

## PART III

## DISPUTE AVOIDANCE AND SETTLEMENT

## CHAPTER 1

*Objective and scope*

## Article 47

**Objective**

The objective of this Part is to avoid and settle any dispute between the EC Party and the Pacific States with a view to arriving at a mutually agreed solution.

## Article 48

**Scope**

1. This Part shall apply to any dispute concerning the interpretation and application of this Agreement except where otherwise expressly provided for in this Agreement.

2. Notwithstanding paragraph 1, the procedure set out in Article 98 of the Cotonou Agreement shall be applicable in the event of a dispute concerning development finance cooperation as provided for by the Cotonou Agreement.

## CHAPTER 2

*Consultations and mediation*

## Article 49

**Consultations**

1. The Parties shall endeavour to resolve any dispute referred to in Article 48 by entering into consultations in good faith with the aim of reaching an agreed solution.

2. A Party shall seek consultations by means of a written request to the other Party, copied to the Trade Committee, identifying the measure at issue and the provisions of the Agreement that it considers the measure not to be in conformity with.

3. Consultations shall be held within 40 days of the date of the submission of the request. The consultations shall be deemed concluded within 60 days of the date of the submission of the request, unless both Parties to the dispute agree to continue consultations. All information disclosed during the consultations shall remain confidential.

4. Consultations on matters of urgency, including those regarding perishable or seasonal goods shall be held within 15 days of the date of the submission of the request, and shall be deemed concluded within 30 days of the date of the submission of the request.

5. If consultations are not held within the timeframes laid down in this Article, or if consultations have been concluded and no agreement has been reached on a mutually agreed solution, the complaining Party may request the establishment of an arbitration panel in accordance with Article 51.

## Article 50

**Mediation**

1. If consultations fail to produce a mutually agreed solution, the Parties to the dispute may, by agreement, seek recourse to a mediator. Unless the Parties to the dispute agree otherwise, the terms of reference for the mediation shall be the matter referred to in the request for consultations.

2. Unless the Parties to the dispute agree on a mediator within ten days of the date of the agreement to request mediation, the presiding co-chair of the Trade Committee, or his or her delegate, shall select by lot a mediator from the pool of individuals who are on the list referred to in Article 65 and are not nationals of either Party to the dispute. The selection shall be made within 20 days of the date of the submission of agreement to request mediation and in the presence of a representative of each Party to the dispute. The mediator will convene a meeting with the Parties to the dispute no later than 30 days after being selected. The mediator shall receive the submissions of each Party to the dispute no later than 15 days before the meeting and notify an opinion no later than 45 days after having been selected.

3. The mediator's opinion may include a recommendation on how to resolve the dispute consistent with the provisions of this Agreement. The mediator's opinion is non-binding.

4. The Parties to the dispute may agree to amend the time limits referred to in paragraph 2. The mediator may also decide to amend these time limits upon request of any of the Parties to the dispute or on his own initiative, given the particular difficulties experienced by the Party concerned or the complexities of the case.

5. The proceedings involving mediation, in particular all information disclosed and positions taken by the Parties to the dispute during these proceedings shall remain confidential.

## CHAPTER 3

**Dispute settlement procedures**

## Section I

**Arbitration procedure**

## Article 51

**Initiation of the arbitration procedure**

1. Where the Parties to the dispute have failed to resolve the dispute by recourse to consultations as provided for in Article 49, and, if applicable, by recourse to mediation as provided for in Article 50, the complaining Party may request the establishment of an arbitration panel.

2. The request for the establishment of an arbitration panel shall be made in writing to the Party complained against and the Trade Committee. The complaining Party or Pacific State shall identify in its request the specific measures at issue, and it shall explain how such measures constitute a breach of the provisions of this Agreement.

## Article 52

**Establishment of the arbitration panel**

1. An arbitration panel shall be composed of three arbitrators.
2. Within ten days of the date of the submission of the request for the establishment of an arbitration panel to the Trade Committee, the Parties to the dispute shall consult each other in order to reach an agreement on the composition of the arbitration panel.
3. In the event that the Parties to the dispute are unable to agree on its composition within the time frame laid down in paragraph 2, either Party may request the presiding co-chair of the Trade Committee, or her or his delegate, to select all three members by lot from the list established under Article 65, one among the individuals proposed by the complaining Party or Pacific State, one among the individuals proposed by the Party or Pacific State complained against and one among the individuals selected by the Parties to act as chairperson. Where the Parties agree on one or more of the members of the arbitration panel, any remaining members shall be selected by the same procedure.

## Section II

**Compliance**

## Article 55

**Compliance with the arbitration panel ruling**

Each Party to the dispute or as the case may be, the relevant Pacific State shall take any measure necessary to comply with the arbitration panel ruling, and the Parties to the dispute will endeavour to agree on the period of time to comply with the ruling.

4. The presiding co-chair of the Trade Committee, or her or his delegate, shall select the arbitrators within five days of the request referred to in paragraph 3 by either Party and in the presence of a representative of each Party.

5. The date of establishment of the arbitration panel shall be the date on which the three arbitrators are selected.

## Article 53

**Interim panel report**

The arbitration panel shall notify to the Parties an interim report containing both the descriptive section and its findings and conclusions, as a general rule, not later than 120 days from the date of establishment of the arbitration panel. Any Party to the dispute may submit written comments to the arbitration panel on precise aspects of its interim report within 15 days of the notification of the report.

## Article 54

**Arbitration panel ruling**

1. The arbitration panel shall notify its ruling to the Parties to the dispute and to the Trade Committee within 150 days from the date of the establishment of the arbitration panel. Where it considers that this deadline cannot be met, the chairperson of the arbitration panel must notify the Parties to the dispute and the Trade Committee in writing, stating the reasons for the delay and the date on which the panel plans to conclude its work. Under no circumstances should the ruling be notified later than 180 days from the date of the establishment of the arbitration panel.
2. In cases of urgency, including those involving perishable and seasonal goods, the arbitration panel shall make every effort to notify its ruling within 75 days from the date of its establishment. Under no circumstance should it take longer than 90 days from its establishment. The arbitration panel may give a preliminary ruling within 10 days of its establishment on whether it deems the case to be urgent.

## Article 56

**The reasonable period of time for compliance**

1. No later than 30 days after the notification of the arbitration panel ruling to the Parties to the dispute, the Party complained against shall notify the complaining Party and the Trade Committee of the time it will require for compliance (reasonable period of time).

2. If there is disagreement between the Parties to the dispute on the reasonable period of time to comply with the arbitration panel ruling, the complaining Party shall, within 20 days of the notification made under paragraph 1, request in writing the arbitration panel to determine the length of the reasonable period of time. Such request shall be notified simultaneously to the other Party to the dispute and to the Trade Committee. The arbitration panel shall notify its ruling to the Parties to the dispute and to the Trade Committee within 30 days from the date of the submission of the request.

3. The arbitration panel shall, in determining the length of the reasonable period of time, take into consideration the length of time that it will normally take the Party complained against or, as the case may be, the relevant Pacific State to adopt comparable legislative or administrative measures to those identified by such Party or as the case may be, the relevant Pacific State as being necessary to ensure compliance. The arbitration panel shall also take into consideration capacity constraints which may affect the defending Party's adoption of the necessary measures.

4. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures set out in Article 52 shall apply. The time limit for notifying the ruling shall be 45 days from the date of the submission of the request referred to in paragraph 2.

5. The reasonable period of time may be extended by agreement of the Parties to the dispute.

#### *Article 57*

##### **Review of any measure taken to comply with the arbitration panel ruling**

1. The Party complained against shall notify the other Party and the Trade Committee before the end of the reasonable period of time of any measure that it has taken to comply with the arbitration panel ruling.

2. In the event that there is disagreement between the Parties to the dispute concerning the compatibility of any measure notified under paragraph 1, with the provisions of this Agreement, the complaining Party may request in writing the arbitration panel to rule on the matter. Such request shall identify the specific measure at issue and it shall explain how such measure is incompatible with the provisions of this Agreement. The arbitration panel shall notify its ruling within 90 days of the date of the submission of the request. In cases of urgency, including those involving perishable and seasonal goods, the arbitration panel shall notify its ruling within 45 days of the date of the submission of the request.

3. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures set out in Article 52 shall apply. The time limit for notifying the ruling shall be 105 days from the date of the submission of the request referred to in paragraph 2.

#### *Article 58*

##### **Temporary remedies in case of non-compliance**

1. If the Party or Pacific State concerned fails to notify any measure taken to comply with the arbitration panel ruling before the expiry of the reasonable period of time, or if the arbitration panel rules that the measure notified under Article 57, paragraph 1 is not compatible with the provisions of this Agreement, the Party complained against or, as the case may be, the relevant Pacific State shall, if so requested by the complaining Party or Pacific State, present an offer for compensation. Such compensation may include or consist of financial compensation although nothing in this Agreement shall oblige the Party complained against, or as the case may be, the relevant Pacific State, to offer such financial compensation.

2. If no agreement on compensation is reached within 30 days of the end of the reasonable period of time or of the arbitration panel's ruling under Article 57 that a measure taken to comply is not compatible with the provisions of this Agreement, the complaining Party or Pacific State shall be entitled, upon notification to the other Party, to adopt appropriate measures. Such measures may be adopted either by the complaining Party, or as the case may be, the relevant Pacific State.

3. In adopting appropriate measures, the complaining Party, or as the case may be, the relevant Pacific State, shall select measures proportionate to the violation that least affect the attainment of the objectives of this Agreement and shall take into consideration their impact on the economy or development of the Party or individual Pacific States complained against.

4. The EC Party shall exercise due restraint in adopting appropriate measures pursuant to paragraphs 1 and 2 of this Article, in particular, where the failure to comply with the Agreement stems from capacity constraints.

5. Compensation or appropriate measures shall be temporary and shall be applied only until any measure found to violate the provisions of this Agreement has been withdrawn or amended so as to bring it into conformity with those provisions or until the Parties have agreed to settle the dispute.

#### *Article 59*

##### **Review of any measure taken to comply after the adoption of appropriate measures**

1. The Party or Pacific State complained against shall notify the other Party or Pacific State to the dispute and the Trade Committee of any measure it has taken to comply with the ruling of the arbitration panel and of its request for an end to application of appropriate measures by the complaining Party or Pacific State.

2. If the Parties to the dispute do not reach an agreement on the compatibility of the notified measure with the provisions of this Agreement within 30 days of the date of the submission of the notification, the complaining Party or Pacific State shall request in writing the arbitration panel to rule on the matter. Such request shall be notified to the other Party or Pacific State to the dispute and to the Trade Committee. The arbitration panel ruling shall be notified to the Parties to the dispute and to the Trade Committee within 45 days of the date of the submission of the request. If the arbitration panel rules that any measure taken to comply is not in conformity with the provisions referred to in this Agreement, the arbitration panel will determine whether the complaining Party or, as the case may be, the relevant Pacific State can

continue to apply appropriate measures. If the arbitration panel rules that any measure taken to comply is in conformity with the provisions of this Agreement, the appropriate measures shall be terminated.

3. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures laid down in Article 52 shall apply. The period for notifying the ruling shall be 60 days from the date of the submission of the request referred to in paragraph 2.

### Section III

#### Common provisions

##### Article 60

##### Mutually agreed solution

The Parties to the dispute may reach an agreed solution to a dispute under Part III at any time. They shall notify the Trade Committee of any such solution. Upon adoption of the mutually agreed solution, the procedure shall be terminated.

##### Article 61

##### Rules of procedure and Code of Conduct

1. Dispute settlement procedures under Part III of this Agreement shall be governed by the Rules of Procedure and the Code of Conduct which shall be adopted by the Parties.

2. The Parties may decide to modify the Rules of Procedure and the Code of Conduct.

3. Any meeting of the arbitration panel shall be open to the public in accordance with the Rules of Procedure, unless the arbitration panel decides otherwise on its own motion or at the request of the Parties to the dispute.

##### Article 62

##### Information and technical advice

At the request of a Party to the dispute, or upon its own initiative, the arbitration panel may obtain information from any source, including the Parties involved in the dispute, it deems appropriate for the arbitration panel proceeding. The arbitration shall also have the right to seek the relevant opinion of experts as it deems appropriate. Interested parties are authorised to submit amicus curiae briefs to the arbitration panels in accordance with the Rules of Procedure. Any information obtained in this manner must be disclosed to each of the Parties to the dispute and submitted for their comments.

##### Article 63

##### Languages of the submissions

1. The written and oral submissions of the Parties to the dispute shall be made in any of the official languages of the Parties.

2. The Parties shall endeavour to agree on a common working language for any specific proceedings under this Part. If the Parties are unable to agree on a common working language, each Party or Pacific State shall arrange for and bear the costs of the translation of its submitted documents and interpretation at the hearings into the language chosen by the Party or Pacific State complained against, unless such language is an official language of that Party or Pacific State <sup>(1)</sup>.

##### Article 64

##### Arbitration panel rulings

1. The arbitration panel shall make every effort to take any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by majority vote.

2. The ruling shall set out the findings of fact, the applicability of the relevant provisions of this Agreement and the reasoning behind any findings and conclusions that it makes. The Trade Committee shall make the arbitration panel rulings publicly available unless it decides not to do so.

<sup>(1)</sup> The official language of the Pacific States is English and the official languages of the EC Party are those indicated in Article 81.

## CHAPTER 4

**General provisions***Article 65***List of arbitrators**

1. The Trade Committee shall, not later than three months after the provisional application of this Agreement, establish a list of 15 individuals who are willing and able to serve as arbitrators. Each of the Parties shall select five individuals to serve as arbitrators. The two Parties shall also agree on five individuals who are not nationals of either Party and who shall act as chairpersons of the arbitration panel. The Trade Committee will ensure that the list is always maintained at this level.

2. Arbitrators shall have specialised knowledge or experience of law and international trade. They shall be independent, serve in their individual capacities and not take instructions from any organisation or government, or be affiliated with the government of any of the Parties, and shall comply with the Code of Conduct annexed to the Rules of Procedures.

*Article 66***Relation with WTO obligations**

1. Arbitration bodies set up under this Agreement shall not arbitrate disputes on each Party's or, as the case may be, the relevant Pacific State's rights and obligations under the Agreement establishing the WTO.

2. Recourse to the dispute settlement provisions of this Agreement shall be without prejudice to any action in the WTO framework, including dispute settlement action. However, where a

Party, or as the case may be, the relevant Pacific State has, with regard to a particular measure, instituted a dispute settlement proceeding, either under Article 51(1) of this Agreement or under the WTO Agreement, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has ended. For purposes of this paragraph, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's or, as the case may be, Pacific State's request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO.

3. Nothing in this Agreement shall preclude a Party or Pacific State from implementing the suspension of obligations authorised by the Dispute Settlement Body of the WTO. Nothing in the WTO Agreement shall preclude Parties from suspending benefits under this Agreement.

*Article 67***Time-limits**

1. All time limits laid down in this Part, including the limits for the arbitration panels to notify their rulings, shall be counted in calendar days from the day following the act or fact to which they refer.

2. Any time limit referred to in this Part may be extended by mutual agreement of the Parties to the dispute.

## PART IV

**INSTITUTIONAL PROVISIONS***Article 68***Trade Committee**

1. A Trade Committee is hereby established that is composed of representatives of the Parties.

2. The Trade Committee shall establish its rules of procedure and be co-chaired by a representative of the EC Party and a representative from the Pacific States. The two co-chairs shall alternate in presiding the meetings. Whoever is presiding a meeting shall be considered 'presiding co-chair' for the purposes of this Agreement until the moment in time when the next meeting commences and the role of a presiding co-chair shall be assumed by the other Party.

3. The Trade Committee shall deal with all matters necessary for the implementation of this Agreement.

4. In the performance of its functions, the Trade Committee may:

- (a) set up and oversee any special committees or bodies necessary for the implementation of this Agreement;
- (b) meet at any time agreed by the Parties;
- (c) consider any issues under this Agreement and take appropriate action in the exercise of its functions; and
- (d) take decisions or make recommendations in cases provided for in this Agreement.

5. The Trade Committee will delegate specific implementing decision-making powers to the special committees as provided for in the relevant provisions of the Agreement, in particular the Special Committee on Customs Cooperation and Rules of Origin.