

CHAPTER 12

DISPUTE SETTLEMENT

Article 12.1: Scope and Coverage

Unless otherwise provided in this Agreement, this Chapter shall apply to the avoidance or settlement of disputes between the Parties concerning the interpretation, implementation or application of this Agreement, wherever a Party considers that:

- (a) a measure of the other Party is inconsistent with its obligations under this Agreement; or
- (b) the other Party has otherwise failed to carry out its obligations under this Agreement.

Article 12.2: Choice of Forum

1. Where a dispute regarding any matter arises under this Agreement and under another agreement to which the 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 for settling a matter, that forum shall be used to the exclusion of other fora in respect of that matter.
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 an arbitral tribunal.

Article 12.3: Consultations

1. Either Party may request for consultations with the other Party concerning the interpretation, implementation or application of this Agreement in accordance with Article 12.1, including a matter relating to a measure that the other Party proposes to take (hereinafter referred to in this Chapter as “proposed measures”).
2. A request for consultations shall be in writing setting out the reasons for the request including identification of the measure at issue and an indication of the legal basis for the complaint, and providing sufficient information to enable examination of the matter. The Party to which the request is made shall reply to the request in writing within 10 days after the date of its receipt, and shall enter into consultations within a period of no more than:

- (a) 15 days after the date of receipt of the request for matters concerning perishable goods; or
 - (b) 30 days after the date of receipt of the request for all other matters.
- 3. The Parties shall make every effort to reach a mutually satisfactory resolution of the matter through consultations.
- 4. A Party may request the other Party to make available for the consultations personnel of its government agencies or other regulatory bodies who have expertise in the matter under consultations.
- 5. Consultations shall be confidential and without prejudice to the rights of either Party in any further proceedings.

Article 12.4: Referral of Matters to the Joint Committee

- 1. If the Parties fail to resolve a matter within 60 days of the delivery of a request for consultations under paragraph 2 of Article 12.3, or 20 days in cases of urgency including those where the matter concerns perishable goods, the requesting Party may refer the matter to the Joint Committee by delivering written notification to the other Party.
- 2. The Joint Committee shall promptly meet and endeavour to reach a mutually satisfactory resolution of the dispute.
- 3. The Joint Committee may:
 - (a) call on such technical advisers or create such working groups or expert groups as it deems necessary; or
 - (b) make recommendations,as may assist the Parties to reach a mutually satisfactory resolution of the dispute.

Article 12.5: Good Offices, Conciliation and 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. If the Parties agree, good offices, conciliation or mediation may continue while the dispute proceeds for resolution before an arbitral tribunal is designated under Article 12.8.

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

Article 12.6: Establishment of Arbitral Tribunals

1. The complaining Party may request in writing for the establishment of an arbitral tribunal if:

- (a) the Party complained against does not enter into consultations within 30 days after the date of its receipt of the request for consultations under Article 12.3;
- (b) the Parties fail to resolve the matter within 60 days after the day of receipt of the request for consultations, or 30 days regarding a matter concerning perishable goods, if there is no referral to the Joint Committee under Article 12.4; or
- (c) the Parties fail to resolve the matter within 30 days after the day of the referral of the matter to the Joint Committee, or 15 days regarding a matter concerning perishable goods.

2. A Party shall not refer a matter concerning a proposed measure to an arbitral tribunal.

3. The request to establish an arbitral tribunal shall identify:

- (a) the specific measures at issue;
- (b) the legal basis of the complaint including the provisions of this Agreement alleged to have been breached or any other relevant provisions; and
- (c) the factual basis for the complaint.

4. The arbitral tribunal shall be established and perform its functions in a manner consistent with the provisions of this Chapter.

5. The date of the establishment of an arbitral tribunal shall be the date on which the chair is appointed

Article 12.7: Terms of Reference

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 of the arbitral tribunal 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 12.6, to make findings of law and fact and determinations on whether the measure is not in conformity with the Agreement and to issue a written report for the resolution of the dispute. If the Parties agree, the arbitral tribunal may make recommendations for resolution of the dispute.”

Article 12.8: Composition of Arbitral Tribunals

1. An arbitral tribunal shall consist of three arbitrators. Each Party shall appoint one arbitrator who may be its national within 30 days of the receipt of the request to establish an arbitral tribunal.
2. The Parties shall designate by common agreement the third arbitrator, who shall be the Chair of the arbitral tribunal. If a Party has not appointed an arbitrator pursuant to paragraph 1 or if the Chair of the arbitral tribunal has not been designated by the Parties within 45 days of the receipt of the request to establish an arbitral tribunal, either Party may request the Director-General of the WTO to appoint the arbitrator or arbitrators not yet appointed.
3. If the Director-General of the WTO has not appointed the arbitrator or arbitrators within 30 days after the date of the request, the arbitrator or arbitrators not yet appointed shall be chosen within 15 days by the arbitrator or arbitrators that were appointed in accordance with paragraph 1.
4. All arbitrators shall:
 - (a) have expertise or experience in law, international trade or other matters covered by this Agreement;
 - (b) be chosen strictly on the basis of objectivity, reliability and sound judgment;
 - (c) be independent of, and not be affiliated with or receive instructions from either Party; and

- (d) comply with a code of conduct, to be provided in the Rules of Procedure referred to in Article 12.15.
- 5. The Chair of the Arbitral Tribunal shall:
 - (a) not be a national of a Party;
 - (b) not have his or her usual place of residence in the territory of a Party;
 - (c) not have dealt with the matter in any capacity; and
 - (d) not be employed by either Party.
- 6. If an arbitrator appointed under this Article resigns or becomes unable to act, a successor arbitrator shall be appointed within 15 days in accordance with the appointment procedure provided for in paragraphs 1 and 2, which shall be applied, respectively, *mutatis mutandis*. The successor shall have all the powers and duties of the original arbitrator. The work of the arbitral tribunal shall be suspended for a period beginning on the date the original arbitrator resigns or becomes unable to act. The work of the arbitral tribunal shall resume on the date the successor is appointed.
- 7. Each Party shall bear the cost of its appointed arbitrator and its own expenses. The cost of the Chair of an arbitral tribunal and other expenses associated with the conduct of the proceedings shall be borne by the Parties in equal shares.

Article 12.9: Proceedings of Arbitral Tribunals

- 1. The arbitral tribunal shall deliberate in closed sessions. Unless otherwise agreed by the Parties, the arbitral tribunal hearings with the Parties shall be open to the public except where information designated as confidential by a Party is being discussed.
- 2. The Parties shall be given the opportunity to provide at least one written submission and to attend any of the presentations, statements or rebuttals in the proceedings. All information or written submissions submitted by a Party to the arbitral tribunal, including any comments on the initial report and responses to questions put by the arbitral tribunal, shall be made available to the other Party. Unless the disputing Parties otherwise agree, the arbitral tribunal proceedings shall be conducted in accordance with the Rules of Procedure for arbitral tribunals referred to in Article 12.15.
- 3. The arbitral tribunal should consult with the Parties as appropriate and provide adequate opportunities for the development of a mutually satisfactory resolution.
- 4. The arbitral tribunal shall aim to make its decisions, including its report, by consensus but may also make its decisions, including its report, by majority vote.

5. After notifying the Parties, and subject to such terms and conditions as the Parties may agree, the arbitral tribunal may seek information from any relevant source and may consult experts to obtain their opinion or advice on certain aspects of the matter. The arbitral tribunal shall provide the Parties with a copy of the information or technical advice received and an opportunity to provide comments. 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.

6. The deliberations of the arbitral tribunal and the documents submitted to it shall be kept confidential.

Article 12.10: Suspension or Termination of Proceedings

1. 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 the event of such a suspension, the time-frames set out in this Chapter shall be extended by the amount of time that the work was suspended. 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.

2. The Parties may agree to terminate the proceedings of the arbitral tribunal by jointly notifying the chair of the arbitral tribunal that a mutually agreed solution to the dispute has been found at any time before the issuance of the report to the Parties.

Article 12.11: Initial Report

1. The initial report of the arbitral tribunal shall be drafted without the presence of the Parties. The arbitral tribunal shall base its report on the relevant provisions of this Agreement and the submissions and arguments of the Parties and may take into account any other relevant information provided to the arbitral tribunal in accordance with paragraph 5 of Article 12.9.

2. Unless the Parties otherwise agree, the arbitral tribunal shall, within 120 days, or within 60 days in cases of urgency, including those which concern perishable goods, after the date of its establishment, submit to the Parties its initial report.

3. The initial report shall contain:

- (a) both the descriptive parts summarising the submissions and arguments of the Parties;
- (b) the findings;

- (c) the determination of the arbitral tribunal as to whether a disputing Party has not conformed with its obligations under this Agreement or any other determination requested in the terms of reference; and
 - (d) if the Parties agree, the arbitral tribunal may make recommendations for resolution of the dispute in its report.
4. The findings and determinations of the arbitral tribunal and, if applicable, any recommendations, cannot add to or diminish the rights and obligations of the Parties to the dispute provided in this Agreement.
5. In exceptional cases, if the arbitral tribunal considers it cannot release its initial report within 120 days or within 60 days in cases of urgency, it shall inform the disputing Parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. Any delay shall not exceed a further period of 30 days unless the Parties otherwise agree.
6. Arbitrators may furnish separate opinions on matters not unanimously agreed.
7. A Party may submit written comments to the arbitral tribunal on its initial report within 15 days of the presentation of the initial report.
8. After considering any written comments on the initial report, the arbitral tribunal may reconsider its report and make any further examination it considers appropriate.

Article 12.12: Final Report

1. The arbitral tribunal shall issue its final report, within 30 days after the date of submission of the initial report. The report shall include any separate opinions on matters not unanimously agreed, not disclosing which arbitrators are associated with majority or minority opinions.
2. The final report of the arbitral tribunal shall be available to the public within 15 days after the date of issuance, subject to the requirement to protect confidential information.
3. The report of the arbitral tribunal shall be final and binding on the Parties.

Article 12.13: Implementation

1. The Party complained against shall immediately eliminate the non-conformity as determined in the report of the arbitral tribunal, or if this is not practicable, within a reasonable period of time. The reasonable period of time shall be mutually determined by the Parties, or where the Parties fail to agree on the reasonable period of time within

45 days of the issuance of the arbitral tribunal's final report, either Party may refer the matter to an arbitral tribunal, as provided for in paragraph 7 of Article 12.14 which shall determine the reasonable period of time.

2. Where there is disagreement between the Parties as to whether the Party complained against has eliminated the non-conformity as determined in the report of the arbitral tribunal within the reasonable period of time as determined pursuant to paragraph 1, either Party may refer the matter to an arbitral tribunal as provided for in paragraph 7 of Article 12.14.

Article 12.14: Non-Implementation

1. If the Party complained against notifies the complaining Party that it is impracticable to comply, or the arbitral tribunal to which the matter is referred pursuant to paragraph 2 of Article 12.13 confirms that the Party complained against has failed to eliminate the non-conformity as determined in the report of the arbitral tribunal within the reasonable period of time that Party shall, if so requested, enter into negotiations with the complaining Party with a view to reaching a mutually satisfactory compensation.

2. If there is no agreement on satisfactory compensation within 20 days after the date of receipt of the request mentioned in paragraph 1, the complaining Party may suspend the concessions or other obligations under this Agreement, after giving 30 days advance notification of such suspension to the Party complained against. Such notification may only be given 20 days after the date of receipt of the request mentioned in paragraph 1.

3. The compensation referred to in paragraph 1 and the suspension referred to in paragraph 2 shall be temporary measures. Neither compensation nor suspension is preferred to full elimination of the non-conformity as determined in the report of the arbitral tribunal. The suspension shall only be applied until such time as the non-conformity is fully eliminated, or a mutually satisfactory solution is reached.

4. In considering what concessions or other obligations to suspend under paragraph 2:

- (a) the complaining Party should first seek to suspend concessions or other obligations in the same sector or sectors as that affected by the measure that the arbitral tribunal has found to be inconsistent with this Agreement; and
- (b) the complaining Party may suspend concessions or other benefits in other sectors if it considers that it is not practicable or effective to suspend in the same sector. The notification of such suspension pursuant to paragraph 2 shall indicate the reasons on which it is based.

5. The level of suspension referred to in paragraph 2 shall be equivalent to the level of the nullification or impairment.

6. If the Party complained against considers that the requirements for the suspension of concessions or other obligations by the complaining Party set out in paragraphs 2 to 5 have not been met, it may refer the matter to an arbitral tribunal.

7. The arbitral tribunal that is established for the purposes of this Article or Article 12.13 shall, wherever possible, will have, as its arbitrators, the arbitrators of the original arbitral tribunal. If this is not possible, then the arbitrators to the arbitral tribunal that is established for the purposes of this Article or Article 12.13 shall be appointed pursuant to Article 12.8. The arbitral tribunal established under this Article or Article 12.13 shall issue its report within 60 days after the date when the matter is referred to it. When the arbitral tribunal considers that it cannot issue its report within the aforementioned 60 days period, it may extend that period for a maximum of 30 days with the consent of the Parties. The report shall be available to the public within 15 days after the date of issuance, subject to the requirement to protect confidential information. The report shall be final and binding on the Parties.

Article 12.15: Rules of Procedure

The Joint Committee shall adopt the Rules of Procedure which provide for the details of the rules and procedures of arbitral tribunals established under this Chapter, upon the entry into force of this Agreement. Unless the Parties otherwise agree, the arbitral tribunal shall follow the Rules of Procedure adopted by the Joint Committee and may, after consulting the Parties, adopt additional rules of procedure not inconsistent with the rules adopted by the Joint Committee.

Article 12.16: Application and Modification of Rules and Procedures

Any time period, or other rules and procedures for arbitral tribunals provided for in this Chapter, including the Rules of Procedure referred to in Article 12.15, may be modified by mutual consent of the Parties. The Parties may also agree at any time not to apply any provision of this Chapter.