

## CHAPTER 18

### DISPUTE SETTLEMENT

#### Section A: Dispute Settlement

##### Article 18.1: Definitions

For the purposes of this Chapter:

**complaining Party** means a Party that requests the establishment of a panel under Article 18.7.1;

**panel** means a panel established under Article 18.7;

**perishable good** means a good that rapidly decays due to its natural characteristics, in particular in the absence of appropriate storage conditions;

**responding Party** means a Party that has been complained against under Article 18.7; and

**Rules of Procedure** means the rules referred to in Article 18.12 and adopted in accordance with Article 17.2 (Functions of the Joint Commission) of Chapter 17 (Administrative and Institutional Provisions).

##### Article 18.2: General Provisions

1. The Parties shall at all times endeavour to agree on the interpretation and application of this Agreement and shall make every effort through cooperation and consultations to reach a mutually satisfactory resolution of any matter that may affect its operation.

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

##### Article 18.3: Scope

Unless otherwise provided in this Agreement, this Chapter shall apply:

- (a) with respect to the avoidance or settlement of any dispute that arises between the Parties regarding the interpretation or application of this Agreement;

- (b) when a Party considers that an actual measure of the other Party is inconsistent with its obligations of this Agreement or that the other Party has otherwise failed to carry out its obligations under this Agreement; or
- (c) when a Party considers that a benefit it could reasonably have expected to accrue to it under Chapter 2 (Trade in Goods), Chapter 3 (Rules of Origin and Origin Procedures), Chapter 4 (Customs Procedures and Trade Facilitation), Chapter 5 (Technical Barriers to Trade), Chapter 6 (Sanitary and Phytosanitary Measures), Chapter 7 (Trade Remedies) or Chapter 8 (Trade in Services), is being nullified or impaired as a result of the application of a measure of the other Party that is not inconsistent with this Agreement.

#### **Article 18.4: Choice of Forum**

1. If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.
2. Once a complaining Party has requested the establishment of, or referred a matter to, a panel, an arbitral tribunal or other forum under an agreement referred to in paragraph 1 to settle the dispute, the forum selected shall be used to the exclusion of other fora.

#### **Article 18.5: Consultations**

1. A Party may request consultations with the other Party, through the contact point designated under Article 17.6 (Contact Points) of Chapter 17 (Administrative and Institutional Provisions), with respect to any matter described in Article 18.3. The Party making the request for consultations shall do so in writing, and shall set out the reasons for the request, including identification of the actual measure or other matter at issue and an indication of the factual and legal basis for the complaint.
2. Unless the Parties otherwise agree, the Party to which a request for consultations is made shall reply in writing to the request no later than 10 days after the date of its receipt.<sup>1</sup>
3. Unless the Parties otherwise agree, they shall enter into consultations no later than:
  - (a) 15 days after the date of receipt of the request in cases of urgency, including those which concern perishable goods; or
  - (b) 30 days after the date of receipt of the request for all other matters.

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<sup>1</sup> For greater certainty, if the Party to which a request for consultations is made does not reply within the time period specified in this paragraph, it shall be deemed to have received the request 10 days after the date on which the Party making the request for consultations transmitted that request.

4. Consultations may be held in person or by any technological means available to the Parties. If the consultations are held in person, they shall be held alternately in the Area of each Party, with the first meeting held in the Area of the Party to which the request for consultations is made, unless the Parties otherwise agree.

5. The Parties shall make every attempt to reach a mutually satisfactory resolution of the matter through consultations under this Article. To this end, each Party shall:

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

6. In consultations under this Article, on request of a Party, the other Party shall endeavour to make available for the consultations personnel of its government agencies or other regulatory bodies who have responsibility for or expertise in the matter under consultation.

7. Consultations shall be confidential and without prejudice to the rights of a Party in any other proceedings.

#### **Article 18.6: Good Offices, Conciliation and Mediation**

1. The Parties may at any time agree to voluntarily undertake an alternative method of dispute resolution, such as good offices, conciliation or mediation.

2. Proceedings that involve such alternative methods of dispute resolution<sup>2</sup> shall be confidential and without prejudice to the rights of a Party in any other proceedings.

3. The Parties may suspend or terminate the proceedings established under this Article at any time.

4. If the Parties agree, the alternative method of dispute resolution may continue while the matter is being examined by a panel established or a panel reconvened under this Chapter.

#### **Article 18.7: Establishment of a Panel**

1. The Party that requested consultations under Article 18.5.1 may request, by means of a written notice addressed to the responding Party, the establishment of a panel if the

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<sup>2</sup> For greater certainty, such proceedings include positions taken by the Parties during these proceedings.

Parties fail to resolve the matter no later than:

- (a) 30 days after the date of receipt of the request for consultations under Article 18.5.1 in cases of urgency, including those which concern perishable goods;
- (b) 60 days after the date of receipt of the request for consultations under Article 18.5.1 for all other matters; or
- (c) any other period as the Parties may agree.

2. The complaining Party shall include in the request to establish a panel an identification of the specific measure or other matter at issue and a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly.

3. A panel shall be established upon receipt of the request.

4. Unless the Parties otherwise agree, the panel shall be composed in a manner consistent with this Chapter and the Rules of Procedure.

#### **Article 18.8: Terms of Reference**

1. Unless the Parties otherwise agree no later than 20 days after the date of receipt of the request for the establishment of a panel, the terms of reference shall be to:

- (a) examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of a panel under Article 18.7.1; and
- (b) make findings and determinations, as well as recommendations, if any, together with the reasons therefor, as provided for in Articles 18.15.4 and 18.16.

2. If, in its request for the establishment of a panel, a complaining Party claims that a measure nullifies or impairs benefits within the meaning of Article 18.3(c), the terms of reference shall so indicate.

#### **Article 18.9: Composition of Panels**

1. A panel shall be composed of three members, including a chair.

2. Unless the Parties otherwise agree, each Party shall, in accordance with Article 18.10, no later than 30 days after the date of receipt of the request for the establishment of a panel, appoint one panellist who may be its natural person and propose

up to three candidates for appointment as the chair of the panel. The chair shall not be a natural person of either Party, nor have his or her usual place of residence in either Party, nor be employed by either Party, nor have dealt with the dispute in any capacity.

3. The Parties shall agree on and appoint the chair no later than 45 days after the date of receipt of the request for the establishment of a panel, taking into account the list of candidates proposed in accordance with paragraph 2. If appropriate, the Parties may jointly consult the panellists appointed in accordance with paragraph 2.

4. If any of the three appointments have not been made no later than 45 days after the date of receipt of the request for the establishment of a panel, panellist not yet appointed shall be appointed, on request of either Party, by lot from the list of the candidates proposed in accordance with paragraph 2. The appointment by lot shall be undertaken no later than seven days after the date of receipt of the request for appointment by lot, unless the Parties otherwise agree. Where more than one panellist, including the chair, is to be selected by lot, the chair shall be selected first.

5. The date of the establishment of a panel shall be the date on which the last panellist is appointed.

6. If the Parties agree that a panellist has failed to comply with the code of conduct referred to in Article 18.10.1(d), they may remove the panellist, waive the violation or request the panellist to ameliorate the violation within a specified period of time. If the Parties agree to waive the violation or determine that, after amelioration, the violation has ceased, the panellist may continue to serve.

7. If a panellist appointed in accordance with this Article resigns or becomes unable to act, including as a result of his or her removal in accordance with paragraph 6, a successor panellist shall be appointed in the same manner as prescribed for the appointment of the original panellist within 21 days, unless the Parties otherwise agree, and shall have all the powers and duties of the original panellist. The work of the panel, including any procedural timeframe, shall be suspended until the successor panellist has been appointed.

8. Where a panel is reconvened under Article 18.19 or Article 18.20, the reconvened panel shall, where possible, have the same panellists as the original panel. Where this is not possible, any successor panellist shall be appointed in the same manner as prescribed for the appointment of the original panellist within 21 days, unless the Parties otherwise agree, and shall have all the powers and duties of the original panellist.

#### **Article 18.10: Qualifications of Panellists**

1. All panellists 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 affiliated with or take instructions from, either Party; and
- (d) comply with the code of conduct in the Rules of Procedure.

2. An individual shall not serve as a panellist for a dispute in which that person has participated under Article 18.6 or dealt with the dispute in any other capacity.

#### **Article 18.11: Function of Panels**

1. The function of a panel is to make an objective assessment of the matter before it, which includes an examination of the facts and the applicability of and conformity with this Agreement, and to make the findings, determinations and recommendations as are called for in its terms of reference and necessary for the resolution of the dispute.

2. Unless the Parties otherwise agree, the panel shall perform its functions and conduct its proceedings in a manner consistent with this Chapter and the Rules of Procedure.

3. The panel shall consider this Agreement in accordance with the customary rules of treaty interpretation of public international law as reflected in the *Vienna Convention on the Law of Treaties*, done at Vienna on May 23, 1969. With respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body. The findings, determinations and recommendations of the panel shall not add to or diminish the rights and obligations of the Parties under this Agreement.

4. A panel shall take its decisions by consensus. If a panel is unable to reach consensus, it may take its decisions by majority vote.

#### **Article 18.12: Rules of Procedure for Panels**

The Rules of Procedure, adopted under this Agreement in accordance with Article 17.2 (Functions of the Joint Commission) of Chapter 17 (Administrative and Institutional Provisions), shall ensure that:

- (a) there is at least one hearing before the panel at which each Party may present its views orally;

- (b) subject to subparagraph (e), any hearing before the panel shall be open to the public if the Parties agree;
- (c) each Party shall have an opportunity to provide at least an initial and a rebuttal written submission;
- (d) subject to subparagraph (e), each Party may:
  - (i) release to the public its written submissions, written version of an oral statement and written response to a request or question from the panel, if any, as soon as possible after those documents are filed; and
  - (ii) if not already released, release all these documents by the time the final report of the panel is issued;
- (e) confidential information is protected;
- (f) the venue for hearings shall be decided by agreement between the Parties. If there is no agreement, the venue shall alternate between the Areas of the Parties with the first hearing to be held in the Area of the responding Party; and
- (g) administrative assistance is provided to a panel established under Article 18.7.

### **Article 18.13: Role of Experts**

On request of either Party, or on its own initiative, a panel may seek information and technical advice from any person or body that it deems appropriate, subject to any terms and conditions agreed by the Parties. The Parties shall have an opportunity to comment on any information or advice obtained under this Article. If the panel takes the information or technical advice into account in the preparation of its reports, it shall also take into account any comments by the Parties on the information or technical advice.

### **Article 18.14: Suspension or Termination of Proceedings**

1. The panel may suspend its work at any time on request of the complaining Party for a period not to exceed 12 consecutive months. The panel shall suspend its work at any time if the Parties request it to do so by joint notification to the chair of the panel. In the event of a suspension, the timeframes set out in this Chapter and in the Rules of Procedure shall be extended by the amount of time that the work was suspended. If the work of the panel is suspended for more than 12 consecutive months, the panel proceedings shall lapse unless the Parties otherwise agree.

2. The panel shall terminate its proceedings if the Parties request it to do so by joint notification to the chair of the panel.

#### **Article 18.15: Initial Report**

1. The panel shall draft its report without the presence of the Parties.
2. The panel shall base its report on the relevant provisions of this Agreement, the interpretations issued by the Joint Commission, the submissions and arguments of the Parties, and any information or advice put before it under Article 18.13.
3. The panel shall present an initial report to the Parties no later than 120 days after the date of the appointment of the last panellist. In cases of urgency, including those which concern perishable goods, the panel shall endeavour to present an initial report to the Parties no later than 90 days after the date of the appointment of the last panellist.
4. The initial report shall contain:
  - (a) a summary of the written and oral submissions and arguments;
  - (b) the findings along with their factual and legal basis;
  - (c) the determination of the panel as to whether:
    - (i) the measure at issue is inconsistent with obligations in this Agreement;
    - (ii) the responding Party has otherwise failed to carry out its obligations in this Agreement; or
    - (iii) the measure at issue is causing nullification or impairment within the meaning of Article 18.3(c);
  - (d) any other determination requested in the terms of reference;
  - (e) recommendations, if any, whether on request of a Party or upon initiative of the panel, for the resolution of the dispute; and
  - (f) the reasons for the findings and determinations.
5. If the panel makes recommendations, it may provide the reasons thereof in the initial report.
6. In exceptional cases, if the panel considers that it cannot present its initial report within the time period specified in paragraph 3, it shall inform the Parties in writing of

the reasons for the delay together with an estimate of when it will issue its report. Any delay shall not exceed an additional period of 30 days unless the Parties otherwise agree.

7. Panellists may present separate opinions on matters not unanimously agreed.
8. A Party may submit written comments to the panel on its initial report no later than 15 days after the date of receipt of the initial report or within another period as the Parties may agree.
9. After considering any written comments by the Parties on the initial report, the panel may modify its report and make any further examination it considers appropriate.

#### **Article 18.16: Final Report**

1. The panel shall present a final report to the Parties, including any separate opinions on matters not unanimously agreed, no later than 30 days, or 20 days in cases of urgency, after the date of receipt of the initial report, unless the Parties otherwise agree. After taking any steps to protect confidential information, and no later than 15 days after the presentation of the final report, the Parties shall release the final report to the public.
2. The panel shall not, either in its initial report or its final report, disclose which panellists are associated with majority or minority opinions.

#### **Article 18.17: Request for Clarification by the Panel**

1. No later than 10 days after the date of receipt of the final report, a Party may submit a written request for the panel to clarify any finding, determination or recommendation of the final report that it considers ambiguous. The panel shall reply to such request no later than 10 days after its submission.
2. Clarification by the panel shall not affect its findings, determinations and recommendations.
3. The submission of a request as described in paragraph 1 shall not affect the timeframes referred to in Article 18.19.

#### **Article 18.18: Implementation of Final Report**

1. The findings and determinations of the panel shall be final and binding on the Parties.

2. The Parties recognise the importance of prompt compliance with determinations made by the panel in its final report under Article 18.16 in achieving the aim of the dispute settlement procedures in this Chapter, which is to secure a positive solution to disputes.

3. If in its final report under Article 18.16 the panel determines that:

- (a) the measure at issue is inconsistent with the obligations of the responding Party in this Agreement;
- (b) the responding Party has otherwise failed to carry out its obligations in this Agreement; or
- (c) the measure at issue is causing nullification or impairment within the meaning of Article 18.3(c),

the responding Party shall eliminate the non-conformity or the nullification or impairment, unless the Parties otherwise agree pursuant to Article 18.19.1.

4. Unless the Parties otherwise agree, the responding Party shall comply with the obligations in paragraph 3 immediately, or if this is not practicable, within a reasonable period of time.

5. The Parties shall endeavour to agree on the reasonable period of time referred to in paragraph 4. If the Parties fail to agree on the reasonable period of time no later than 45 days after the presentation of the final report under Article 18.16.1, either Party may, no later than 60 days after the presentation of the final report under Article 18.16.1, refer the matter to the chair of the panel to determine the reasonable period of time through arbitration.

6. The chair of the panel shall take into consideration as a guideline that the reasonable period of time should not exceed 15 months from the presentation of the final report under Article 18.16.1. However, such reasonable period of time may be shorter or longer, depending upon the particular circumstances.

7. The chair of the panel shall determine the reasonable period of time no later than 60 days after the date of referral to the chair under paragraph 5.

8. The Parties may agree to vary the procedures set out in paragraph 5, paragraph 6 and paragraph 7 for the determination of the reasonable period of time.

#### **Article 18.19: Non-Implementation – Compensation and Suspension of Benefits**

1. The responding Party shall, if requested by the complaining Party, enter into negotiations no later than 15 days after receipt of that request, with a view to developing mutually acceptable compensation, if:

- (a) the responding Party has notified the complaining Party that it does not intend to comply with the obligations in Article 18.18.3; or
  - (b) following the expiry of the reasonable period of time established in accordance with Article 18.18, there is disagreement between the Parties as to whether the responding Party has complied with the obligations in Article 18.18.3.
2. A complaining Party may suspend benefits in accordance with paragraph 3 if the Parties have:
  - (a) been unable to agree on compensation within 30 days of the date of receipt of the request made under paragraph 1; or
  - (b) agreed on compensation but the complaining Party considers that the responding Party has failed to observe the terms of the agreement.
3. A complaining Party may, at any time after either of the conditions set out in paragraph 2 are met, provide written notice to the responding Party that it intends to suspend benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend.<sup>3</sup> The complaining Party may begin suspending benefits 30 days after the date on which it provides notice under this paragraph.
4. The right to suspend benefits arising under paragraph 3 shall not be exercised if:
  - (a) a review is being undertaken in accordance with paragraph 7; or
  - (b) an agreed solution has been reached by the Parties.
5. The level of the suspension of benefits shall be equivalent to the level of the non-compliance, nullification or impairment.
6. In considering what benefits to suspend under paragraph 3, the complaining Party shall apply the following principles and procedures:
  - (a) it should first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the panel has determined non-conformity or nullification or impairment to exist;
  - (b) if it considers that it is not practicable or effective to suspend benefits in the same sector or sectors, it may suspend benefits in a different sector or sectors. In the written notice referred to in paragraph 3, the complaining Party shall indicate the reasons on which such decision to suspend benefits is based; and

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<sup>3</sup> For greater certainty, the phrase “the level of benefits that the Party proposes to suspend” refers to the level of concessions or other obligations under this Agreement the application of which the Party proposes to suspend.

- (c) in applying the principles set out in subparagraph (a) and subparagraph (b), it shall take into account:
  - (i) the trade in the sector or sectors in which the panel has determined the non-conformity or nullification or impairment to exist, and the importance of that trade to the complaining Party;
  - (ii) that goods, all financial services covered under Chapter 9 (Financial Services), services other than such financial services, and Chapter 13 (Intellectual Property), are each distinct sectors; and
  - (iii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of benefits.

7. If the responding Party considers that:

- (a) the level of benefits proposed to be suspended is manifestly excessive pursuant to paragraph 5 or the complaining Party has failed to follow the principles and procedures set out in paragraph 6; or
- (b) it has complied with the obligations in Article 18.18.3,

it may, within 30 days of the date of delivery of the written notice provided by the complaining Party under paragraph 3, request that the panel be reconvened to consider the matter. The responding Party shall deliver its request in writing to the complaining Party. The panel shall reconvene within 30 days of the date of delivery of the request and shall present its determination to the Parties no later than 60 days after it reconvenes to review a request under subparagraph (a) or subparagraph (b), or 90 days after it reconvenes for a request under both subparagraph (a) and subparagraph (b). If the panel determines that the level of benefits the complaining Party proposes to suspend is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect pursuant to paragraph 5.

8. Unless the panel has determined that the responding Party has complied with the obligations in Article 18.18.3, the complaining Party may suspend benefits up to the level the panel has determined under paragraph 7 or, if the panel has not determined the level, the level the complaining Party has proposed to suspend under paragraph 3. If the panel determines that the complaining Party has not followed the principles and procedures set out in paragraph 6, the panel shall set out in its determination the extent to which the complaining Party may suspend benefits in which sector or sectors in order to ensure full compliance with the principles and procedures set out in paragraph 6. The complaining Party may suspend benefits only in a manner consistent with the determination of the panel.

9. Compensation and suspension of benefits shall be temporary measures. Neither compensation nor suspension is preferred to compliance with the obligations in Article 18.18.3. Compensation and suspension of benefits shall only be applied until such time the responding Party has complied with the obligations in Article 18.18.3, or until a mutually satisfactory solution is reached.

#### **Article 18.20: Compliance Review**

1. Without prejudice to the procedures in Article 18.19, if a responding Party considers that it has complied with the obligations in Article 18.18.3, it may refer the matter to the panel by providing a written notice to the complaining Party. The panel shall issue its report on the matter no later than 90 days after the responding Party provides the written notice.

2. If the panel determines that the responding Party has complied with the obligation to eliminate the non-conformity or the nullification or impairment in accordance with Article 18.18.3, the complaining Party shall promptly stop the suspension of benefits as applied in accordance with Article 18.19.

### **Section B: Private Rights and Alternative Dispute Resolution**

#### **Article 18.21: Private Rights**

Neither Party shall provide for a right of action under its law against the other Party on the ground that a measure of the other Party is inconsistent with its obligations under this Agreement, or that the other Party has otherwise failed to carry out its obligations under this Agreement.

#### **Article 18.22: Alternative Dispute Resolution**

1. Each Party shall, to the extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.

2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.

3. A Party shall be deemed to be in compliance with paragraph 2 if it is in compliance with the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on June 10, 1958.