

CHAPTER 17

DISPUTE SETTLEMENT

Article 17.1

Scope

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

- (a) a measure of the other Party is inconsistent with its obligations under this Agreement;
- (b) the other Party has otherwise failed to carry out its obligations under this Agreement; or
- (c) a benefit the Party could reasonably have expected to accrue to it under this Agreement is being nullified or impaired as a result of a 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 Preamble of this Agreement.

3. Should any matter arise regarding the implementation, interpretation or application of Chapter 14 (Environment), it will be resolved through the procedures provided in Article 14.5.

4. Neither Party may have recourse to procedures provided under this Chapter for any matter arising under Chapter 13 (Competition).

Article 17.2

Choice of Dispute Settlement Procedure

1. Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which both Parties are party or the *WTO Agreement*, the complaining Party may select the dispute settlement procedure in which to settle the dispute.

2. Once the complaining Party has requested the establishment of a panel under an agreement referred to in paragraph 1, the dispute settlement procedure selected shall be used to the exclusion of the others.

3. 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 17.3

Consultations

1. Either Party may request in writing consultations with the other Party concerning any matter on the implementation, interpretation or application of this Agreement.

2. The requesting Party shall deliver the request to the other Party, 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 an examination of the matter.

3. The Party to which the request is made shall enter into consultations in good faith, with a view to reaching a mutually satisfactory resolution, 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 arrive at a mutually satisfactory resolution of the matter through consultations under this Article. In conducting the consultations, the Parties shall treat any information exchanged in the course of consultations which is designated by a Party as confidential in nature on the same basis as the Party providing the information.

5. In consultations under this Article, a Party may request the other Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.

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

Article 17.4

Good Offices, Conciliation or Mediation

1. The Parties may at any time agree to good offices, conciliation or mediation. They may begin 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 17.5

Establishment of Arbitral Panels

1. The complaining Party that requested consultations under Article 17.3 may request in writing the establishment of an arbitral panel if:
 - (a) the responding Party does not enter into consultations within the time-frames specified in Article 17.3.3 (a) or (b), or a period otherwise mutually agreed by the Parties; or
 - (b) the consultations fail to settle a dispute within 30 days after the date of receipt of the request for consultations under Article 17.3.2 in cases of urgency, including those which concern perishable goods, or 60 days after the date of such receipt regarding all other matters.
2. Any request to establish an arbitral panel pursuant to this Article shall identify:
 - (a) the specific measure at issue;
 - (b) the legal basis of the complaint, including any provision of this Agreement alleged to have been breached or whether there is a claim pursuant to Article 17.1 (c), and any other relevant provisions; and
 - (c) the factual basis for the complaint.
3. The arbitral panel shall be established and perform its functions in a manner consistent with this Chapter.
4. The date of the establishment of an arbitral panel shall be the date on which the chair is appointed.

Article 17.6

Terms of Reference of Arbitral Panels

Unless the Parties agree otherwise within 20 days from the date of receipt of the request for the establishment of the arbitral panel, the terms of reference of the arbitral panel 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 panel pursuant to Article 17.5, to make findings of law and fact, procedural rulings and determinations on whether the measure is not in conformity with this Agreement or is causing nullification or impairment in the sense of Article 17.1 (c) together with the reasons therefore, and to issue a written report for the resolution of the dispute. The arbitral panel may make recommendations for resolution of the dispute.”

Article 17.7

Composition of Arbitral Panels

1. An arbitral panel shall comprise 3 panelists.
2. Each Party shall, within 30 days after the date of receipt of the request for the establishment of an arbitral panel, appoint 1 panelist who may be a natural person of such Party and propose up to 3 candidates to serve as the third panelist who shall be the chair of the arbitral panel. The third panelist shall be a national of a non-Party and shall not 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 third panelist within 45 days after the date of receipt of the request for the establishment of an arbitral panel, taking into account the candidates proposed pursuant to paragraph 2.
4. If a Party has not appointed a panelist pursuant to paragraph 2 or if the Parties fail to agree on and appoint the third panelist pursuant to paragraph 3, the panelist or panelists not yet appointed shall be chosen within 7 days by lot from the candidates proposed pursuant to paragraph 2 and be appointed accordingly.

5. All panelists shall:

- (a) have expertise or experience in law, international trade or 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 receive instructions from, the government of either Party; and
- (d) comply with a code of conduct, to be provided in the Rules of Procedure referred to in Article 17.13.

6. If a panelist appointed under this Article dies, becomes unable to act or resigns, a successor shall be appointed within 21 days from the date both Parties have received written notice of the vacancy or from the date both Parties become aware of the vacancy, whichever is the earlier, in accordance with the appointment procedure provided for in paragraphs 2, 3 and 4, which shall be applied, respectively, *mutatis mutandis*. The successor shall have all the powers and duties of the original panelist. The work of the arbitral panel shall be suspended for a period beginning on the date the original panelist dies, becomes unable to act or resigns. The work of the arbitral panel shall resume on the date the successor is appointed.

Article 17.8

Proceedings of Arbitral Panels

1. The arbitral panel shall meet in closed session, unless the Parties decide otherwise. If the Parties decide that the panel meeting is open to the public, part of the meeting may however be held in closed session, if the arbitral panel, on application by either Party, so decides for good reasons. In particular, the arbitral panel shall meet in closed session when the submissions and arguments of a Party contain business confidential information.

2. The Parties shall be given the opportunity to provide at least 1 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 panel, including any comments on the draft report and responses to questions put by the arbitral panel, shall be made available to the other Party.

3. The arbitral panel shall consult with the Parties as appropriate and provide adequate opportunities for the development of a mutually satisfactory resolution.

4. The arbitral panel 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 if any within 10 days after such notification, the arbitral panel may seek information from any relevant source and may consult experts to obtain their opinion or advice on certain aspects of the matter. The panel shall provide the Parties with a copy of any advice or opinion obtained and an opportunity to provide comments. Where the arbitral panel 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 panel and the documents submitted to it shall be kept confidential.

7. Notwithstanding paragraph 6, either Party may make public statements as to its views regarding the dispute, but shall treat as confidential, information and written submissions submitted by the other Party to the arbitral panel which that other Party has designated as confidential. Where a Party has provided information or written submissions designated to be confidential, that Party shall, within 28 days of a request of the other Party, provide a non-confidential summary of the information or written submissions which may be disclosed publicly.

8. Unless the Parties agree otherwise, each Party shall bear the cost of its appointed panelist and its own expenses. The cost of the chair of an arbitral panel shall be borne by the Parties in equal shares. Other expenses associated with the conduct of the proceedings shall be borne by the Parties in equal shares unless the arbitral panel decides otherwise.

Article 17.9

Suspension or Termination of Proceedings

1. The Parties may agree that the arbitral panel suspends 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 paragraphs 2, 5 and 7 of Article 17.10 and paragraph 7 of Article 17.12 shall be extended by the amount of time that the work of the arbitral panel was suspended. If the work of the arbitral panel has been suspended for more than 12 months, the

authority for establishment of the arbitral panel shall lapse unless the Parties agree otherwise.

2. The Parties may agree to terminate the proceedings of the arbitral panel by jointly notifying the chair of the arbitral panel at any time before the issuance of the report to the Parties.

Article 17.10

Report

1. The report of the arbitral panel shall be drafted without the presence of the Parties. The panel 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 information provided to the arbitral panel pursuant to paragraph 5 of Article 17.8.

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

3. The draft report shall contain both the descriptive part summarising the submissions and arguments of the Parties and the findings, procedural rulings and determinations of the arbitral panel. The arbitral panel may make recommendations for resolution of the dispute in its report. The findings, procedural rulings and determinations of the panel and, if applicable, any recommendations cannot add to or diminish the rights and obligations of the Parties provided in this Agreement.

4. When the arbitral panel considers that it cannot submit its draft report within the 120-day or 60-day period referred to in paragraph 2, it may extend that period with the consent of the Parties.

5. A Party may provide written comments to the arbitral panel on its draft report within 15 days after the date of submission of the draft report to the Parties.

6. After considering any written comments on the draft report, the arbitral panel may reconsider its draft report and make any further examination it considers appropriate.

7. The arbitral panel shall issue its final report, within 30 days after the date of submission of the draft report to the Parties. The report shall include any separate opinions on matters not unanimously agreed, not disclosing which panelists are associated with majority or minority opinions.

8. The final report of the arbitral panel shall be made available to the public within 15 days after the date of its issuance, subject to the requirement to protect confidential information.

9. The report of the arbitral panel, other than any recommendations made, shall be final and binding on the Parties.

Article 17.11

Implementation of the Report

1. Unless the Parties agree otherwise, the Party complained against shall eliminate the non-conformity with this Agreement or the nullification or impairment in the sense of Article 17.1 (c) as determined in the final report of the arbitral panel, immediately, or if this is not practicable, within a reasonable period of time.

2. The Parties shall continue to consult at all times on the possible development of a mutually satisfactory resolution.

3. The reasonable period of time referred to in paragraph 1 shall be mutually determined by the Parties. The reasonable period of time should not exceed 12 months from the date of the issuance of the arbitral panel's final report to the Parties unless the Parties agree otherwise. Where the Parties fail to agree on the reasonable period of time within 45 days after the date of issuance of the final report of the arbitral panel referred to in Article 17.10, either Party may refer the matter to an arbitral panel as provided for in Article 17.12.7, which shall determine the reasonable period of time.

4. Where there is disagreement between the Parties as to whether the Party complained against eliminated the non-conformity or the nullification or impairment in the sense of Article 17.1 (c) as determined in the report of the arbitral panel within the reasonable period of time as determined pursuant to paragraph 3, either Party may refer the matter to an arbitral panel as provided for in Article 17.12.7.

Article 17.12

Non-Implementation – Compensation and Suspension of Concessions or Other Obligations

1. If the Party complained against notifies the complaining Party that it is impracticable, or the arbitral panel to which the matter is referred pursuant to Article 17.11.4 confirms that the Party complained against has failed, to eliminate the non-conformity with this Agreement or the nullification or impairment in the sense of Article 17.1 (c) as determined in the final report of

the arbitral panel within the reasonable period of time as determined pursuant to Article 17.11.3, the Party complained against shall, if so requested, enter into negotiations with the complaining Party with a view to reaching 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 application to the Party complained against of concessions or other obligations under this Agreement, after giving notification of such suspension 30 days in advance. Such notification may only be given after the 20-day period has lapsed. Concessions or other obligations under this Agreement shall not be suspended while the complaining Party is pursuing negotiations under 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 with this Agreement or the nullification or impairment in the sense of Article 17.1 (c) as determined in the final report of the arbitral panel. The suspension shall only be applied until such time as the non-conformity with this Agreement or the nullification or impairment in the sense of Article 17.1 (c) is fully eliminated, or a mutually satisfactory resolution is reached.

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

- (a) the complaining Party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the final report of the arbitral panel referred to in Article 17.10 has found the non-conformity with this Agreement or the nullification or impairment of benefits in the sense of Article 17.1 (c); and
- (b) if the complaining Party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may suspend concessions or other obligations with respect to other sectors. 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 paragraph 2, 3, 4 or 5 have not been met, it may refer the matter to an arbitral panel.

7. The arbitral panel that is established for the purposes of this Article or Article 17.11 shall have, wherever possible, as its panelists, the panelists of the original arbitral panel. If this is not possible, then the panelists to the arbitral panel that is established for the purposes of this Article or Article 17.11 shall be appointed pursuant to Article 17.7. The arbitral panel established for the purposes of this Article or Article 17.11 shall issue its report within 60 days after the date when the matter is referred to it. When the arbitral panel considers that it cannot issue its report within the aforementioned 60-day period, it may extend that period for a maximum of 30 days with the consent of the Parties. The report shall be made 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. If the arbitral panel finds that the responding Party has complied with the findings and rulings, the complaining Party shall promptly stop the suspension of benefits under Article 17.12.

Article 17.13

Rules of Procedure

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

Article 17.14

Application and Modification of Rules and Procedures

Any time period or other rules and procedures for arbitral panels provided for in this Chapter, including the Rules of Procedure referred to in Article 17.13, 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.