

CHAPTER 12 DISPUTE SETTLEMENT

Article 12.1 Objective

The objective of this Chapter is to provide an effective and efficient process for consultations and settlement of disputes arising under this Agreement and to arrive at, where possible, a mutually agreed solution.

Article 12.2 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 and application of this Agreement.
2. Subject to Article 12.3 (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.

Article 12.3 Choice of Forum

1. Where a dispute regarding the same matter arises under this Agreement and under another agreement to which the disputing Parties are party, the complaining Party may select the dispute settlement procedure in which to settle the dispute.
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 requested a Panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the other.

Article 12.4 Consultations

1. Each Party shall accord adequate opportunity for consultations with the other Party with respect to any matter affecting the interpretation and application of this Agreement. Such matters shall as far as possible be settled through consultation between the Parties.
2. The request for consultations shall be in writing. The request shall include the reasons for the request, including the identification of the measure at issue and an indication of the legal basis for the complaint, and provide sufficient information to enable an examination of the matter. A copy of the request for consultations shall be delivered to the Joint Committee. 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 any matter through consultations. Upon initiation of consultations, 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 any confidential 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. Consultations shall take place in the territory of the Party complained against, unless the Parties agree otherwise.

5. Consultations shall be confidential and without prejudice to the rights of either Party in any further proceedings.

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 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 Arbitration Panel.

3. Proceedings involving good offices, conciliation and mediation 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 12.6

Request for the Establishment of an Arbitration Panel

1. The Complaining Party may request in writing for the establishment of an Arbitration Panel, 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 12.4 (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; or

(c) the Parties fail to resolve a dispute 60 days after the date of receipt of the request for consultations regarding any other matter.

2. The request to establish an Arbitration Panel 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.
3. The establishment of an Arbitration Panel shall not be requested on any matter relating to a proposed measure.

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 Arbitration Panel, the terms of reference of the Arbitration 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 Arbitration Panel pursuant to Article 12.6 (Request for the Establishment of an Arbitration Panel), 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 Arbitration Panel may make recommendations for resolution of the dispute.”

Article 12.8 **Composition and Establishment of Arbitration Panel**

1. An Arbitration Panel shall consist of three arbitrators. Each Party shall appoint one arbitrator, who may be its national, within 30 days of the date of the receipt of the request for the establishment of the Arbitration Panel.
2. The Parties shall agree on and appoint the third arbitrator, who shall be the chairperson of the Arbitration Panel, within 45 days of the date of receipt of the request for the establishment of the Arbitration Panel. If the chair of the Arbitration Panel 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 Panel. If the chair of the Arbitration Panel 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 Arbitration Panel. In the event where the Director General of the WTO is not able to appoint the third arbitrator, for any reason, within 45 days, the Parties to the dispute shall consult each other in order to jointly appoint the third arbitrator within a further period of 30 days. During this consultation, the Parties shall take into consideration the indicative list of governmental and non-governmental panellists established by the WTO.
3. The date of establishment of an Arbitration Panel shall be the date on which the last arbitrator is appointed.

4. All arbitrators shall have specialized knowledge or experience in law, international trade or other matters relating to this Agreement or in the resolution of disputes arising under international trade agreements. They shall be independent, serve in their individual capacities and not be affiliated with, nor take instructions from any Party or organisation related to this dispute and shall comply with Annex 12-1 of this Agreement.

5. The chair of the Arbitration Panel shall not be a national of a Party, nor have his or her usual place of residence in the territory of a Party and not be employed by either Party or have dealt with the matter in any capacity.

6. Where a Party considers that an arbitrator does not comply with the requirements of Code of Conduct, the Parties shall consult and, if so agreed, they shall replace that arbitrator in accordance with paragraph 7.

7. If an arbitrator appointed under this Article becomes unable to participate in the proceeding or resigns or is to be replaced according to paragraph 6, a successor shall be selected within 10 days 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. The work of the Arbitration Panel shall be suspended for a period beginning on the date the arbitrator becomes unable to participate in the proceeding, resigns, or is to be replaced according to paragraph 6. The work of the Arbitration Panel shall resume on the date the successor is appointed.

Article 12.9

Functions and Proceedings of the Arbitration Panel

1. The function of an Arbitration Panel is to make an objective assessment of the matter 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 it.

2. Arbitration Panels shall interpret this Agreement in accordance with customary rules of interpretation of public international law.

3. Arbitration Panel meetings shall be closed to the public, unless the Parties decide otherwise.

4. 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 Arbitration Panel, including any comments on the interim report and responses to questions put by the Arbitration Panel, shall be made available to the other Party.

5. A Party asserting that a measure of the other Party is inconsistent with this Agreement shall have the burden of establishing such inconsistency. A Party asserting that a measure is subject to an exception under this Agreement shall have the burden of establishing that the exception applies.

6. The Arbitration Panel should consult with the Parties as appropriate and provide adequate opportunities for the development of a mutually satisfactory resolution.

7. The Arbitration Panel shall take its decisions by consensus. In the event where the Arbitration Panel is unable to reach a consensus, it may take its decisions by majority vote.

8. On request of a Party or on its own initiative and subject to such terms and conditions as the Parties may agree within 10 days of the date of establishment of the Arbitration Panel, the Arbitration 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 Arbitration Panel shall provide the Parties with a copy of any advice or opinion obtained and an opportunity to provide comments. Where the Arbitration Panel takes the information or technical advice into account in the preparation of its report, it shall also address any comments by the Parties on the information or technical advice.

9. The deliberations of the Arbitration Panel and the documents submitted to it shall be kept confidential.

10. Notwithstanding paragraph 9, either Party may make public statements as to its own position or submissions regarding the dispute, but shall treat as confidential, information and written submissions submitted by the other Party to the Arbitration Panel which the other Party has designated as confidential. Where a Party has provided information or written submissions designated to be confidential, that Party shall, within 30 days of a request of the other Party, provide a non-confidential summary of the information or written submissions which may be disclosed to the public.

Article 12.10 Expenses

Each Party shall bear the cost of its appointed arbitrator and its own expenses. The cost of the chairperson of an Arbitration Panel and other expenses associated with the conduct of the proceedings shall be borne by the Parties in equal shares.

Article 12.11 Arbitration Panel Report

1. The reports of the Arbitration Panel shall be drafted without the presence of the Parties. The Arbitration Panel shall base its reports 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 Arbitration Panel in accordance with paragraph 8 of Article 12.9 (Functions and Proceedings of the Arbitration Panel).

2. The Arbitration Panel shall issue to the Parties an initial report setting out the findings of facts, the applicability of the relevant provisions, the basic rationale behind any findings and its conclusions within 90 days of the date of establishment of the Arbitration Panel. Where the Arbitration Panel considers it cannot issue 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. Under no circumstances should the initial report be issued later than 120 days after the date of the establishment of the Arbitration Panel.

3. Any Party may submit written comments to the Arbitration Panel on its initial report within 14 days of its issuance. After considering any written comments by the Parties on the initial report, the Arbitration Panel may reconsider its report and make any further examination it considers appropriate.

4. The Arbitration Panel shall issue its final report to the Parties within 120 days of the date of the establishment of the Arbitration Panel. Where the Arbitration Panel considers it cannot issue its final report within 120 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. Under no circumstances should the ruling be issued later than 150 days after the date of the establishment of the Arbitration Panel.

5. The final report shall contain:

- (a) the descriptive part summarising the submissions and arguments of the Parties;
- (b) the findings of the fact;
- (c) the applicability of relevant provisions and the basic rationale behind any findings;
- (d) recommendation that the Party complained against bring the measure into conformity with the obligations under this Agreement; and
- (e) recommendations, if the Parties agree, on the means to resolve the dispute.

6. The report of the Arbitration Panel shall be final and binding on the Parties.

7. The findings and determinations of the Arbitration Panel and, if applicable, any recommendations cannot add to or diminish the rights and obligations of the Parties provided in this Agreement.

8. On matters of urgency, including those regarding perishable goods, the Arbitration Panel shall make every effort to issue its interim and final reports to the Parties within half of the respective time periods under paragraphs 2 and 4. The Arbitration Panel may give a preliminary report on whether a case is urgent.

Article 12.12

Suspension or Termination of Proceedings

1. The Parties may agree that the Arbitration Panel 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 regarding the work of the Arbitration Panel shall be extended by the amount of time that the work was suspended. If the work of the Arbitration Panel has been suspended for more than 12 months, the authority for establishment of the Arbitration Panel shall lapse unless the Parties agree otherwise. This shall not prejudice the rights of the complaining Party to request at a later stage, the establishment of an Arbitration Panel on the same subject matter.

2. The Parties may agree to terminate the proceedings of the Arbitration Panel by

jointly so notifying the chairperson of the Arbitration Panel at any time before the issuance of the report to the Parties.

Article 12.13 Implementation

1. The Party complained against shall promptly comply with the findings and rulings of the Arbitration Panel. 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 final report of the Arbitration Panel referred to in Article 12.11 (Arbitration Panel Report), either Party may refer the matter to an Arbitration Panel, which shall determine the reasonable period of time following consultation with the Parties.

2. The Party complained against shall notify to the complaining Party the implementing measures that it has taken to comply with the determinations and recommendations, if any, of the Arbitration Panel, before the expiry of the reasonable period of time agreed by the Parties or determined in accordance with paragraph 1.

3. Where there is disagreement between the Parties as to whether the Party complained against eliminated the non-conformity as determined in the report of the Arbitration Panel within the reasonable period of time as determined pursuant to paragraph 2, either Party may refer the matter to an Arbitration Panel.

4. The Arbitration Panel for the purpose of this Article shall be the Arbitration Panel as established under paragraph 2 of Article 12.15 (Review).

Article 12.14 Compensation and Suspension of Benefits

1. If the Party complained against fails to notify the implementing measures before the expiry of the reasonable period of time, or notifies the complaining Party that it is impracticable, or the Arbitration Panel to which the matter is referred pursuant to paragraph 3 of Article 12.13 (Implementation) rules that the Party complained against has failed to eliminate the non-conformity within the reasonable period of time, the Party complained against shall, if so requested by the complaining Party, 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 of the date of receipt of the request mentioned in paragraph 1, the complaining Party may, by giving notification, suspend benefits conferred on the other Party under this Agreement. Such suspension shall only take effect after 30 days of the notification.

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 Arbitration Panel referred to in Article 12.11 (Arbitration Panel Report). 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 pursuant to paragraph 2:

- (a) the complaining Party should first seek to suspend benefits with respect to the same sector(s) as that affected by the measure or other matter that the Arbitration Panel referred to in Article 12.11 (Arbitration Panel Report) has found to be inconsistent with this Agreement;
- (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; and
- (c) the level of suspension referred to in paragraph 2 shall be equivalent to the level of benefits that have been impaired.

Article 12.15 **Review**

1. Without prejudice to the procedures in Article 12.14 (Compensation and Suspension of Benefits), the Party complained against may request an Arbitration Panel to determine whether the requirements for the suspension of benefits set out in paragraph 2, 3 or 4 of Article 12.14 (Compensation and Suspension of Benefits), have not been met.

2. The Arbitration Panel that is established for the purposes of this Article or Article 12.13 (Implementation) shall have, to the extent possible, as its arbitrators, the arbitrators of the original Arbitration Panel. If this is not possible, then the arbitrators to the Arbitration Panel that is established for the purposes of this Article or Article 12.13 (Implementation) shall be appointed pursuant to Article 12.8 (Composition and Establishment of Arbitration Panel). The Arbitration Panel established under this Article or Article 12.13 (Implementation) shall issue its report to the Parties within 20 days on the reasonable period of time and 45 days on the other issues after the date when the matter is referred to it. When the Arbitration Panel considers that it cannot issue its report within the aforementioned periods, it may extend that period for a maximum of 30 days with the consent of the Parties. The report shall be final and binding on the Parties.

3. If the Arbitration Panel decides that the Party complained against has eliminated the non-conformity, the complaining Party shall promptly reinstate any benefits it has suspended under Article 12.14 (Compensation and Suspension of Benefits). If the Arbitration Panel decides that the level of benefits suspended by the complaining Party is excessive, the complaining Party shall modify the level of suspension of concessions accordingly.

Article 12.16
Rules of Procedure

1. Dispute settlement procedures under this Chapter shall be governed by Annex 12-2 of this Agreement. Arbitration Panels may, after consulting the Parties, adopt additional rules of procedure not inconsistent with this Agreement.
2. Any time period or other rules and procedures for Arbitration Panels provided for in this Chapter 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.