Model Rules of Procedure for Arbitral Tribunals in Annex I.

2. Unless the Parties otherwise agree within 20 days from the date of receipt of the request for the establishment of the arbitral tribunal, the terms of reference shall be:

“To examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of an arbitral tribunal pursuant to Article 6 and to make findings and rulings of law and fact together with the reasons therefore for the resolution of the dispute.”

3. At the request of either Party or on its own initiative, the arbitral tribunal may seek information and technical advice from any individual or body which it deems appropriate. Any information or technical advice so obtained shall be submitted to the Parties for comment. Where the arbitral tribunal takes the information or technical advice into account in the preparation of its report, it shall also take into account any comments by the Parties on the information or technical advice.

Article 10

Termination of Proceedings

1. The Parties may agree to terminate the proceedings of an arbitral tribunal in the event that a mutually satisfactory solution to the dispute has been found. In such event the Parties shall jointly notify the chair of the arbitral tribunal.

2. The Parties may agree that the arbitral tribunal suspend its work at any time for a period not exceeding 12 months

from the date of such agreement. In such event the Parties shall jointly notify the chair of the arbitral tribunal. If the work of the arbitral tribunal has been suspended for more than 12 months, the authority for establishment of the arbitral tribunal shall lapse unless the Parties agree otherwise.

Article 11 **Reports of the Arbitral Tribunal**

1. The reports of the arbitral tribunal shall be drafted without the presence of the Parties and shall be based on the relevant provisions of this Agreement, the submissions and arguments of the Parties and any other information provided to the arbitral tribunal pursuant to Paragraph 3 of Article 9.

2. The arbitral tribunal shall present its initial report to the Parties within 90 days of the date of establishment of the arbitral tribunal or in cases of urgency, including those concerning perishable goods, within 60 days of the date of establishment of the arbitral tribunal. The initial report shall contain:

- (a) findings of fact; and
- (b) the determination of the arbitral tribunal as to whether a Party has not conformed with its obligations under this Agreement or that a Party's measure is causing nullification or impairment in the sense of Paragraph 1(c) of Article 2 and any other determination requested in the terms of reference or required to perform its functions under Article 8.

3. In exceptional cases, if the arbitral tribunal considers it cannot present its initial report within 90 days, or within 60 days in cases of urgency, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will present its report. Any delay shall not exceed a further period of 30 days unless the Parties otherwise agree.

4. A Party may submit written comments on the initial report to the arbitral tribunal within ten days of receiving the initial report or within such other period as the Parties may agree.

5. After considering any written comments by the Parties and making any further examination it considers necessary, the arbitral tribunal shall present its final report to the Parties within 30 days of presentation of the initial report, unless the Parties otherwise agree.

6. If in its final report, the arbitral tribunal finds that a Party's measure does not conform with this Agreement or is causing nullification or impairment in the sense of Paragraph 1(c) of Article 2, it shall include in its findings and rulings a requirement to remove the non-conformity or address the nullification or impairment.

7. The Parties shall release the final report of the arbitral tribunal as a public document within 15 days from the date of its presentation to the Parties, subject to the protection of confidential information.

Article 12 Implementation

1. The findings and rulings of the arbitral tribunal shall be final and binding on the Parties.

2. The Parties shall promptly comply with the findings and rulings of the arbitral tribunal. Where it is not practicable to comply immediately, the Party concerned shall comply with the findings and rulings within a reasonable period of time. The reasonable period of time shall be mutually determined by the Parties. As a guideline, the reasonable period of time should not exceed 12 months from the date of the presentation of the arbitral tribunal's final report to the Parties. Where the Parties fail to agree on the reasonable period of

time within 45 days of the presentation to the Parties of the arbitral tribunal's final report, either Party may refer the matter, in accordance with Paragraph 9 of Article 7, to the original arbitral tribunal, which shall determine the reasonable period of time following consultation with the Parties.

3. The arbitral tribunal shall present its report to the Parties within 60 days of the date on which the arbitral tribunal is established, in accordance with Paragraph 7 of Article 7, to consider the matter referred to in Paragraph 2. The report shall contain the determination of the arbitral tribunal as to the reasonable period of time and the reasons for its determination. When the arbitral tribunal considers that it cannot present its report within this timeframe, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will present its report. Any delay shall not exceed a further period of 30 days unless the Parties otherwise agree.

Article 13

Compliance within Reasonable Period of Time

1. Where there is disagreement as to the existence or consistency with this Agreement of measures taken within a reasonable period of time to comply with the findings and rulings of the arbitral tribunal, such disagreement shall be decided through recourse to the dispute settlement procedures in this Chapter, including wherever possible by resort to the original arbitral tribunal, in accordance with Paragraph 9 of Article 7.

2. The arbitral tribunal shall present its report to the Parties within 90 days of the date on which the arbitral tribunal is established to consider the dispute on compliance within a reasonable period of time referred to in Paragraph 1. When the arbitral tribunal considers that it cannot present its report within this timeframe, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the

period within which it will present its report. Any delay shall not exceed a further period of 30 days unless the Parties otherwise agree.

Article 14

Compensation and Suspension of Benefits

1. If a failure to comply with the findings and rulings of the arbitral tribunal has been established in accordance with Paragraph 1 of Article 13 or the responding Party notifies the other Party in writing that it does not intend to comply with the findings and rulings, the responding Party shall, if so requested, enter into negotiations with the complaining Party within ten days of the receipt of such request with a view to reaching a mutually satisfactory agreement on any necessary compensatory adjustment.

2. If no mutually satisfactory agreement on compensatory adjustment as set out in Paragraph 1 is reached within 20 days of entering into negotiations, the complaining Party may at any time thereafter notify the responding Party that it intends to suspend the application to the responding Party of benefits of equivalent effect and shall have the right to begin suspending those benefits 30 days after the receipt of the notification. Benefits shall not be suspended while the complaining Party is pursuing negotiations under Paragraph 1.

3. Compensation and the suspension of benefits shall be temporary measures. Neither compensation nor the suspension of benefits is preferred to full compliance with the findings and rulings of the arbitral tribunal. Compensation and suspension of benefits shall only be applied until such time as the measure found to be not in conformity with this Agreement has been brought into conformity, or the responding Party has complied with the arbitral tribunal's findings and rulings, or a mutually satisfactory solution is reached.

4. In considering what benefits to suspend pursuant to Paragraph 2:

- (a) the complaining Party shall first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the arbitral tribunal has found to be not in conformity with this Agreement or to have caused nullification or impairment; and
- (b) the complaining Party may suspend benefits in other sectors if it considers that it is not practicable or effective to suspend benefits in the same sector or sectors. The communication in which it announces such a decision shall indicate the reasons on which it is based.

5. Any suspension of benefits shall be restricted to benefits accruing to the other Party under this Agreement.

Article 15 Review

1. Where the right to suspend benefits has been exercised under Article 14, upon written request of the responding Party, the arbitral tribunal shall decide whether:

- (a) the level of benefits suspended by the complaining Party is not of equivalent effect pursuant to Article 14; or
- (b) the responding Party has complied with the findings and rulings of the original arbitral tribunal.

2. Such matters shall be decided through recourse to the dispute settlement procedures in this Chapter, including wherever possible by resort to the original arbitral tribunal, in accordance with Paragraph 9 of Article 7.

3. The arbitral tribunal shall present its report to the Parties within 90 days of the date on which the arbitral tribunal is established to consider the matters referred to in Paragraph 1. When the arbitral tribunal considers that it cannot present its report within this timeframe, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will present its report. Any delay shall not exceed a further period of 30 days unless the Parties otherwise agree.

4. If the arbitral tribunal finds that the level of benefits suspended by the complaining Party is not of equivalent effect, the complaining Party shall modify the level of benefits suspended accordingly. If the arbitral tribunal finds that the responding Party has complied with the findings and rulings, the complaining Party shall promptly stop the suspension of benefits under Article 14.

Article 16 Expenses

Unless the arbitral tribunal decides otherwise because of the particular circumstances of the case, each Party shall bear the cost of its appointed arbitrator and its own expenses. The cost of the chair of the arbitral tribunal and other expenses associated with the conduct of its proceedings shall be borne by the Parties in equal shares.