

CHAPTER SIXTEEN

DISPUTE SETTLEMENT

Article 16.1 **Definitions**

For the purposes of this Chapter:

- (a) **Complaining Party** means any Party that requests consultations under Article 16.5 (Consultations);
- (b) **Disputing Party or Parties** means the Party or Parties to the dispute; and
- (c) **Party complained against** means any Party to which a request for consultations is made under Article 16.5 (Consultations).

Article 16.2 **Objective**

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

Article 16.3 **Scope and Coverage**

1. Except as otherwise provided in this Agreement, this Chapter shall apply to the settlement of disputes between the Parties regarding the interpretation, implementation or application of this Agreement.
2. Subject to Article 16.4 (Choice of Forum), 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 parties.
3. For the avoidance of doubt, the Parties agree that the provisions of this Agreement shall be interpreted in accordance with the customary rules of treaty interpretation of public international law.

Article 16.4 Choice of Forum

1. Where a dispute regarding any matter arises under this Agreement and under another agreement to which the disputing Parties are party, the complaining Party may select the forum in which to address that matter.
2. The complaining Party shall notify the other Party in writing of its intention to select a particular forum before doing so.
3. Once the complaining Party has selected a particular forum for addressing a matter, that forum shall be used to the exclusion of other possible fora in respect of that matter.
4. For the purposes of this Article, a Party shall be deemed to have selected a forum when it has requested the establishment of, or referred a matter to, a dispute settlement panel or Arbitral Tribunal.

Article 16.5 Consultations

1. Each Party shall accord adequate opportunity for consultations with the other Party with respect to any matter affecting the interpretation, implementation, or application of this Agreement. Such matters shall as far as possible be settled through consultations between the Parties.
2. A request for consultations shall be in writing. The Party to which the request is made shall reply to the request in writing within ten 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 any matter through consultations. To this end, the Parties shall:
 - (a) provide sufficient information to enable a full examination of how the matter might affect the operation and application of this Agreement; and
 - (b) treat as confidential any information designated as such by the other Party providing the information.
4. The complaining Party may request the Party complained against 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 16.6 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 convened under Article 16.8 (Request for the Establishment of an Arbitral Tribunal).

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 Parties in any further proceedings.

Article 16.7 Referral to the Joint Commission

1. If a Party considers that any benefit that could have reasonably been expected to accrue to it under any provision of this Agreement is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, that Party may, in accordance with paragraph 2, have recourse to the dispute settlement procedures under this Chapter.

2. If consultations undertaken pursuant to Article 16.5 (Consultations) fail to resolve such a nullification or impairment complaint under the timeframes and circumstances set out in Article 16.8(1)(a-c) (Request for the Establishment of an Arbitral Tribunal) the complaining Party shall, by delivery of written notification to the other Party, refer the dispute to the Joint Commission in accordance with Article 15.1(3)(e) (Joint Commission) for its consideration.

Article 16.8 Request for the Establishment of an Arbitral Tribunal

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 16.5 (Consultations);

- (b) the Parties fail to resolve a dispute 30 days after the date of receipt of the request for consultations regarding a matter concerning perishable goods;
 - (c) the Parties fail to resolve a dispute 60 days after the date of receipt of the request for consultations regarding any other matter; or
 - (d) the Joint Commission fails to resolve the matter within 60 days after the delivery of the notification described in Article 16.7 (Referral to the Joint Commission) of the request for its consideration of the dispute.
2. 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.

Article 16.9 Composition and Establishment of an Arbitral Tribunal

1. The Arbitral Tribunal shall consist of three members. The complaining Party and the Party complained against shall each appoint one arbitrator within 45 days of the receipt of the request to establish an Arbitral Tribunal.
2. If either Party fails to appoint an arbitrator within such period, then the arbitrator appointed by the other Party shall act as the sole arbitrator of the Tribunal.
3. Where two arbitrators are appointed in accordance with paragraph 1, the Parties shall designate by common agreement the third arbitrator who shall chair the Arbitral Tribunal. If the chair of the Arbitral Tribunal has not been designated by the Parties within 15 days of the appointment of the second arbitrator, the two arbitrators appointed in accordance with paragraph 1 shall designate by common agreement the third arbitrator who shall chair the tribunal. If the chair of the Arbitral Tribunal has not been designated by the arbitrators within 30 days of the appointment of the second arbitrator, either Party may request the Director-General of the WTO to appoint the third arbitrator to chair the Arbitral Tribunal. The appointment shall take place within 30 days of the request.
4. The date of establishment of the Arbitral Tribunal shall be the date on which the last arbitrator is appointed.

5. All arbitrators should be objective, reliable and of sound judgement. In particular, all arbitrators 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 independent of, and not be affiliated with or take instructions from, any Party to the dispute; and
- (c) comply with the code of conduct for panellists established under the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

6. 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; and
- (c) not have dealt with the matter in any capacity.

7. If an arbitrator appointed under this Article resigns or becomes unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

8. Where an Arbitral Tribunal is reconvened under Articles 16.14(1) and (2) (Implementation) and 16.16(2) (Review), the reconvened Arbitral Tribunal shall, where possible, have the same arbitrator as the original Arbitral Tribunal. Where it is not possible, the replacement arbitrator(s) shall be appointed in the same manner as prescribed for the appointment of the original arbitrator(s) and the successor(s) shall have all the powers and duties of the original arbitrator(s).

Article 16.10 **Functions of an Arbitral Tribunal**

1. The function of an Arbitral Tribunal is to make an objective assessment of the dispute before it, including an examination of the facts of the case and the applicability of and conformity with this Agreement, and make such other findings and rulings necessary for the resolution of the dispute referred to as it thinks fit.

2. Where an Arbitral Tribunal finds that a measure is inconsistent with this Agreement, it shall include in its findings and rulings a requirement to bring the measure into conformity with this Agreement. Where an Arbitral Tribunal finds that a measure nullifies or impairs benefits, it shall include in its findings and

rulings a requirement to address the nullification or impairment through a mutually satisfactory adjustment or other mutually agreed solution.

3. The findings and rulings of the Arbitral Tribunal shall be binding on the Parties.

4. The Arbitral Tribunal shall, apart from the matters set out in Article 16.11 (Rules of Procedure), regulate its own procedures in relation to the rights of Parties to be heard and its deliberations in consultation with the Parties.

5. An Arbitral Tribunal shall take its decisions by consensus, provided that where an Arbitral Tribunal is unable to reach consensus it may take its decisions by majority vote.

Article 16.11 Rules of Procedure

1. Within 14 days of its establishment, the Arbitral Tribunal shall establish rules of procedure, which shall, *inter alia*, ensure:

- (a) a right to at least one, but no more than two, hearings before the Tribunal;
- (b) an opportunity for the complaining and responding Parties to provide initial and rebuttal submissions;
- (c) that each Party's written submissions, written versions of its oral statements and written responses to requests or questions from the Tribunal may be made public by that Party, subject to paragraph 2; and
- (d) that any other procedural elements referred to in this Chapter, or mutually agreed by the Parties to the dispute are provided for.

2. Information designated as confidential by a Party shall be treated as such by the other Party and by the Arbitral Tribunal.

3. The Arbitral Tribunal may at any time put questions to the Parties and ask them for explanations or further information, either in the course of a meeting or in writing. A Party shall respond promptly and fully to any request by an Arbitral Tribunal for such information as the Arbitral Tribunal considers necessary and appropriate. There shall be no *ex parte* communications with the Arbitral Tribunal concerning matters under consideration by it.

4. The Arbitral Tribunal shall have the right to seek information and technical advice from any individual or body which it deems appropriate. 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.

5. The reports of the Arbitral Tribunal shall be drafted without the presence of the Parties in the light of the information provided and the statements made to the Arbitral Tribunal.

6. In order to enable the Parties to have an opportunity for review and comment, the Arbitral Tribunal shall present the Parties its initial report within 90 days of the Tribunal's establishment setting out its findings of fact and its determination as to whether a disputing Party has conformed with its obligations under this Agreement or caused nullification or impairment. In exceptional cases, if the Arbitral Tribunal considers it cannot release its initial report within 90 days, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its report.

7. The Arbitral Tribunal shall present the Parties its final report within 30 days of presentation of the initial report, unless the disputing Parties otherwise agree. The final report of the Arbitral Tribunal may be made available as a public document after the elapse of ten days from the date of its release.

Article 16.12 Expenses

Each Party shall bear the costs of its appointed arbitrator and its own expenses and legal costs. The costs of the chair of the Arbitral Tribunal and other expenses associated with the conduct of its proceedings shall be borne in equal parts by both Parties.

Article 16.13 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. If the work of the Arbitral Tribunal has been suspended for more than 12 months, the authority for establishment of the Tribunal shall lapse unless the Parties agree otherwise.

2. The Parties may agree to terminate the proceedings of an Arbitral Tribunal in the event that a mutually satisfactory solution to the dispute has been found.

3. Before the Arbitral Tribunal presents its final report, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably.

Article 16.14 Implementation

1. The Party complained against shall promptly comply with the findings and rulings of the Arbitral Tribunal. Where it is not practicable to comply immediately, the Party complained against shall comply with the findings and rulings 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 release of the Arbitral Tribunal's final report, either Party to the dispute may refer the matter to the Tribunal, which shall determine the reasonable period of time following consultation with the Parties.

2. Where there is disagreement as to the existence or consistency with this Agreement of measures taken within the reasonable period of time to comply with the findings and rulings of the Arbitral Tribunal, such dispute shall be decided through recourse to the dispute settlement procedures in this Chapter, including wherever possible by resort to the original Arbitral Tribunal.¹⁴ The Arbitral Tribunal shall provide its initial report to the Parties within 60 days, and its final report 20 days thereafter. When the Arbitral Tribunal considers that it cannot provide its report within this timeframe, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

Article 16.15 Compensation and Suspension of Benefits

1. If the Party complained against fails to bring the measure found to be inconsistent with the Agreement or to have caused nullification or impairment into compliance with the findings and rulings 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 agreement on any necessary compensatory adjustment.

2. The complaining Party may suspend the application of benefits of equivalent effect to the Party complained against 30 days after the end of the reasonable period of time established in accordance with Article 16.14 (Implementation). Benefits shall not be suspended while the complaining Party is pursuing negotiations under paragraph 1.

3. Any suspension of benefits shall be restricted to benefits accruing to the other Party under this Agreement.

4. In considering what benefits to suspend under paragraph 2, the complaining Party:

¹⁴ Consultations under Article 16.5 (Consultations) are not required for these procedures.

- (a) shall first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the Arbitral Tribunal has found to be inconsistent with this Agreement or caused nullification or impairment; and
- (b) may suspend benefits in other sectors if it considers that it is not practicable or effective to suspend benefits in the same sector.

5. The suspension of benefits shall be temporary and shall only be applied until such time as it has been determined, in accordance with these procedures, that the measure found to be inconsistent with this Agreement has been brought into conformity, or the Party that must implement the Arbitral Tribunal's findings and rulings has done so, or a mutually satisfactory solution is reached.

Article 16.16 Review

1. Without prejudice to the procedures in Article 16.15 (Compensation and Suspension of Concessions), the Party complained against may request an Arbitral Tribunal to determine whether:

- (a) it has eliminated the non-conformity or nullification or impairment in accordance with the findings and rulings of the original Arbitral Tribunal; and/or
- (b) the level of benefits suspended by the complaining Party pursuant to Article 16.15(2) (Compensation and Suspension of Concessions) is excessive, taking into account any matters considered pursuant to Article 16.15(4) (Compensation and Suspension of Concessions).

2. Such matters shall be decided through recourse to the dispute settlement procedures in this Chapter, including wherever possible by resort to the original Arbitral Tribunal.¹⁵ The Arbitral Tribunal shall provide its initial report to the Parties within 60 days, and its final report 20 days thereafter. When the Arbitral Tribunal considers that it cannot provide its report within this timeframe, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

3. If the Arbitral Tribunal decides that the Party complained against has eliminated the non-conformity or the nullification or impairment, the complaining Party shall promptly reinstate any benefits it has suspended under Article 16.15 (Compensation and Suspension of Benefits). If the Arbitral Tribunal decides that the level of benefits suspended by the complaining Party is excessive, the

¹⁵ Consultations under Article 16.5 (Consultations) are not required for these procedures.

complaining Party shall modify the level of suspension of concessions accordingly.

Article 16.17
Language

1. All proceedings pursuant to this Chapter shall be conducted in the English language.
2. Any document submitted for use in any proceedings pursuant to this Agreement shall be in the English language. If any original document is not in the English language, the Party submitting it for use in the proceedings shall provide an English translation of that document.

Article 16.18
Computation of Time

Where a time period specified in this Chapter would expire on a Saturday or a Sunday, it shall be deemed to expire on the following Monday.

Article 16.19
Contact Points and Service of Documents

1. The Parties shall designate a Contact Point for this Chapter. Any request, acknowledgement, written submission or other document relating to the dispute settlement procedures in this Chapter shall be delivered to the relevant Party through its designated Contact Point.
2. Any request, written submission or other document shall be delivered by a Party or by the Arbitral Tribunal by delivery against an acknowledgement of receipt.