

CHAPTER 16

DISPUTE SETTLEMENT

Article 183 Objectives

1. The objectives of this Chapter are:
 - (a) to encourage the Parties at all times to endeavour to reach a mutually satisfactory resolution of disputes arising under this Agreement through cooperation and consultations; and
 - (b) to provide an effective, efficient and transparent process for consultations and settlement of disputes between the Parties concerning their rights and obligations under this Agreement.
2. Notwithstanding anything else in this Chapter, the Parties may, at any time, reach a mutually satisfactory resolution of the dispute.

Article 184 Scope of Application

1. Except as otherwise provided in this Agreement, this Chapter shall apply to the avoidance or settlement of disputes between the Parties concerning their rights and obligations under this Agreement, except for Chapter 14 (Cooperation).
2. Any action taken pursuant to Articles 59 or 65.3 shall be without prejudice to the rights and obligations of the Parties under this Chapter.

Article 185 Choice of Forum

1. Except as provided in this Article, this Chapter is without prejudice to the rights of the Parties to have recourse to dispute settlement procedures available under other agreements to which they are party.
2. Where a dispute regarding any matter arises under this Agreement and under another agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.
3. Once the complaining Party has requested a particular forum, the forum selected shall be used to the exclusion of other possible fora.
4. For the purposes of this Article, a Party shall be deemed to have selected a forum when it has requested the establishment of, or referred a matter to, a dispute settlement panel or arbitral tribunal.

Article 186 Consultations

1. The Parties shall make every effort to reach a mutually satisfactory resolution of any matter through consultations. Each Party shall accord adequate opportunity for consultations with the other Party with respect to any matter affecting the implementation, interpretation or application of this Agreement. Any differences shall as far as possible be settled through consultation between the Parties.

2. A request for consultations shall be submitted in writing and shall set out the reasons for the request, including identification of the measure at issue and an indication of the legal basis for the complaint. The complaining Party shall deliver the request to the other Party.

3. If a request for consultations is made, 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 in good faith, with a view to reaching a mutually satisfactory solution, 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.

4. If the Party complained against does not respond within the aforesaid 10 days, or does not enter into consultations within the timeframe specified in paragraph 3(a) or 3(b), then the complaining Party may proceed directly to request the establishment of an arbitral tribunal.

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

6. In conducting the 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 or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information.

7. The complaining Party may request the responding Party to make available for the consultations personnel of its government agencies or other regulatory bodies who have expertise in the matter under consultation.

Article 187 Good Offices, Mediation and Conciliation

1. The Parties may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time.
2. If both Parties agree, good offices, conciliation or mediation may continue while the dispute proceeds for resolution before an arbitral tribunal convened under Article 188.
3. If both Parties agree, they may seek assistance of the FTA Joint Commission regarding good offices, mediation and conciliation.

Article 188 Establishment of an Arbitral Tribunal

1. If the consultations fail to resolve a dispute within:
 - (a) 30 days after the date of receipt of the request for consultations regarding a matter concerning perishable goods; or
 - (b) 60 days after the date of receipt of the request for consultations regarding any other matter;

the Party that made the request for consultations may request in writing the establishment of an arbitral tribunal to consider the matter.

2. The request to establish an arbitral tribunal shall identify:
 - (a) the specific measures at issue; and
 - (b) the legal basis of the complaint including the provisions of this Agreement alleged to have been breached and any other relevant provisions, sufficient to present the problem clearly.
3. An arbitral tribunal shall be established upon receipt of a request.

Article 189 Composition of an Arbitral Tribunal

1. An arbitral tribunal shall comprise 3 members.
2. Within 15 days after the establishment of a tribunal, both Parties shall designate one member of that arbitral tribunal respectively.
3. The Parties shall designate by common agreement the appointment of the third arbitrator within 30 days after the establishment of a tribunal. The arbitrator thus appointed shall chair the arbitral tribunal.

4. If any member of the arbitral tribunal has not been designated or appointed within 30 days after the establishment of a tribunal, either Party may request that the Director-General of the WTO designate a member within 30 days of that request.

5. All arbitrators shall:

- (a) have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements;
- (b) be chosen strictly on the basis of objectivity, reliability, and sound judgement;
- (c) be independent of, and not be affiliated with or take instructions from, either Party; and
- (d) comply with the WTO *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*.¹²

6. The chair of the arbitral tribunal shall:

- (a) not be a national of either Party;
- (b) not have his or her usual place of residence in the territory of either Party; and
- (c) not have dealt with the matter in any capacity.

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

Article 190 Functions of Arbitral Tribunals

1. The function of an arbitral tribunal is to make an objective assessment of the dispute before it, including an objective assessment of the facts of the case and the applicability of and conformity with this Agreement, and make such factual findings necessary for the resolution of the dispute.

2. Where the tribunal makes a finding that a measure is inconsistent with this Agreement, that finding shall be binding on the Parties and the responding Party shall have the obligation to remove the non-conformity.

¹² Document WT/DSB/RC/1

3. For the avoidance of doubt, the Parties agree that the provisions of this Agreement shall be clarified in accordance with the customary rules of treaty interpretation of public international law.

4. The arbitral tribunal, in its findings, cannot add to or diminish the rights and obligations provided in this Agreement.

Article 191 Rules of Procedure of an Arbitral Tribunal

1. Within 14 days of its composition, the arbitral tribunal shall establish rules of procedure, which shall, *inter alia*, ensure:

- (a) a right to at least 1, but no more than 2, hearings before the tribunal;
- (b) an opportunity for the complaining and responding Parties to provide initial and rebuttal submissions;
- (c) that any other procedural elements referred to in this Chapter or mutually agreed by the Parties to the dispute are provided for;
- (d) the protection of business confidential information, including in the final report.

2. Each Party has the right to make public its written submissions, written versions of its oral statements and written responses to a request or questions from the tribunal, subject to paragraph 3.

3. Each Party shall treat as confidential information submitted by the other Party to the arbitral tribunal which that Party has designated as confidential.

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

5. The arbitral tribunal shall have the right to seek information and technical advice from any individual or body which it deems appropriate. The arbitral tribunal shall provide the Parties with a copy of the information or technical advice received and an opportunity to provide comments. Where the arbitral tribunal takes the information or technical advice into account in the preparation of its report, it shall also take into account any comments by the Parties on the information or technical advice.

6. Unless the Parties otherwise agree within 20 days from the date of the establishment of the arbitral tribunal, the terms of reference shall be:

"To examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of an arbitral tribunal pursuant to Article 188 and to make findings of law and fact together with the reasons therefor for the resolution of the dispute."

7. The arbitral tribunal shall take its decisions by consensus; provided that where an arbitral tribunal is unable to reach consensus, it may take its decisions by majority vote. Any opinions expressed in the tribunal report by individual arbitrators shall be anonymous.

8. The arbitral tribunal shall, apart from the matters set out in this Article, regulate its own procedures in relation to the rights of the Parties to be heard and its deliberations, in consultation with the Parties.

Article 192 Expenses

Unless the Parties determine otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the Parties in equal shares.

Article 193 Suspension or Termination of Proceedings

1. The Parties may agree that the arbitral tribunal suspend its work at any time for a period not exceeding 12 months from the date of such agreement. If the work of the arbitral tribunal has been suspended for more than 12 months, the authority for establishment of the tribunal shall lapse, unless the Parties agree otherwise.

2. The Parties may agree to terminate the proceedings of an arbitral tribunal in the event that a mutually satisfactory solution to the dispute has been found. In such event the Parties shall jointly notify the chair of the arbitral tribunal.

Article 194 Report of Arbitral Tribunal

1. The report of the arbitral tribunal shall be drafted without the presence of the Parties in the light of the information provided and the statements made to the arbitral tribunal.

2. In order to enable the Parties to have an opportunity for review and comment, the arbitral tribunal shall present the Parties its initial report within 90

days of the tribunal's formation setting out its findings of facts and its determination as to whether a disputing Party has conformed with its obligations under this Agreement. In exceptional cases, if the arbitral tribunal considers it cannot release its initial report within 90 days, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. Any delay shall not exceed a further period of 30 days, unless the Parties otherwise agree.

3. A Party may submit written comments to the arbitral tribunal within 10 days of receiving the initial report. After considering these written comments by the Parties and making any further examination it considers appropriate, the arbitral tribunal shall present the Parties its final report within 30 days of presentation of the initial report, unless the Parties otherwise agree. The final report of the arbitral tribunal shall be made available as a public document after the lapse of 10 days from the date of its release.

4. The arbitral report is final.

Article 195 Implementation of Arbitral Report

1. The Party concerned shall comply with the findings of the tribunal. If it is not practicable to comply immediately, the Party concerned shall implement the findings contained in the report of the arbitral tribunal within a reasonable period of time.

2. Where the tribunal makes a finding that a measure is inconsistent with this Agreement, the Party concerned shall have the obligation to eliminate the non-conformity.

Article 196 Reasonable Period of Time

1. The reasonable period of time shall be mutually determined by the Parties, or where the Parties fail to agree on the reasonable period of time within 45 days of the release of the arbitral tribunal's report, either Party may refer the matter to the original arbitral tribunal (to the extent this is possible), which shall determine the reasonable period of time following consultation with the Parties.

2. The arbitral tribunal shall provide its report to the Parties within 60 days after the date of the referral of the matter to it. When the arbitral tribunal considers that it cannot provide its report within this timeframe, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. Any delay shall not exceed a further period of 30 days, unless the Parties otherwise agree.

Article 197 Compliance Review

1. Where there is disagreement as to the existence or consistency with this Agreement of measures taken within the reasonable period of time to comply with the findings of the arbitral tribunal, such dispute shall be referred to an arbitral tribunal proceeding under this Chapter, including wherever possible by resort to the original arbitral tribunal.

2. The arbitral tribunal shall provide its report to the Parties within 60 days after the date of the referral of the matter to it. When the arbitral tribunal considers that it cannot provide its report within this timeframe, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. Any delay shall not exceed a further period of 30 days unless the Parties otherwise agree.

Article 198 Compensation and Suspension of Concessions and Obligations

1. If the Party concerned fails to bring the measure found to be inconsistent with this Agreement into compliance with the findings of the arbitral tribunal within the reasonable period of time or if the Party complained against expresses in writing that it will not implement the findings, that Party shall, if so requested, enter into negotiations with the complaining Party with a view to reaching a mutually satisfactory agreement on any necessary compensation.

2. If the Parties do not reach agreement on compensation as set forth by paragraph 1 within 30 days, the complaining Party may suspend the application of concessions and obligations of equivalent effect to the responding Party, with 30 days' notice in writing after the end of the reasonable period of time established in accordance with Article 196. Concessions and obligations may not be suspended while the complaining Party is pursuing negotiations under paragraph 1.

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

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

- (a) the complaining Party should first seek to suspend concessions and obligations in the same sector(s) as that affected by the measure that the arbitral tribunal has found to be inconsistent with the obligations of this Agreement; and
- (b) if the complaining Party considers that it is not practicable or effective to suspend concessions and obligations in the same sector(s), it may suspend concessions and obligations in other

sectors. The communication in which it announces such a decision shall indicate the reasons on which it is based.

5. The suspension of benefits shall be temporary and shall only be applied until such time as the measure found to be inconsistent with this Agreement has been removed, or the Party that must implement the arbitral tribunal's findings has done so, or a mutually satisfactory solution is reached.

6. Upon written request of the Party concerned, the original arbitral tribunal shall determine whether the level of concessions and obligations to be suspended by the complaining Party pursuant to paragraph 2 is excessive. If the arbitral tribunal cannot be established with its original members, the proceeding set out in Article 189 shall be applied.

7. The arbitral tribunal shall present its determination within 60 days from the request made pursuant to paragraph 6, or if an arbitral tribunal cannot be established with its original members, from the date on which the last arbitrator is selected. The decision of the arbitral tribunal shall be final and binding. It shall be delivered to the Parties and be made publicly available.

Article 199 Post Suspension

1. Without prejudice to the procedures in Article 198, if the responding Party considers that it has eliminated the non-conformity that the arbitral tribunal has found, it may provide written notice to the complaining Party with a description of how non-conformity has been removed. If the complaining Party disagrees, it may refer the matter to the original arbitral tribunal within 60 days after receipt of such written notice. Otherwise, the complaining Party shall promptly stop the suspension of concessions and obligations.

2. The arbitral tribunal shall release its report within 60 days after the referral of the matter. If the arbitral tribunal concludes that the responding Party has eliminated the non-conformity, the complaining Party shall promptly stop the suspension of concessions and obligations.