

## CHAPTER 28

### DISPUTE SETTLEMENT

#### Section A: Dispute Settlement

##### Article 28.1: Definitions

For the purposes of this Chapter:

**complaining Party** means a Party that requests the establishment of a panel under Article 28.7.1 (Establishment of a Panel);

**consulting Party** means a Party that requests consultations under Article 28.5.1 (Consultations) or the Party to which the request for consultations is made;

**disputing Party** means a complaining Party or a responding Party;

**panel** means a panel established under Article 28.7 (Establishment of a Panel);

**perishable goods** means perishable agricultural and fish goods classified in HS Chapters 1 through 24;

**responding Party** means a Party that has been complained against under Article 28.7 (Establishment of a Panel);

**Rules of Procedure** means the rules referred to in Article 28.13 (Rules of Procedure for Panels) and established in accordance with Article 27.2.1(f) (Functions of the Commission); and

**third Party** means a Party, other than a disputing Party, that delivers a written notice in accordance with Article 28.14 (Third Party Participation).

##### Article 28.2: Cooperation

The Parties shall at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation or application.

### **Article 28.3: Scope**

1. Unless otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply:

- (a) with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement;
- (b) when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of this Agreement or that another Party has otherwise failed to carry out an obligation under this Agreement; or
- (c) when a Party considers that a benefit it could reasonably have expected to accrue to it under Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Rules of Origin and Origin Procedures), Chapter 4 (Textile and Apparel Goods), Chapter 5 (Customs Administration and Trade Facilitation), Chapter 8 (Technical Barriers to Trade), Chapter 10 (Cross-Border Trade in Services) or Chapter 15 (Government Procurement), is being nullified or impaired as a result of the application of a measure of another Party that is not inconsistent with this Agreement.

2. No later than six months after the effective date that Members of the WTO have the right to initiate non-violation nullification or impairment complaints under Article 64 of the TRIPS Agreement, the Parties shall consider whether to amend paragraph 1(c) to include Chapter 18 (Intellectual Property).

3. An instrument entered into by two or more Parties in connection with the conclusion of this Agreement:

- (a) does not constitute an instrument related to this Agreement within the meaning of paragraph 2(b) of Article 31 of the *Vienna Convention on the Law of Treaties*, done at Vienna on May 23, 1969 and shall not affect the rights and obligations under this Agreement of Parties which are not party to the instrument; and
- (b) may be subject to the dispute settlement procedures under this Chapter for any matter arising under the instrument if that instrument so provides.

### **Article 28.4: Choice of Forum**

1. If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party,

including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. Once a complaining Party has requested the establishment of, or referred a matter to, a panel or other tribunal under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of other fora.

#### **Article 28.5: Consultations**

1. Any Party may request consultations with any other Party with respect to any matter described in Article 28.3 (Scope). The Party making the request for consultations shall do so in writing, and shall set out the reasons for the request, including identification of the actual or proposed measure<sup>1</sup> or other matter at issue and an indication of the legal basis for the complaint. The requesting Party shall circulate the request concurrently to the other Parties through the overall contact points designated under Article 27.5.1 (Contact Points).

2. The Party to which a request for consultations is made shall, unless the consulting Parties agree otherwise, reply in writing to the request no later than seven days after the date of its receipt of the request.<sup>2</sup> That Party shall circulate its reply concurrently to the other Parties through the overall contact points and enter into consultations in good faith.

3. A Party other than a consulting Party that considers it has a substantial interest in the matter may participate in the consultations by notifying the other Parties in writing no later than seven days after the date of circulation of the request for consultations. The Party shall include in its notice an explanation of its substantial interest in the matter.

4. Unless the consulting Parties agree otherwise, they shall enter into consultations no later 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.

5. Consultations may be held in person or by any technological means

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<sup>1</sup> The Parties shall, in the case of a proposed measure, make every effort to make the request for consultation under this provision within 60 days of the date of publication of the proposed measure, without prejudice to the right to make such request at any time.

<sup>2</sup> For greater certainty, if the Party to which a request for consultations is made does not reply within the time period specified in this paragraph, it shall be deemed to have received the request seven days after the date on which the Party making the request for consultations transmitted that request.

available to the consulting Parties. If the consultations are held in person, they shall be held in the capital of the Party to which the request for consultations was made, unless the consulting Parties agree otherwise.

6. The consulting Parties shall make every attempt to reach a mutually satisfactory resolution of the matter through consultations under this Article. To this end:

- (a) each consulting Party shall provide sufficient information to enable a full examination of how the actual or proposed measure might affect the operation or application of this Agreement; and
- (b) a Party that participates in the consultations shall treat any information exchanged in the course of the consultations that is designated as confidential on the same basis as the Party providing the information.

7. In consultations under this Article, a consulting Party may request that another consulting Party make available personnel of its government agencies or other regulatory bodies who have expertise in the matter at issue.

8. Consultations shall be confidential and without prejudice to the rights of any Party in any other proceedings.

#### **Article 28.6: Good Offices, Conciliation and Mediation**

1. Parties may at any time agree to voluntarily undertake an alternative method of dispute resolution, such as good offices, conciliation or mediation.

2. Proceedings that involve good offices, conciliation or mediation shall be confidential and without prejudice to the rights of the Parties in any other proceedings.

3. Parties participating in proceedings under this Article may suspend or terminate those proceedings at any time.

4. If the disputing Parties agree, good offices, conciliation or mediation may continue while the dispute proceeds for resolution before a panel established under Article 28.7 (Establishment of a Panel).

#### **Article 28.7: Establishment of a Panel**

1. A Party that requested consultations under Article 28.5.1 (Consultations) may request, by means of a written notice addressed to the responding Party, the establishment of a panel if the consulting Parties fail to resolve the matter within:

- (a) a period of 60 days after the date of receipt of the request for consultations under Article 28.5.1 (Consultations);
  - (b) a period of 30 days after the date of receipt of the request for consultations under Article 28.5.1 (Consultations) in a matter regarding perishable goods; or
  - (c) any other period as the consulting Parties may agree.
2. The complaining Party shall circulate the request concurrently to all Parties through the overall contact points designated under Article 27.5.1 (Contact Points).
3. The complaining Party shall include in the request to establish a panel an identification of the measure or other matter at issue and a brief summary of the legal basis of the complaint sufficient to present the problem clearly.
4. A panel shall be established upon delivery of the request.
5. Unless the disputing Parties agree otherwise, the panel shall be composed in a manner consistent with this Chapter and the Rules of Procedure.
6. If a panel has been established regarding a matter and another Party requests the establishment of a panel regarding the same matter, a single panel should be established to examine those complaints whenever feasible.
7. A panel shall not be established to review a proposed measure.

#### **Article 28.8: Terms of Reference**

1. Unless the disputing Parties agree otherwise no later than 20 days after the date of delivery of the request for the establishment of a panel, the terms of reference shall be to:
- (a) examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel); and
  - (b) make findings and determinations, and any jointly requested recommendations, together with its reasons therefor, as provided for in Article 28.17.4 (Initial Report).
2. If, in its request for the establishment of a panel, a complaining Party claims that a measure nullifies or impairs benefits within the meaning of Article 28.3.1(c) (Scope), the terms of reference shall so indicate.

## **Article 28.9: Composition of Panels**

1. A panel shall be composed of three members.
2. Unless the disputing Parties agree otherwise, they shall apply the following procedures to compose a panel:
  - (a) Within a period of 20 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel), the complaining Party or Parties, on the one hand, and the responding Party, on the other, shall each appoint a panellist and notify each other of those appointments.
  - (b) If the complaining Party or Parties fail to appoint a panellist within the period specified in subparagraph (a), the dispute settlement proceedings shall lapse at the end of that period.
  - (c) If the responding Party fails to appoint a panellist within the period specified in subparagraph (a), the complaining Party or Parties shall select the panellist not yet appointed:
    - (i) from the responding Party's list established under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists);
    - (ii) if the responding Party has not established a list under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists), from the roster of panel chairs established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists); or
    - (iii) if the responding Party has not established a list under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists) and no roster of panel chairs has been established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists), by random selection from a list of three candidates nominated by the complaining Party or Parties,  
  
no later than 35 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel).
  - (d) For appointment of the third panellist, who shall serve as chair:
    - (i) the disputing Parties shall endeavour to agree on the appointment of a chair;

- (ii) if the disputing Parties fail to appoint a chair under subparagraph (d)(i) by the time the second panellist is appointed or within a period of 35 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel), whichever is longer, the two panellists appointed shall, by agreement, appoint the chair from the roster established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists);
- (iii) if the two panellists do not agree on the appointment of the chair under subparagraph (d)(ii) within a period of 43 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel), the two panellists shall appoint the chair with the agreement of the disputing Parties;
- (iv) if the two panellists fail to appoint the chair under subparagraph (d)(iii) within a period of 55 days after the date of delivery of the request for the establishment of the panel, the disputing Parties shall select the chair by random selection from the roster established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists) within a period of 60 days after the date of delivery of the request for the establishment of the panel;
- (v) notwithstanding subparagraph (d)(iv), if the two panellists fail to appoint the chair under subparagraph (d)(iii) within a period of 55 days after the date of delivery of the request for the establishment of the panel, a disputing Party may elect to have the chair appointed from the roster established under Article 28.11(Roster of Panel Chairs and Party Specific Lists) by an independent third party, provided that the following conditions are met:
  - (A) any costs associated with the appointment are borne by the electing Party;
  - (B) the request to the independent third party to appoint the chair shall be made jointly by the disputing Parties. Any subsequent communication between a disputing Party and the independent third party shall be copied to the other disputing Party or Parties. No disputing Party shall attempt to influence the independent third party's appointment process; and

- (C) if the independent third party is unable or unwilling to complete the appointment as requested within a period of 60 days after the date of delivery of the request for the establishment of the panel, then the chair shall be randomly selected within a further period of five days using the process set out in subparagraph (d)(iv);
- (vi) if a roster has not been established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists), and subparagraphs (d)(ii) through (v) cannot apply, the complaining Party or Parties, on the one hand, and the responding Party, on the other hand, may nominate three candidates. The chair shall be randomly selected from those candidates that are nominated within a period of 60 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel); and
- (vii) notwithstanding subparagraph (d)(vi), if a roster has not been established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists), and subparagraphs (d)(i) through (v) cannot apply, a disputing Party may, following the nomination of candidates under subparagraph (d)(vi), elect to have the chair appointed from those candidates by an independent third party, provided that the following conditions are met:
  - (A) any costs associated with such appointment are borne by the electing Party;
  - (B) the request to the independent third party to appoint the chair shall be made jointly by the disputing Parties. Any subsequent communication between a disputing Party and the independent third party shall be copied to the other disputing Party or Parties. No disputing Party shall attempt to influence the independent third party's appointment process; and
  - (C) if the independent third party is unable or unwilling to complete the appointment as requested within a period of 60 days after the date of delivery of the request for the establishment of the panel, then the chair shall be randomly selected within a further period of five days using the process set out in



subparagraph (vi).

3. Unless the disputing Parties agree otherwise, the chair shall not be a national of any of the disputing Parties or a third Party and any nationals of the disputing Parties or a third Party appointed to the roster established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists) shall be excluded from a selection process under paragraph 2(d).

4. Each disputing Party shall endeavour to select panellists who have expertise or experience relevant to the subject matter of the dispute.

5. For a dispute arising under Chapter 19 (Labour), Chapter 20 (Environment) or Chapter 26 (Transparency and Anti-corruption), each disputing Party shall select panellists in accordance with the following requirements, in addition to those set out in Article 28.10.1 (Qualifications of Panellists):

- (a) in any dispute arising under Chapter 19 (Labour), panellists other than the chair shall have expertise or experience in labour law or practice;
- (b) in any dispute arising under Chapter 20 (Environment), panellists other than the chair shall have expertise or experience in environmental law or practice; and
- (c) in any dispute arising under section C of Chapter 26 (Transparency and Anti-corruption), panellists other than the chair shall have expertise or experience in anti-corruption law or practice.

6. If a panellist selected under paragraph 2 is unable to serve on the panel, the complaining Party, the responding Party, or the disputing Parties, as the case may be, shall, no later than seven days after learning that the panellist is unavailable, select another panellist in accordance with the same method of selection that was used to select the panellist who is unable to serve, unless the disputing Parties agree otherwise.

7. If the process for selecting the new panellist under paragraph 6 is not completed within the time frame set out in that paragraph then the disputing Parties shall select the panellist by random selection from the roster established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists) no later than 15 days after learning that the original panellist is no longer able to serve.

8. If a roster has not been established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists) then the disputing Parties shall select the panellist by using the method of selection set out in paragraph 2(d)(vi) no later than 15 days after learning that the original panellist is no longer able to serve.

9. If a panellist appointed under this Article resigns or becomes unable to

serve on the panel, either during the course of the proceeding or when the panel is reconvened under Article 28.20 (Non-Implementation - Compensation and Suspension of Benefits) or Article 28.21 (Compliance Review), a replacement panellist shall be appointed within 15 days in accordance with paragraphs 6, 7 and 8. The replacement shall have all the powers and duties of the original panellist. The work of the panel shall be suspended pending the appointment of the replacement panellist, and all time frames set out in this Chapter and in the Rules of Procedure shall be extended by the amount of time that the work was suspended.

10. If a disputing Party believes that a panellist is in violation of the code of conduct referred to in Article 28.10.1(d) (Qualifications of Panellists), the disputing Parties shall consult and, if they agree, the panellist shall be removed and a new panellist shall be selected in accordance with this Article.

#### **Article 28.10: Qualifications of Panellists**

1. All panellists 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 chosen strictly on the basis of objectivity, reliability and sound judgment;
  - (c) be independent of, and not affiliated with or take instructions from, any Party; and
  - (d) comply with the code of conduct in the Rules of Procedure.
  
2. An individual shall not serve as a panellist for a dispute in which that person has participated under Article 28.6 (Good Offices, Conciliation and Mediation).

#### **Article 28.11: Roster of Panel Chairs and Party Specific Lists**

##### *Roster of Panel Chairs*

1. No later than 120 days after the date of entry into force of this Agreement, those Parties for which this Agreement has come into force under Article 30.5 (Entry into Force) shall establish a roster to be used for the selection of panel chairs.

2. If the Parties are unable to establish a roster within the time period specified in paragraph 1, the Commission shall immediately convene to appoint individuals to the roster. Taking into account the nominations made under paragraph 4 and the qualifications set out in Article 28.10 (Qualifications of Panellists), the Commission shall establish the roster no later than 180 days after the date of entry into force of this Agreement.

3. The roster shall consist of at least 15 individuals, unless the Parties agree otherwise.

4. Each Party may nominate up to two individuals for the roster and may include up to one national of any Party among its nominations.

5. The Parties shall appoint individuals to the roster by consensus. The roster may include up to one national of each Party.

6. Once established under paragraph 1 or 2, or if reconstituted following a review by the Parties, a roster shall remain in effect for a minimum of three years or until the Parties constitute a new roster. Members of the roster may be reappointed.

7. The Parties may appoint a replacement at any time if a roster member is no longer willing or available to serve.

8. Subject to paragraphs 4 and 5, any acceding Party may nominate up to two individuals for the roster. Either or both of those individuals may be included on the roster by consensus of the Parties.

#### *Party Specific Indicative List*

9. At any time after the date of entry into force of this Agreement, a Party may establish a list of individuals who are willing and able to serve as panellists.

10. The list referred to in paragraph 9 may include individuals who are nationals of that Party or non-nationals. Each Party may appoint any number of individuals to its list and appoint additional individuals or replace a list member at any time.

11. A Party that establishes a list in accordance with paragraph 9 shall promptly make it available to the other Parties.

#### **Article 28.12: Function of Panels**

1. A panel's function is to make an objective assessment of the matter before it, which includes an examination of the facts and the applicability of and conformity with this Agreement, and to make the findings, determinations and

recommendations as are called for in its terms of reference and necessary for the resolution of the dispute.

2. Unless the disputing Parties agree otherwise, the panel shall perform its functions and conduct its proceedings in a manner consistent with this Chapter and the Rules of Procedure.

3. The panel shall consider this Agreement in accordance with the rules of interpretation under international law as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties (1969)*. With respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body. The findings, determinations and recommendations of the panel shall not add to or diminish the rights and obligations of the Parties under this Agreement.

4. A panel shall take its decisions by consensus, except that, if a panel is unable to reach consensus, it may take its decisions by majority vote.

#### **Article 28.13: Rules of Procedure for Panels**

The Rules of Procedure, established under this Agreement in accordance with Article 27.2.1(f) (Functions of the Commission), shall ensure that:

- (a) disputing Parties have the right to at least one hearing before the panel at which each may present views orally;
- (b) subject to subparagraph (f), any hearing before the panel shall be open to the public, unless the disputing Parties agree otherwise;
- (c) each disputing Party has an opportunity to provide an initial and a rebuttal written submission;
- (d) subject to subparagraph (f), each disputing Party shall:
  - (i) make its best efforts to release to the public its written submissions, written version of an oral statement and written response to a request or question from the panel, if any, as soon as possible after those documents are filed; and
  - (ii) if not already released, release all these documents by the time the final report of the panel is issued;
- (e) the panel shall consider requests from non-governmental entities located in the territory of a disputing Party to provide written views

regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties;

- (f) confidential information is protected;
- (g) written submissions and oral arguments shall be made in English, unless the disputing Parties agree otherwise; and
- (h) unless the disputing Parties agree otherwise, hearings shall be held in the capital of the responding Party.

#### **Article 28.14: Third Party Participation**

A Party that is not a disputing Party and that considers it has an interest in the matter before the panel shall, on delivery of a written notice to the disputing Parties, be entitled to attend all hearings, make written submissions, present views orally to the panel, and receive written submissions of the disputing Parties. The Party shall provide written notice no later than 10 days after the date of circulation of the request for the establishment of the panel under Article 28.7.2 (Establishment of a Panel).

#### **Article 28.15: Role of Experts**

At the request of a disputing Party, or on its own initiative, a panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties agree and subject to any terms and conditions agreed by the disputing Parties. The disputing Parties shall have an opportunity to comment on any information or advice obtained under this Article.

#### **Article 28.16: Suspension or Termination of Proceedings**

1. The panel may suspend its work at any time at the request of the complaining Party or, if there is more than one complaining Party, at the joint request of the complaining Parties, for a period not to exceed 12 consecutive months. The panel shall suspend its work at any time if the disputing Parties request it to do so. In the event of a suspension, the time frames set out in this Chapter and in the Rules of Procedure shall be extended by the amount of time that the work was suspended. If the work of the panel is suspended for more than 12 consecutive months, the panel proceedings shall lapse unless the disputing Parties agree otherwise.

2. The panel shall terminate its proceedings if the disputing Parties request it to do so.

### **Article 28.17: Initial Report**

1. The panel shall draft its report without the presence of any Party.
2. The panel shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the disputing Parties and any third Parties, and on any information or advice put before it under Article 28.15 (Role of Experts). At the joint request of the disputing Parties, the panel may make recommendations for the resolution of the dispute.
3. The panel shall present an initial report to the disputing Parties no later than 150 days after the date of the appointment of the last panellist. In cases of urgency, including those related to perishable goods, the panel shall endeavour to present an initial report to the disputing Parties no later than 120 days after the date of the appointment of the last panellist.
4. The initial report shall contain:
  - (a) findings of fact;
  - (b) the determination of the panel as to whether:
    - (i) the measure at issue is inconsistent with obligations in this Agreement;
    - (ii) a Party has otherwise failed to carry out its obligations in this Agreement; or
    - (iii) the measure at issue is causing nullification or impairment within the meaning of Article 28.3.1(c) (Scope);
  - (c) any other determination requested in the terms of reference;
  - (d) recommendations, if the disputing Parties have jointly requested them, for the resolution of the dispute; and
  - (e) the reasons for the findings and determinations.
5. In exceptional cases, if the panel considers that it cannot release its initial report within the time period specified in paragraph 3, it shall inform the disputing Parties in writing of the reasons for the delay together with an estimate of when it will issue its report. A delay shall not exceed an additional period of 30 days unless the disputing Parties agree otherwise.
6. Panellists may present separate opinions on matters not unanimously agreed.

7. A disputing Party may submit written comments to the panel on its initial report no later than 15 days after the presentation of the initial report or within another period as the disputing Parties may agree.

8. After considering any written comments by the disputing Parties on the initial report, the panel may modify its report and make any further examination it considers appropriate.

#### **Article 28.18: Final Report**

1. The panel shall present a final report to the disputing Parties, including any separate opinions on matters not unanimously agreed, no later than 30 days after presentation of the initial report, unless the disputing Parties agree otherwise. After taking any steps to protect confidential information, and no later than 15 days after the presentation of the final report, the disputing Parties shall release the final report to the public.

2. No panel shall, either in its initial report or its final report, disclose which panellists are associated with majority or minority opinions.

#### **Article 28.19: Implementation of Final Report**

1. The Parties recognise the importance of prompt compliance with determinations made by panels under Article 28.18 (Final Report) in achieving the aim of the dispute settlement procedures in this Chapter, which is to secure a positive solution to disputes.

2. If in its final report the panel determines that:

- (a) the measure at issue is inconsistent with a Party's obligations in this Agreement;
- (b) a Party has otherwise failed to carry out its obligations in this Agreement; or
- (c) the measure at issue is causing nullification or impairment within the meaning of Article 28.3.1(c) (Scope),

the responding Party shall, whenever possible, eliminate the non-conformity or the nullification or impairment.

3. Unless the disputing Parties agree otherwise, the responding Party shall have a reasonable period of time in which to eliminate the non-conformity or nullification or impairment if it is not practicable to do so immediately.

4. The disputing Parties shall endeavour to agree on the reasonable period of time. If the disputing Parties fail to agree on the reasonable period of time within a period of 45 days after the presentation of the final report under Article 28.18.1 (Final Report), any disputing Party may, no later than 60 days after the presentation of the final report under Article 28.18.1 (Final Report), refer the matter to the chair to determine the reasonable period of time through arbitration.

5. The chair shall take into consideration as a guideline that the reasonable period of time should not exceed 15 months from the presentation of the final report under Article 28.18.1 (Final Report). However, that time may be shorter or longer, depending upon the particular circumstances.

6. The chair shall determine the reasonable period of time no later than 90 days after the date of referral to the chair under paragraph 4.

7. The disputing Parties may agree to vary the procedures set out in paragraphs 4 through 6 for the determination of the reasonable period of time.

#### **Article 28.20: Non-Implementation – Compensation and Suspension of Benefits**

1. The responding Party shall, if requested by the complaining Party or Parties, enter into negotiations with the complaining Party or Parties no later than 15 days after receipt of that request, with a view to developing mutually acceptable compensation, if:

- (a) the responding Party has notified the complaining Party or Parties that it does not intend to eliminate the non-conformity or the nullification or impairment; or
- (b) following the expiry of the reasonable period of time established in accordance with Article 28.19 (Implementation of Final Report), there is disagreement between the disputing Parties as to whether the responding Party has eliminated the non-conformity or the nullification or impairment.

2. A complaining Party may suspend benefits in accordance with paragraph 3 if that complaining Party and the responding Party have:

- (a) been unable to agree on compensation within a period of 30 days after the period for developing compensation has begun; or
- (b) agreed on compensation but the relevant complaining Party considers that the responding Party has failed to observe the terms of the agreement.



3. A complaining Party may, at any time after the conditions set out in paragraph 2 are met in relation to that complaining Party, provide written notice to the responding Party that it intends to suspend benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend.<sup>3</sup> The complaining Party may begin suspending benefits 30 days after the later of the date on which it provides notice under this paragraph or the date that the panel issues its determination under paragraph 5, as the case may be.

4. In considering what benefits to suspend under paragraph 3, the complaining Party shall apply the following principles and procedures:

- (a) it should first seek to suspend benefits in the same subject matter as that in which the panel has determined non-conformity or nullification or impairment to exist;
- (b) if it considers that it is not practicable or effective to suspend benefits in the same subject matter, and that the circumstances are serious enough, it may suspend benefits in a different subject matter. In the written notice referred to in paragraph 3, the complaining Party shall indicate the reasons on which its decision to suspend benefits in a different subject matter is based; and
- (c) in applying the principles set out in subparagraphs (a) and (b), it shall take into account:
  - (i) the trade in the good, the supply of the service or other subject matter in which the panel has found the non-conformity or nullification or impairment, and the importance of that trade to the complaining Party;
  - (ii) that goods, all financial services covered under Chapter 11 (Financial Services), services other than such financial services, and each section in Chapter 18 (Intellectual Property), are each distinct subject matters; and
  - (iii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of benefits.

5. If the responding Party considers that:

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<sup>3</sup> For greater certainty, the phrase “the level of benefits that the Party proposes to suspend” refers to the level of concessions under this Agreement, the suspension of which a complaining Party considers will have an effect equivalent to that of the non-conformity, or nullification or impairment in the sense of Article 28.3.1(c) (Scope), determined to exist by the panel in its final report issued under Article 28.18.1 (Final Report).

- (a) the level of benefits proposed to be suspended is manifestly excessive or the complaining Party has failed to follow the principles and procedures set out in paragraph 4; or
- (b) it has eliminated the non-conformity or the nullification or impairment that the panel has determined to exist,

it may, within 30 days of the date of delivery of the written notice provided by the complaining Party under paragraph 3, request that the panel be reconvened to consider the matter. The responding Party shall deliver its request in writing to the complaining Party. The panel shall reconvene as soon as possible after the date of delivery of the request and shall present its determination to the disputing Parties no later than 90 days after it reconvenes to review a request under subparagraph (a) or (b), or 120 days after it reconvenes for a request under both subparagraphs (a) and (b). If the panel determines that the level of benefits the complaining Party proposes to suspend is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect.

6. Unless the panel has determined that the responding Party has eliminated the non-conformity or the nullification or impairment, the complaining Party may suspend benefits up to the level the panel has determined under paragraph 5 or, if the panel has not determined the level, the level the complaining Party has proposed to suspend under paragraph 3. If the panel determines that the complaining Party has not followed the principles and procedures set out in paragraph 4, the panel shall set out in its determination the extent to which the complaining Party may suspend benefits in which subject matter in order to ensure full compliance with the principles and procedures set out in paragraph 4. The complaining Party may suspend benefits only in a manner consistent with the panel's determination.

7. The complaining Party shall not suspend benefits if, within 30 days after it provides written notice of intent to suspend benefits or, if the panel is reconvened under paragraph 5, within 20 days after the panel provides its determination, the responding Party provides written notice to the complaining Party that it will pay a monetary assessment. The disputing Parties shall begin consultations no later than 10 days after the date on which the responding Party has given notice that it intends to pay a monetary assessment, with a view to reaching agreement on the amount of the assessment. If the disputing Parties are unable to reach an agreement within 30 days after consultations begin and are not engaged in discussions regarding the use of a fund under paragraph 8, the amount of the assessment shall be set at a level, in U.S. dollars, equal to 50 per cent of the level of the benefits the panel has determined under paragraph 5 to be of equivalent effect or, if the panel has not determined the level, 50 per cent of the level that the complaining Party has proposed to suspend under paragraph 3.

8. If a monetary assessment is to be paid to the complaining Party, then it

shall be paid in U.S. dollars, or in an equivalent amount of the currency of the responding Party or in another currency agreed to by the disputing Parties in equal, quarterly instalments beginning 60 days after the date on which the responding Party gives notice that it intends to pay an assessment. If the circumstances warrant, the disputing Parties may decide that the responding Party shall pay an assessment into a fund designated by the disputing Parties for appropriate initiatives to facilitate trade between the Parties, including by further reducing unreasonable trade barriers or by assisting the responding Party to carry out its obligations under this Agreement.

9. At the same time as the payment of its first quarterly instalment is due, the responding Party shall provide to the complaining Party a plan of the steps it intends to take to eliminate the non-conformity or the nullification or impairment.

10. A responding Party may pay a monetary assessment in lieu of suspension of benefits by the complaining Party for a maximum of 12 months from the date on which the responding Party has provided written notice under paragraph 7 unless the complaining Party agrees to an extension.

11. A responding Party that seeks an extension of the period for the payment under paragraph 10 shall make a written request for that extension no later than 30 days before the expiration of the 12 month period. The disputing Parties shall determine the length and terms of any extension, including the amount of the assessment.

12. The complaining Party may suspend the application to the responding Party of benefits in accordance with paragraphs 3, 4 and 6, if:

- (a) the responding Party fails to make a payment under paragraph 8 or fails to make the payment under paragraph 13 after electing to do so;
- (b) the responding Party fails to provide the plan as required under paragraph 9; or
- (c) the monetary assessment period, including any extension, has lapsed and the responding Party has not yet eliminated the non-conformity or the nullification or impairment.

13. If the responding Party notified the complaining Party that it wished to discuss the possible use of a fund and the disputing Parties do not agree on the use of a fund within three months of the date of the responding Party's notice under paragraph 7, and this time period has not been extended by agreement of the disputing Parties, the responding Party may elect to make the monetary assessment payment equal to 50 per cent of the amount determined under paragraph 5 or the level proposed by the complaining Party under paragraph 3 if there has been no determination under paragraph 5. If this election is made, the

payment must be made within nine months of the responding Party's notice under paragraph 7 in U.S. dollars, or in an equivalent amount of the currency of the responding Party or in another currency agreed to by the disputing Parties. If the election is not made, the complaining Party may suspend the application of benefits in the amount determined under paragraph 5, or the level proposed by the complaining Party under paragraph 3 if there has been no determination under paragraph 5, at the end of the election period.

14. The complaining Party shall accord sympathetic consideration to the notice provided by the responding Party regarding the possible use of the fund referred to in paragraphs 8 and 13.

15. Compensation, suspension of benefits and the payment of a monetary assessment shall be temporary measures. None of these measures is preferred to full implementation through elimination of the non-conformity or the nullification or impairment. Compensation, suspension of benefits and the payment of a monetary assessment shall only be applied until the responding Party has eliminated the non-conformity or the nullification or impairment, or until a mutually satisfactory solution is reached.

#### **Article 28.21: Compliance Review**

1. Without prejudice to the procedures in Article 28.20 (Non-Implementation - Compensation and Suspension of Benefits), if a responding Party considers that it has eliminated the non-conformity or the nullification or impairment found by the panel, it may refer the matter to the panel by providing a written notice to the complaining Party or Parties. The panel shall issue its report on the matter no later than 90 days after the responding Party provides written notice.

2. If the panel determines that the responding Party has eliminated the non-conformity or the nullification or impairment, the complaining Party or Parties shall promptly reinstate any benefits suspended under Article 28.20 (Non-Implementation - Compensation and Suspension of Benefits).

### **Section B: Domestic Proceedings and Private Commercial Dispute Settlement**

#### **Article 28.22: Private Rights**

No Party shall provide for a right of action under its law against any other Party on the ground that a measure of that other Party is inconsistent with its obligations under this Agreement, or that the other Party has otherwise failed to carry out its obligations under this Agreement.

### **Article 28.23: Alternative Dispute Resolution**

1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.
3. A Party shall be deemed to be in compliance with paragraph 2 if it is a party to, and is in compliance with, the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* done at New York on 10 June 1958.