

## **CHAPTER TWENTY-TWO**

### **DISPUTE SETTLEMENT**

#### **Article 22.01: Definitions**

For purposes of this Chapter:

**complaining Party** means a Party that requests the establishment of a panel under Article 22.07;

**panel** means a panel established under Article 22.07; and

**Party complained against** means the Party that receives the request for the establishment of a panel under Article 22.07.

#### **Article 22.02: Cooperation**

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

#### **Article 22.03: Scope and Coverage**

Except for matters arising under Chapters 17 (Environment) and 18 (Labour) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter apply with respect to the settlement of disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that:

- (a) an actual or proposed measure of the other Party is or would be inconsistent with one of its obligations under this Agreement;
- (b) the other Party has otherwise failed to carry out one of its obligations under this Agreement; or

(c) there is nullification or impairment in the sense of Annex 22.03.

#### **Article 22.04: Choice of Forum**

1. Subject to paragraph 2, a dispute regarding a matter arising under both this Agreement and the WTO Agreement or any other free trade agreement to which both Parties are party may be settled in a forum designated under the terms of one of these agreements at the discretion of the complaining Party.
2. Notwithstanding paragraph 1, if a Party complained against claims that a measure is subject to Article 1.06 (Initial Provisions and General Definitions – Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may resort only to the dispute settlement procedures in this Agreement.
3. If the complaining Party requests the establishment of a dispute settlement panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the other, unless the Party complained against makes a request pursuant to paragraph 2.

#### **Article 22.05: Consultation**

1. A Party may request in writing a consultation with the other Party regarding a matter referred to in Article 22.03.
2. The Party requesting the consultation shall deliver the request to the other Party, setting out the reasons for the request, identifying the measure or matter at issue under Article 22.03 and indicating the legal basis for the complaint.
3. Subject to paragraph 4, the Parties, unless they otherwise decide, shall enter into a consultation within 30 days of the date of receipt of the request by the other Party.

4. In cases of urgency, including those involving a good or service that rapidly loses its trade value, such as a perishable good, consultation shall commence within 15 days of the date of receipt of the request by the other Party.

5. The requesting Party may ask that the other Party make available personnel of its governmental agencies or other regulatory bodies with expertise in the subject matter of the consultation.

6. The Parties shall attempt to arrive at a mutually satisfactory resolution of a matter through consultation under this Article. To this end, each Party shall:

- (a) provide sufficient information for a full examination of the measure or matter at issue; and
- (b) treat confidential or proprietary information received in the course of consultation on the same basis as the Party providing the information.

7. Consultation is confidential and without prejudice to the rights of the Parties in proceedings under this Chapter.

8. Consultation may be held in person or by another means that the Parties decide.

#### **Article 22.06: Good Offices, Conciliation and Mediation**

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

2. The Parties shall conduct alternative methods of dispute resolution according to procedures on which they decide.

3. Either Party at any time may begin, suspend or terminate proceedings established under this Article.

4. Proceedings involving good offices, conciliation or mediation are confidential and without prejudice to the rights of the Parties in other proceedings.

#### **Article 22.07: Establishment of a Panel**

1. Unless the Parties decide otherwise, and subject to paragraph 3, the complaining Party may refer the matter to a dispute settlement panel if a matter referred to in Article 22.05 has not been resolved:

- (a) within 45 days of the date of receipt of the request for consultations; or
- (b) within 25 days of the date of receipt of the request for consultation for matters referred to in Article 22.05(4).

2. The complaining Party shall deliver the written request for panel establishment to the other Party, indicating the reason for the request, identifying the specific measure or other matter at issue and providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3. A dispute settlement panel may not be established to review a proposed measure.

#### **Article 22.08: Panel Selection**

1. The panel shall consist of three panellists.

2. Within 30 days of receiving the request to establish a panel, a Party shall notify the other Party of its appointment of a panellist, and propose up to four candidates to serve as the chair of the panel. If a Party fails to appoint a panellist within this time, the panellist shall be selected by the other Party from the candidates proposed for the chair.

3. The Parties, within 45 days of the date of receipt of the request for panel establishment, shall endeavour to select a panellist who will serve as chair from among the candidates proposed. If the Parties fail to select a chair within this time period, within a further 7 days the chair shall be selected randomly from the candidates proposed.

4. If a panellist appointed by a Party withdraws, is removed or becomes unable to serve, a replacement shall be appointed by that Party within 30 days, failing which the replacement shall be appointed in accordance with the second sentence of paragraph 2.

5. If the chair of the panel withdraws, is removed or becomes unable to serve, the Parties shall endeavour to decide on the appointment of a replacement within 30 days, failing which the replacement shall be appointed in accordance with the second sentence of paragraph 3.

6. If an appointment in paragraph 4 or 5 would require selecting from the list of candidates proposed for chair and there are no remaining candidates, each Party shall propose up to 3 additional candidates within 30 days and, within 7 days of that deadline, the panellist shall be selected randomly from the candidates proposed.

7. A time limit applicable to the proceeding is suspended as of the date the panellist withdraws, is removed or becomes unable to serve, and resumes on the date the replacement is selected.

#### **Article 22.09: Qualifications of Panellists**

Each panellist shall:

- (a) have expertise or experience in law, international trade or other matters covered by this Agreement, or in the settlement 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 be affiliated with or take instructions from a Party;
- (d) not be a national of a Party, nor have their usual place of residence in the territory of a Party, nor be employed by either of them;
- (e) comply with a Code of Conduct that the Commission shall approve at its first session following the entry into force of this Agreement; and
- (f) not have been involved in an alternative dispute settlement proceeding referred to in Article 22.06 regarding the same dispute.

#### **Article 22.10: Rules of Procedure**

1. A panel shall follow the provisions of this Chapter, including Annex 22.10 (Rules of Procedure). A panel, in consultation with the Parties, may establish supplementary rules of procedure that do not conflict with the provisions of this Chapter.
2. Unless the Parties decide otherwise, the rules of procedure shall ensure that:
  - (a) each Party has the opportunity to provide initial and rebuttal written submissions;
  - (b) the Parties have the right to at least 1 hearing before the panel; subject to subparagraph (g) these hearings shall be open to the public;
  - (c) the Parties have the right to present and receive written submissions and oral arguments in any of the Parties' official languages;
  - (d) all submissions and comments made to the panel are available to the other Party;

- (e) a Party may make available to the public either Party's written submissions, transcripts of oral statements and written responses to requests or questions from the panel, subject to subparagraph (g);
- (f) the panel allows a non-governmental person of a Party to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties; and
- (g) information designated by either Party for confidential treatment is protected.

3. Unless the Parties decide otherwise within 15 days of the date of the establishment of the panel, the terms of reference of the panel shall be:

“To examine, in the light of the relevant provisions of the Agreement, the matter referred to in the request for the establishment of the panel and to make findings, determinations and recommendations as provided in Article 22.11.”

4. If the complaining Party claims that a benefit has been nullified or impaired within the meaning of Annex 22.03, the terms of reference shall so indicate.

5. If a Party wishes the panel to make findings as to the degree of adverse trade effects on a Party of a measure determined:

- (a) to be inconsistent with an obligation in the Agreement, or
- (b) to have caused nullification or impairment in the sense of Annex 22.03,

the terms of reference shall so indicate.

6. At the request of a Party, or on its own initiative, the panel may seek information and technical advice from a person or body it deems appropriate, subject to such terms and conditions that the Parties may decide.

7. The panel may rule on its own jurisdiction.
8. The panel may delegate to the chair authority to make administrative and procedural decisions.
9. The panel, in consultation with the Parties, may modify a time period applicable in the panel proceedings and make other procedural or administrative adjustments required for the fairness or efficiency of the proceeding.
10. Findings, determinations and recommendations of the panel under Article 22.11 shall be made by a majority of its members.
11. Panellists may furnish separate opinions on matters not unanimously agreed. A panel may not disclose which panellists are associated with majority or minority opinions.
12. Unless the Parties decide otherwise, the expenses of the panel, including the remuneration of the panellists, shall be borne in equal shares by the Parties.

### **Article 22.11: Panel Reports**

1. Unless the Parties decide otherwise, the panel shall issue reports in accordance with the provisions of this Chapter.
2. The panel shall base its reports on the provisions of this Agreement applied and interpreted in accordance with the rules of interpretation of public international law, the submissions and arguments of the Parties and information and technical advice before it under the provisions of this Chapter.
3. The panel shall issue an initial report to the Parties within 120 days of the selection of the last panellist. This report shall contain:
  - (a) findings of fact;

- (b) a determination as to whether the Party complained against has conformed with its obligations under this Agreement and any other finding or determination requested in the terms of reference; and
  - (c) a recommendation for resolution of the dispute, if requested by a Party.
4. Notwithstanding Article 22.10, the initial report of the panel shall be confidential.
5. A Party may submit written comments to the panel on its initial report, subject to time limits that may be set by the panel. After considering those comments, the panel, on its own initiative or on the request of a Party, may:
- (a) request the views of a Party;
  - (b) reconsider its report; or
  - (c) carry out a further examination that it considers appropriate.
6. The panel shall present to the Parties a final report within 30 days of presentation of the initial report.
7. Unless the Parties decide otherwise, the final report of the panel may be published by either Party 15 days after it is presented to the Parties, subject to Article 22.10(2)(g).

### **Article 22.12: Implementation of the Final Report**

1. On receipt of the final report of a panel, the Parties shall decide on the resolution of the dispute. Unless the Parties decide otherwise, the resolution shall conform with a determination or recommendation made by the panel.
2. Wherever possible, the resolution shall be the removal of a measure not conforming to this Agreement or removal of the nullification or impairment within the meaning of Annex 22.03.

3. If the Parties are unable to reach a resolution within 30 days of presentation of the final report, or such other period as the Parties may decide, the Party complained against, if so requested by the complaining Party, shall enter into negotiations with a view to determining compensation.

#### **Article 22.13: Non-Implementation – Suspension of Benefits**

1. The complaining Party, subject to paragraph 4 and following notice to the other Party, may suspend the application to the other Party of benefits of equivalent effect if:

- (a) in its final report a panel determines that a measure is inconsistent with the obligations of this Agreement or that there is nullification or impairment within the meaning of Annex 22.03;
- (b) the Parties have not been able to resolve the dispute to their mutual satisfaction within 30 days of receiving the final report; or
- (c) the Parties fail to decide on compensation within 30 days of the complaining Party's request, if such a request was made.

2. The notice referred to in paragraph 1 shall specify the level of benefits that the complaining Party proposes to suspend.

3. In considering which benefits to suspend under paragraph 1:

- (a) the complaining Party should first seek to suspend benefits or other obligations in the same sector affected by the measure or other matter that the panel has found to be inconsistent with an obligation under this Agreement or to have caused nullification or impairment within the meaning of Annex 22.03; and

- (b) a complaining Party that considers it is not practicable or effective to suspend benefits or other obligations in the same sector may suspend benefits in another sector.
4. A Party may only suspend benefits temporarily, and only until the other Party has brought the inconsistent measure or other matter into conformity with this Agreement, including as a result of the panel process described in Article 22.14, or until such time as the Parties arrive at a resolution of the dispute.
5. For purposes of paragraph 4, “inconsistent measure or other matter” means a measure or other matter found by a panel to be inconsistent with the obligations of this Agreement or otherwise nullifying or impairing benefits within the meaning of Annex 22.03.

#### **Article 22.14: Review of Compliance and Suspension of Benefits**

1. A Party, by written notice to the other Party, may request that a panel be reconvened to make a determination regarding:
  - (a) whether the level of benefits suspended by a Party under Article 22.13(1) is manifestly excessive; or
  - (b) any disagreement as to the existence or consistency with this Agreement of measures taken to comply with the determinations or recommendations of the previously established panel.
2. In the written notice of the request referred to in paragraph 1, the Party shall identify the specific measure or matter at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.
3. The panel shall be reconvened when the other Party receives written notice of the request referred to in paragraph 1. In the event that a panellist is unable to serve on the reconvened panel, they shall be replaced under Article 22.08(4).

4. The provisions of Articles 22.10 and 22.11 apply to procedures adopted and a report issued by a panel reconvened under this Article, with the exception that, subject to Article 22.10(9), the panel shall present an initial report within 60 days of being reconvened where the request concerns only paragraph 1(a), and otherwise within 90 days.

5. A panel reconvened under this Article may include in its report a recommendation, where appropriate, that a suspension of benefits be terminated or that the amount of benefits suspended be modified.

#### **Article 22.15: Referrals of Matters from Judicial or Administrative Proceedings**

1. If an issue of interpretation or application of this Agreement arises in a domestic, judicial or administrative proceeding of a Party that either Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Party. The Commission shall endeavour to determine an appropriate response as expeditiously as possible.

2. The Party in whose territory the court or administrative body is located shall submit any interpretation of the Commission to the court or administrative body in accordance with the rules of that forum.

3. If the Commission is unable to decide on the interpretation, each Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

#### **Article 22.16: Private Rights**

A Party may not provide a right of action under its domestic law against the other Party on the ground that an act or omission of that Party is inconsistent with this Agreement.

### **Article 22.17: Alternative Dispute Resolution**

1. Each Party shall encourage and facilitate the use of arbitration and other means of alternative dispute resolution to the extent possible in order to settle 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 awards in such disputes.
3. A Party shall be deemed to comply with paragraph 2 if it is a party to and complies with the New York Convention.

## **Annex 22.03**

### **Nullification or Impairment**

1. If a Party considers that a benefit it could reasonably have expected to accrue to it under a provision of:

- (a) Chapters 2 (National Treatment and Market Access for Goods), 3 (Rules of Origin), 4 (Customs Procedures), 5 (Trade Facilitation), 8 (Emergency Action) or 16 (Government Procurement), or
- (b) Chapter 10 (Cross-Border Trade in Services),

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, in the sense of Article XXIII:1(b) of the GATT 1994, Article XXIII(3) of GATS or Article XXII(2) of the *Agreement on Government Procurement* done April 15, 1994 (GPA), the Party may have recourse to dispute settlement under this Chapter. A panel established under this Chapter shall take into account relevant jurisprudence interpreting Article XXIII:1(b) of the GATT 1994, Article XXIII(3) of GATS and Article XXII(2) of the GPA.

2. A Party may not invoke paragraph 1(b) with respect to a measure subject to an exception under Article 23.02 (Exceptions – General Exceptions), nor invoke paragraph 1 with respect to a measure subject to the exception under Article 23.06 (Exceptions – Cultural Industries).

## **Annex 22.10**

### **Rules of Procedure**

#### **Application**

1. The following rules of procedure apply to a dispute settlement proceeding under this Chapter, unless the Parties decide otherwise.

#### **Definitions**

2. For purposes of this Annex:

**adviser** means a person retained by a Party to advise or assist the Party in connection with the panel proceeding;

**legal holiday** means every Saturday and Sunday and any other day designated by a Party as a holiday for the purposes of these rules; and

**representative** means an employee of a government department or agency or of another government entity of a Party.

#### **Written Submissions and Other Documents**

3. Each Party shall deliver the original and a minimum of 3 copies of any written submission to the panel and one 1 copy to the Embassy of the other Party. Delivery of submissions and any other document related to the panel proceeding may be made by e-mail or other means of electronic transmission if the Parties so decide. When a Party delivers physical copies of written submissions or any other document related to the panel proceeding, that Party shall deliver at the same time an electronic version of the submissions or other document.

4. The complaining Party shall deliver an initial written submission no later than 10 days after the date on which the last panellist is appointed. The Party complained against, in turn, shall deliver a written counter-submission no later than 20 days after the date on which the initial written submission of the complaining Party is due.

5. The panel, in consultation with the Parties, shall establish dates for the delivery of the subsequent written rebuttal submissions of the Parties and any other written submissions that the panel and the Parties determine are appropriate.

6. A Party at any time may correct minor errors of a clerical nature in any written submission or other document related to the panel proceeding by delivering a new document clearly indicating the changes.

7. If the last day for delivery of a document falls on a legal holiday observed by a Party or on another day on which the government offices of a Party are closed by order of the government or by *force majeure*, the document may be delivered on the next business day.

### **Burden of Proof**

8. A complaining Party asserting that a measure of the other Party is inconsistent with the provisions of this Agreement shall have the burden of establishing such inconsistency. If the Party complained against asserts that a measure is subject to an exception under this Agreement, it shall have the burden of establishing that the exception applies.

### **Written Submission by a Non-Governmental Person**

9. A panel, on application, may grant leave to a non-governmental person of a Party to file written submissions. In making its decision to grant leave, the panel shall consider, among other things:

- (a) whether the subject matter of the proceeding is of public interest;
- (b) whether the non-governmental person has a substantial interest in the proceeding; a substantial interest requires more than an interest in the development of trade law jurisprudence, the interpretation of the Agreement or the subject matter of the dispute;
- (c) whether the written submission would assist the panel in determining a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the Parties; and

- (d) submissions by the Parties on the application for leave.

10. Where the panel has granted leave to a non-governmental person to file a written submission, the panel shall ensure that:

- (a) the written submission does not introduce new issues to the dispute;
- (b) the written submission is within the terms of reference of the dispute as defined by the Parties;
- (c) the written submission addresses only the issues of fact and law that the person described in its request;
- (d) the written submission avoids disrupting the proceeding and preserves the equality of the Parties; and
- (e) the Parties have the opportunity to respond to the written submission.

### **Role of Experts**

11. On request of a Party, or on its own initiative, the panel may seek information and technical advice from a person or body that it deems appropriate, subject to paragraphs 12 and 13 and such additional terms and conditions as the Parties may decide. The requirements set out in Article 22.09 apply to the experts or bodies, as appropriate.

12. Before the panel seeks information or technical advice under paragraph 11, it shall:

- (a) notify the Parties of its intention to seek information or technical advice and provide them with an adequate period of time to submit comments; and
- (b) provide the Parties with a copy of information or technical advice received and provide them with an adequate period of time to submit comments.

13. When the panel takes into consideration the information or technical advice received under paragraph 11 for the preparation of its report, it shall also take into consideration comments or observations submitted by the Parties with respect to such information or technical advice.

### **Operation of Panels**

14. The chair shall preside at all of the panel's meetings.

15. The panel may conduct its business by appropriate means, including by telephone, facsimile transmission and video or computer links.

16. Only panellists may take part in the deliberations of the panel. The panel, in consultation with the Parties, may employ such number of assistants, interpreters or translators, or stenographers as may be required for the proceeding and permit them to be present during such deliberations. The members of the panel and the persons employed by the panel shall maintain the confidentiality of the panel's deliberations and information that is protected under Article 22.10.

17. A panel, in consultation with the Parties, may modify a time period applicable in the panel proceedings and make other procedural or administrative adjustments required in the proceeding.

### **Hearings**

18. The chair shall fix the date and time of the initial hearing and any subsequent hearing in consultation with the Parties and the panellists, and then notify the Parties in writing of those dates and times.

19. The location of hearings shall alternate between the territories of the Parties, with the first hearing to take place in the territory of the Party complained against, unless the Parties decide otherwise.

20. No later than 5 days before the date of a hearing, each Party shall deliver to the other Party and the panel a list of the names of the persons who will be present at the hearing on behalf of that Party and of other representatives or advisers who will be attending the hearing.

21. Each hearing shall be conducted by the panel in a manner that ensures that the complaining Party and the Party complained against are afforded equal time for arguments, replies and counter-replies.
22. Hearings shall be open to the public, except as necessary to protect information designated by either Party for confidential treatment. The panel, in consultation with the Parties, shall adopt appropriate logistical arrangements and procedures to ensure that hearings are not disrupted by the attendance of the public. Such procedures may include, among other methods, the use of live web-broadcasting or closed-circuit television.
23. The panel shall arrange the preparation of hearing transcripts, if any, and shall, as soon as possible after any such transcripts are prepared, deliver a copy to each Party.

#### ***Ex Parte Contacts***

24. A Party may not communicate with the panel without notifying the other Party. The panel shall not communicate with a Party in the absence of, or without notifying, the other Party.
25. A panellist may not discuss an aspect of the substantive subject matter of the proceeding with the Parties in the absence of the other panellists.

#### **Remuneration and Payment of Expenses**

26. Unless the Parties decide otherwise, the expenses of the panel and the remuneration, travel and lodging expenses and all general expenses of the panellists and their assistants shall be born in equal shares by the Parties.
27. Each panellist shall keep a record and render a final account to the Parties of their time and expenses, and those of any assistant. The chair of the panel shall keep a record and render a final account to the Parties of all general expenses.