

CHAPTER 27

DISPUTE SETTLEMENT

Section A: Dispute Settlement

Article 27.1: Definitions

For the purposes of this Chapter:

complaining Party means a Party that requests the establishment of a panel under Article 27.7.1;

panel means a panel established under Article 27.7;

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 27.7; and

Rules of Procedure means the rules referred to in Article 27.12 and established in accordance with Article 26.2.1(f) (Functions of the Joint Commission).

Article 27.2: 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 27.3: Scope

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 the other Party

is or would be inconsistent with an obligation of this Agreement or that the other 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 (Customs Administration and Trade Facilitation), Chapter 7 (Technical Barriers to Trade), Chapter 9 (Cross-Border Trade in Services) or Chapter 14 (Government Procurement), is being nullified or impaired as a result of the application of a measure of the other Party that is not inconsistent with this Agreement.

Article 27.4: Choice of Forum

1. If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the 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 27.5: Consultations

1. Any Party may request consultations with the other Party, through the contact point designated under Article 26.5.1 (Contact Points), with respect to any matter described in Article 27.3. 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 measure¹ or other matter at issue and an indication of the legal basis for the complaint.
2. The Party to which a request for consultations is made shall, unless the Parties agree otherwise, reply in writing to the request no later than seven days after the date of its receipt of the request.²
3. Unless the Parties agree otherwise, they shall enter into consultations no later than:

¹ 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.

² 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.

- (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.
- 4. Consultations may be held in person or by any technological means available to the 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 Parties agree otherwise.
- 5. The Parties shall make every attempt to reach a mutually satisfactory resolution of the matter through consultations under this Article. To this end:
 - (a) each 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) each Party 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.
- 6. In consultations under this Article, a Party may request that the other Party make available personnel of its government agencies or other regulatory bodies who have expertise in the matter at issue.
- 7. Consultations shall be confidential and without prejudice to the rights of a Party in any other proceedings.

Article 27.6: Good Offices, Conciliation and Mediation

- 1. The 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. The Parties may suspend or terminate those proceedings at any time.
- 4. If the Parties agree, good offices, conciliation or mediation may continue while the dispute proceeds for resolution before a panel established under Article 27.7.

Article 27.7: Establishment of a Panel

- 1. The Party that requested consultations under Article 27.5.1 may request, by means

of a written notice addressed to the responding Party, the establishment of a panel if the 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 27.5.1;
- (b) a period of 30 days after the date of receipt of the request for consultations under Article 27.5.1 in a matter regarding perishable goods; or
- (c) any other period as the Parties may agree.

2. 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.

3. A panel shall be established upon delivery of the request.

4. Unless the Parties agree otherwise, the panel shall be composed in a manner consistent with this Chapter and the Rules of Procedure.

5. A panel shall not be established to review a proposed measure.

Article 27.8: Terms of Reference

1. Unless the 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 27.7.1; and
- (b) make findings and determinations, and any jointly requested recommendations, together with its reasons therefor, as provided for in Article 27.15.4.

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 27.3.1(c), the terms of reference shall so indicate.

Article 27.9: Composition of Panels

1. A panel shall be composed of three members, including a chair.

2. Unless the Parties otherwise agree, each Party shall, within 30 days after the date

of receipt of the request for the establishment of a panel, appoint one panellist who may be its national and propose up to three candidates to serve as the chair. The chair shall not be a national of either Party, nor 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 chair within 45 days after the date of receipt of the request for the establishment of a panel, taking into account the candidates proposed in accordance with paragraph 2. If appropriate, the Parties may jointly consult the panellists appointed in accordance with paragraph 2.

4. If any of the three appointments have not been made within 45 days after the date of receipt of the request for the establishment of a panel, any panellist not yet appointed shall be appointed, on request of either Party, by lot from the list of the candidates proposed in accordance with paragraph 2. The appointment by lot shall be undertaken within seven days after the date of receipt of the request for appointment by lot, unless the Parties otherwise agree. Where more than one panellist, including a chair is to be selected by lot, the chair shall be selected first.

5. The date of the establishment of a panel shall be the date on which the third panellist is appointed.

6. If the Parties agree that a panellist has failed to comply with the code of conduct referred to in Article 27.10.1(d), they may remove the panellist, waive the violation or request the panellist to ameliorate the violation within a specified period of time. If the Parties agree to waive the violation or determine that, after amelioration, the violation has ceased, the panellist may continue to serve.

7. If a panellist appointed in accordance with this Article dies, resigns or becomes unable to act, including as a result of his or her removal in accordance with paragraph 6, a successor panellist shall be appointed in the same manner as prescribed for the appointment of the original panellist and shall have all the powers and duties of the original panellist.

8. Where a panel is reconvened under Article 27.18 or Article 27.19, the reconvened panel shall, where possible, have the same panellists as the original panel. Where this is not possible, a replacement panellist shall be appointed in the same manner as prescribed for the appointment of the original panellist, and shall have all the powers and duties of the original panellist.

Article 27.10: 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, either 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 27.6.

Article 27.11: 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 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*, done at Vienna on 23 May, 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 27.12: Rules of Procedure for Panels

The Rules of Procedure, established under this Agreement in accordance with Article 26.2.1(f) (Functions of the Joint Commission), shall ensure that:

- (a) there is at least one hearing before the panel at which each Party may present views orally;
- (b) subject to subparagraph (f), any hearing before the panel shall be open to the public, unless the Parties agree otherwise;

- (c) each Party has an opportunity to provide an initial and a rebuttal written submission;
- (d) subject to subparagraph (f), each 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 either Party to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties;
- (f) confidential information is protected;
- (g) unless the Parties agree otherwise, hearings shall be held in the capital of the responding Party; and
- (h) administrative assistance is provided to a panel established under Article 27.7.

Article 27.13: Role of Experts

At the request of either 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 Parties agree and subject to any terms and conditions agreed by the Parties. The Parties shall have an opportunity to comment on any information or advice obtained under this Article.

Article 27.14: Suspension or Termination of Proceedings

1. The panel may suspend its work at any time at the request of the complaining Party for a period not to exceed 12 consecutive months. The panel shall suspend its work at any time if the 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 Parties agree otherwise.

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

Article 27.15: Initial Report

1. The panel shall draft its report without the presence of either Party.
2. The panel shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the Parties, and on any information or advice put before it under Article 27.13. At the joint request of the Parties, the panel may make recommendations for the resolution of the dispute.
3. The panel shall present an initial report to the 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 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 27.3.1(c);
 - (c) any other determination requested in the terms of reference;
 - (d) recommendations, if the 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 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 Parties agree otherwise.
6. Panellists may present separate opinions on matters not unanimously agreed.
7. A 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 Parties may agree.

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

Article 27.16: Final Report

1. The panel shall present a final report to the Parties, including any separate opinions on matters not unanimously agreed, no later than 30 days after presentation of the initial report, unless the 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 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 27.17: Implementation of Final Report

1. The Parties recognise the importance of prompt compliance with determinations made by panels under Article 27.16 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 27.3.1(c),

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

3. Unless the 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 Parties shall endeavour to agree on the reasonable period of time. If the 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 27.16.1, either Party may, no later than 60 days after the presentation of the final report under Article 27.16.1, 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 27.16.1. 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 Parties may agree to vary the procedures set out in paragraphs 4 through 6 for the determination of the reasonable period of time.

Article 27.18: Non-Implementation – Compensation and Suspension of Benefits

1. The responding Party shall, if requested by the complaining Party, enter into negotiations 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 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 27.17, there is disagreement between the 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 the 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 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, 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.³ The complaining Party may begin suspending benefits 30 days after the later

³ 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 27.3.(c), determined to exist by the panel in its final report issued under Article 27.16.1.

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 10 (Financial Services), services other than such financial services, and each section in Chapter 17 (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:

- (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 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 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 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 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 Parties may decide that the responding Party shall pay an assessment into a fund designated by the 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 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 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 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 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 27.19: Compliance Review

1. Without prejudice to the procedures in Article 27.18, 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. 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 shall promptly reinstate any benefits suspended under Article 27.18.

Section B: Domestic Proceedings and Private Commercial Dispute Settlement

Article 27.20: Private Rights

No Party shall provide for a right of action under its law against the other Party on the ground that a measure of the 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 27.21: 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 in compliance with the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on 10 June, 1958.