

## **CHAPTER 18**

### **DISPUTE SETTLEMENT**

#### **Section A – Dispute Settlement**

##### **Article 18.01 Cooperation**

The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

##### **Article 18.02 Scope of Application**

Except as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply:

- a) with respect to the prevention or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement;
- b) wherever a Party considers that an actual or proposed measure of the other Party is or would be inconsistent 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 an actual or proposed measure of the other Party causes or would cause nullification or impairment in the sense of Annex 18.02.

##### **Article 18.03 Choice of Forum**

1. The disputes arising in connection with the provisions of this Agreement and the WTO Agreement or agreements negotiated in accordance with the WTO Agreement may be settled in one of those fora, as the complaining Party chooses.

2. Where a Party has requested the establishment of the arbitral panel under Article 18.07, or has requested the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO Agreement, the forum chosen shall be used to the exclusion of the other.

##### **Article 18.04 Perishable Goods**

1. On disputes regarding perishable goods<sup>1</sup>, the Parties and the panel referred to in Article 18.07 shall do everything to expedite the procedure. To this end, the Parties shall, by mutual agreement, shorten the timeframes established in this Chapter.

2. In cases of urgency, including issues regarding perishable goods, the consultations shall begin within fifteen (15) days upon receipt of the request.

#### **Article 18.05 Consultations**

1. A Party may request in writing consultations with the other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement, as referred to in Article 18.02.

2. The Party shall deliver the request to the other Party, and shall set out the reasons for the request, including an identification of the actual or proposed measure or other matter at issue, and the legal basis for the complaint.

3. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the Parties shall:

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

#### **Article 18.06 Commission – Good Offices, Conciliation and Mediation**

1. Any consulting Party may<sup>2</sup> request in writing a meeting of the Commission, if the Parties fail to resolve a matter pursuant to Article 18.04 or 18.05 within:

- a) 30 days of delivery of a request for consultations;
- b) 15 days of delivery of a request for consultations in matters regarding perishable goods; or

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<sup>1</sup> For greater certainty, the term “perishable goods” means perishable agricultural and fish goods classified in chapters 1 through 24 of the Harmonized System.

<sup>2</sup> This shall not be understood as a preliminary step needed to request the establishment of an arbitral panel, pursuant to Article 18.07.

- c) such other terms as they may agree.
2. The requesting Party shall deliver the request to the other Party and shall set out the reasons for the request, including an identification of the measure or other matter at issue, and the legal basis for the complaint.
3. Unless it decides otherwise, the Commission shall convene within ten (10) days of delivery of the request and shall endeavor to resolve the dispute promptly. The Commission may:
- a) call on technical advisers or create working groups or expert groups as it deems necessary;
  - b) resort to good offices, conciliation, mediation or other dispute resolution procedures; or
  - c) make recommendations,
- in order to assist the consulting Parties in reaching a mutually satisfactory resolution of the dispute.
4. Unless otherwise decided, pursuant to this Article, the Commission shall consolidate two or more proceedings presented for its consideration, relating to the same measure. The Commission may consolidate two or more proceedings presented for its consideration, relating to other matters whenever it deems appropriate to consider these proceedings jointly.

#### **Article 18.07      Establishment of an Arbitral Panel**

1. If the Parties fail to resolve the matter within:
- a) thirty (30) days after the Commission has convened pursuant to Article 18.06;
  - b) thirty (30) days after the Commission has convened in respect of the matter most recently referred to it, where proceedings have been consolidated pursuant to Article 18.06 (4);
  - c) fifteen (15) days after a Party has delivered a request for consultations under Article 18.05 in a matter regarding perishable goods, if the Commission has not convened pursuant to Article 18.06 (1);
  - d) thirty (30) days after a Party has delivered a request for consultations under Article 18.05, if the Commission has not convened pursuant to Article 18.06(3); or

e) such other terms as the consulting Parties may agree,

any Party that requested a meeting of the Commission in accordance with Article 18.05 may request in writing the establishment of an arbitral panel to consider the matter, and shall set out the reasons for the request, including an identification of the actual or proposed measure or other matter at issue, and the legal basis for the complaint.

2. An arbitral panel shall be established upon delivery of a request.

3. The complaining Party shall deliver the request to the other Party, and shall set out the reasons for the request, including an identification of the measure or other matter at issue and the legal basis for the complaint.

4. The Parties may consolidate two (2) or more proceedings regarding other issues whenever they deem it appropriate to consider these proceedings jointly.

5. Arbitral panel procedures shall be considered invoked when the Party complained against receives the request to establish a panel. The Parties shall adopt all necessary measures pursuant to Article 18.10 for the establishment of said panel.

6. Unless otherwise decided by the Parties, the panel shall be established and shall carry out its functions in consistency with the provisions of this Chapter.

7. Notwithstanding paragraph 1, an arbitral panel may not be established to review a proposed measure.

#### **Article 18.08            Roster**

1. Within three (3) months of the date of entry into force of this Agreement, the Parties shall establish and maintain a roster of up to twenty individual with the required qualification to serve as panelists. Said roster shall be composed of the “Roster Panelist of the Parties” and the “Roster of Panelist of Non-Party Countries”. Each Party may designate five (5) national panelists to form the “Roster of Panelists of the Parties”, and five (5) panelists of Non-Party countries to form the “Roster Panelists of Non-Party Countries”.

2. The roster of panelists may be modified every three (3) years. Notwithstanding, the Commission may revise, by request of a Party, the roster of panelists before the expiration of this period.

3. The members of the roster of panelists shall meet the qualifications set forth in Article 18.09.

#### **Article 18.09            Qualifications of the Panelists**

1. The panelists shall meet the following qualifications:
  - 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, any Party; and
  - d) comply with a Code of Conduct to be established by the Commission.
2. Individuals may not serve as panelists for a dispute in which they have participated pursuant to Article 18.06.

#### **Article 18.10      Composition of Arbitral Panel**

1. In the establishment of the arbitral panel, the Parties shall observe the following procedures:
  - a) the arbitral panel shall be composed of three members;
  - b) the Parties shall endeavor to agree on the designation of the chair of the arbitral panel within fifteen (15) days of receipt of the request for the establishment of the arbitral panel;
  - c) if the Parties do not reach an agreement within the above-mentioned timeframe, the chair shall be chosen by drawing lot from the "Roster of Panelists of Non-Party Countries";
  - d) within fifteen (15) days after the designation of the chair, each Party shall select a panelist from the "Roster of Panelists of the Parties" and the panelist selected could be of either of the Party's nationality; and
  - e) if a Party does not select a panelist, the panelist shall be chosen by drawing from the "Roster of Panelists of the Parties" and shall be of that Party's nationality.
2. Where a Party considers that a panelist has violated the Code of Conduct, the Parties shall hold consultations and decide whether to remove that panelist and select a new one pursuant to the provisions of this Article.

#### **Article 18.11      Model Rules of Procedure**

1. Upon the entry into force of this Agreement, the Commission shall establish the Model Rules of Procedure in accordance with the following principles:

- a) the procedures shall ensure the right to at least one hearing before the arbitral panel and an opportunity for each Party to provide initial and rebuttal written submissions; and
- b) the hearing before the arbitral panel, the deliberations and the preliminary report, as well as all the writings and communications presented in it shall be confidential.

2. Unless the Parties otherwise agree, the arbitral panel shall conduct its proceedings in accordance with the Model Rules of Procedure.

3. Unless the Parties otherwise agree, within twenty (20) days of receipt of the request for the establishment of the arbitral panel, the terms of reference shall be:

"To examine, in the light of the provisions of this Agreement, the matters submitted for its consideration and to make findings, decisions, and recommendations as provided in Articles 18.13 (2) and 18.14".

4. If a complaining Party claims that a matter causes nullification or impairment of benefits referred to in Annex 18.02, the terms of reference shall so indicate.

5. When a Party requests that the arbitral panel makes findings on the extent of the adverse trade effects brought upon by the measure adopted by the other Party and it is considered by the Party as inconsistent with the Agreement, or that the measure has caused nullification or impairment in the sense of Annex 18.02, the terms of reference shall state it.

#### **Article 18.12      Role of Experts**

Upon request of a Party, or *ex officio*, the arbitral panel may seek information and technical advice from any persons or institutions that it deems appropriate under the Model Rules of Procedure.

#### **Article 18.13      Preliminary Report**

1. Unless the Parties otherwise agree, the arbitral panel shall base its preliminary report on the communications and arguments presented by the Parties, as well as the relevant provisions of this Agreement and any information received, pursuant to Article 18.12.

2. Unless the Parties otherwise agree, within ninety (90) days after the last panelist is selected, the arbitral panel shall present to the Parties a preliminary report containing:

- a) findings of fact, including any findings pursuant to a request under Article 18.11 (5);
- b) a decision about whether the measure in question is or could be inconsistent with the obligations arising from this Agreement, or is a cause of nullification or impairment in the sense of Annex 18.02 or any other decision requested in the terms of reference; and
- c) its recommendations, if any, to settle the dispute.

3. Panelists may furnish separate opinion in writing on matters in which consensus has not been reached.

4. Either Party may submit written comments to the arbitral panel on its preliminary report within fourteen (14) days of presentation of the report. After considering any written comments on the preliminary report, the arbitral panel upon request of a Party, or *ex officio*, may:

- a) reconsider its report; and
- b) take any steps deemed appropriate.

#### **Article 18.14 Final Report**

1. Within thirty (30) days of the presentation of the preliminary report, unless the Parties otherwise agree, the arbitral panel shall notify the Parties of its final report reached by majority of votes, including any separate opinions, in writing, on matters in which there is no consensus.

2. No arbitral panel may, in either its preliminary report or its final report, disclose the identity of the panelists that voted with the majority or the minority.

3. Unless the Parties otherwise agree, the Parties shall release the final report to the public within fifteen (15) days of its notification to the Parties.

#### **Article 18.15 Implementation of the Final Report**

1. The final report of the arbitral panel shall be compulsory for the Parties to implement under the terms and conditions specified in it. The term of implementation shall not exceed six (6) months from the date on which the final report was notified to the Parties, unless the Parties otherwise agree.

2. When the final report of arbitral panel determines that a measure has not conformed to a Party's obligations under this Agreement, the Party complained against shall be prevented from implementing the measure or shall eliminate the non-conformity.

3. When the final report of arbitral panel determines that a measure is causing nullification or impairment in the sense of Annex 18.02, it shall indicate the level of nullification or impairment and may suggest mutually satisfactory adjustments for the Parties.

#### **Article 18.16      Suspension of Benefits**

1. Unless the Parties notify the Commission of their agreement on the final report, within fifteen (15) days after the expiration of the timeframe determined by the arbitral panel, the panel shall determine if the Party complained against has conformed to the report.

2. The complaining Party may suspend the Party complained against from the benefits arising from this Agreement that have an effect equivalent to the benefits not received, if the arbitral panel decides that:

- a) a measure is inconsistent with the obligations of this Agreement, and the Party complained against has not implemented the final report within the term established by the panel; or
- b) a measure is the cause of nullification or impairment in the sense of Annex 18.02, and the Parties do not reach a mutually satisfactory agreement of the dispute within the term established by the panel.

3. The suspension of benefits shall last until the Party complained against implements the final report or until the Parties reach a mutually satisfactory agreement of the dispute.

4. In considering what benefits to be suspended pursuant to this Article:

- a) the complaining Party should first seek to suspend benefits in the same sector or sectors that are affected by the measure, or other matter that the panel has found to be inconsistent with the obligations of this Agreement or to have caused nullification or impairment in the sense of Annex 18.02; and
- b) if the complaining Party considers not feasible or effective to suspend benefits in the same sector or sectors, it may suspend benefits in other sectors.

5. Once benefits have been suspended, the Parties, upon written request of a Party, shall establish an arbitral panel for determining if the final report has been enforced, or if the level of benefits suspended by the complaining Party is excessive to the Party



complained against, in accordance with this Article. When possible, the panel shall be composed of the same panelists who resolved the dispute.

6. When the arbitral panel established in paragraph 5 is composed of the same panelists who resolved the dispute, it shall submit a final report within thirty (30) days as of the request mentioned in paragraph 5. When the arbitral panel established in paragraph 5 is not composed of the same panelists, the panel shall submit a final report within sixty (60) days of the meeting in which it was established, or when the Parties so decide.

7. When the Party complained against cannot comply with the final report, within thirty (30) days after the arbitral panel submits the final report, the said Party may request consultations with the complaining Party to reach an agreement on alternative measures to compensate the complaining Party.

8. If an agreement on alternative measures is not reached, the complaining Party may suspend the benefits, notwithstanding the provisions established in above paragraphs 2 and 4, to the extent necessary to persuade the Party complained against to comply with the final report. In the application of this provision, the difference in the development levels of the Parties will be taken into consideration.

## **Section B – Domestic Proceedings and Settlement Of Private Commercial Disputes**

### **Article 18.17 Interpretation of the Agreement Before Judicial and Administrative Proceedings**

1. If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceedings of a Party that the other Party considers as meriting its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Party. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible.

2. The Party in whose territory the court or administrative body is located shall submit any agreed interpretation of the Commission to the court or administrative body in accordance with the rules of that forum.

3. If the Commission does not agree upon an interpretation or responses, a Party may submit its own views to the judicial or administrative proceeding in accordance with the rules of that forum.

### **Article 18.18 Private Rights**

No Party may provide for a right of action under its domestic law against the other Party on the grounds that a measure of the other Party is inconsistent with this Agreement.

## **Article 18.19      Alternative Dispute Resolution**

1. Each Party shall, to the maximum 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 established by this Agreement.
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. The Commission may establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes. The Committee shall report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use, and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area established by this Agreement.

## **ANNEX 18.02**

### **NULLIFICATION AND IMPAIRMENT**

1. A party may resort to the dispute settlement mechanism of this Chapter, when in light of the application of a measure from the other Party that does not contravene this Agreement, it considers that the benefits that might be reasonably expected are nullified or impaired in:

- a) Part Two (Trade in Goods);
- b) Part Three (Trade Barriers); or
- c) Chapter Eleven (Cross-border Trade in Services).

2. With respect to any measure subject to an exception in accordance with Article 19.02 (General Exceptions), a Party may not invoke:

- a) paragraph 1(a) or (b), to the extent that the benefit arises from any cross-border trade in services provisions of Part Two (Trade in Goods), or of Part Three (Trade Barriers); or
- b) paragraph 1 (c).

3. To determine the elements of nullification and impairment, the Parties may take into account the principles set out in the jurisprudence of paragraph 1(b) of Article XXIII of GATT 1994.