

## **Chapter 22**

### **Dispute Settlement**

#### **Section A: Dispute Settlement**

##### **Article 22.01 Cooperation**

The Parties shall at all times endeavor 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.

##### **Article 22.02 Scope of Application**

Except as 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) wherever a Party considers that an actual or proposed measure of the other Party is or would be inconsistent with the obligations of this Agreement; or
- (c) wherever a Party considers that an actual or proposed measure of the other Party causes or would cause nullification or impairment in the sense of Annex 22.02.

##### **Article 22.03 Choice of Forum**

1. Where a dispute regarding any matter arises under this Agreement and under the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. In any dispute referred to in paragraph 1 where the Party complained against claims that its action is subject to Article 1.04 (Relation to Other International Agreement in Environmental and Conservation) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

3. Where a Party has requested the establishment of an arbitral group under Article 22.07. or has requested the establishment of a arbitral group under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO Agreement, the forum chosen shall be used to the exclusion of the other.

#### **Article 22.04 Urgent Cases**

1. In cases of urgency, the Parties and the arbitral groups shall make every effort to accelerate to the greatest extent the proceedings.
2. In cases of perishable agricultural goods, fish and fish products that are perishable:
  - (a) a Party may request in writing that the Commission meet, when an issue is not resolved in accordance with Article 22.05 within 15 days following the submission of the request for consultations; and
  - (b) the Party that has requested the intervention of the Commission, may request in writing the formation of an arbitral group when the issue has not been resolved within 15 days after the meeting of the Commission, or if the Commission has not met, within 15 days after submitting the request for such a meeting.

#### **Article 22.05 Consultations**

1. A Party may request in writing consultations to the other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.
2. The Party shall deliver the request to the other Party, and shall set out the reasons for the request, including identification of the actual or proposed measure or other matter at issue and an indication of the legal basis for the complaint.
3. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the Parties shall:
  - (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation and application of this Agreement; and
  - (b) treat any confidential information exchanged in the course of consultations on the same basis as the Party providing the information.
4. In consultations under this Article, a Party may request to the other Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.<sup>1</sup>

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<sup>1</sup> A Party receiving such a request shall strive to accommodate it.

## **Article 22.06 Commission – Good Offices, Conciliation, and Mediation**

1. Any Party may request in writing a meeting of the Commission, if the Parties fail to resolve a matter pursuant to Article 22.05 within:

- (a) 60 days of receipt of a request for consultations;
- (b) 15 days of receipt of a request for consultations in matters of Urgent cases; described in Article 22.04.2; or
- (c) such other period as both Parties may agree.

2. The Party shall deliver the request to the other Party, and shall set out the reasons for the request, including identification of the actual or proposed measure or other matter at issue and an indication of the legal basis for the complaint.

3. Unless it decides otherwise, the Commission shall convene within ten days of receipt of the request and shall endeavor to resolve the dispute promptly. The Commission may:

- (a) call on such technical advisers or create such working groups or expert groups as it deems necessary;
- (b) have recourse to good offices, conciliation, mediation, or such other dispute resolution procedures; or
- (c) make recommendations;

as may assist the Parties to reach a mutually satisfactory resolution of the dispute.

## **Article 22.07 Request for Establishment of an Arbitration Group**

1. If the Parties fail to resolve a matter within:

- (a) 30 days after the Commission has convened pursuant to Article 22.06;
- (b) 30 days after a Party has received a request for consultations under Article 4 in a matter regarding urgent cases, if the Commission has not convened pursuant to Article 22.04.2;
- (c) 75 days after a Party has received a request for consultations under Article 22.05, if the Commission has not convened pursuant to Article 22.06.4; or
- (d) such other period as the Parties may agree;

any Party that requested a meeting of the Commission with regard to the measure or other matter in accordance with Article 22.06 may request in writing the

establishment of an arbitral group to consider the matter. The Party shall deliver the request to the other Party, and shall set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint sufficient to present the problem clearly.

2. An arbitral group shall be established within three days upon receipt of a request.

3. Unless otherwise agreed by the Parties, the arbitral group shall be established and perform its functions in a manner consistent with the provisions of this Chapter.

4. An arbitral group may not be established to review a proposed measure.

#### **Article 22.08 Roster**

1. The Parties shall establish within six months of the date of entry into force of this Agreement and maintain a roster of up to 20 individuals who are willing and able to serve as panelists. Unless the Parties otherwise agree, up to six members of the roster shall be nationals of each Party, and up to four members of the roster shall be selected from among individuals who are not nationals of any Party. The roster members shall be appointed by mutual agreement, and may be reappointed.

2. To meet the deadline referred to in paragraph 1, each Party shall: (1) by day 75, submit its nominees to the other Party; (2) by day 120, approve or reject the nominees of the other Party; and (3) by day 150, submit additional nominees in place of any nominees that the other Party has rejected. The Parties shall finalize the initial roster by day 180.

3. Once established, a roster shall remain in effect for a minimum of three years, and shall remain in effect thereafter until the Parties constitute a new roster. The Parties may appoint a replacement where a roster member is no longer available to serve.

#### **Article 22.09 Qualifications of Panelists**

1. All the arbitrators shall meet the following qualifications:

- (a) have specialized knowledge or experience in law, international trade, other matters related to this Agreement, or in the settlement of disputes arising from international trade agreements;
- (b) be elected strictly according to their objectivity, integrity, reliability and good judgement;
- (c) be independent, not associated with, and not accepting instructions from any Party; and
- (d) observe the Code of Conduct that the Commission establishes.

2. Persons that have participated in a dispute under Article 22.06.3 cannot serve as arbitrators for the same dispute.

### **Article 22.10 Arbitral Group Selection**

1. The Parties shall apply the following procedures in selecting an arbitral group:
  - (a) the arbitral group shall comprise three members;
  - (b) the Parties shall endeavor to agree on the chair of the arbitral group within 15 days of the receipt of the request for the establishment of the arbitral group. If the Parties are unable to agree on the chair within this period, the chair shall be selected by lot within three days from among the roster members who are not nationals of a Party;
  - (c) within 15 days of selection of the chair, the complaining Party shall select one panelist and the Party complained against shall select one panelist;
  - (d) if either Party fail to select a panelist within this period, the panelist shall be selected by lot within three days from among the roster members who are nationals of such Party, as the case may be; and
  - (e) each Party shall endeavor to select panelists who have expertise or experience relevant to the subject matter of the dispute, as appropriate.
2. Panelists shall normally be selected from the roster. Any Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by a Party within 15 days after the individual has been proposed.
3. If a Party believes that a panelist is in violation of the Code of Conduct, the Parties shall consult and if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with this Article.

### **Article 22.11 Model Rules of Procedure**

1. The Commission shall establish by the date of entry into force of this Agreement Model Rules of Procedure, which shall ensure:
  - (a) a right to at least one hearing before the arbitral group, which, subject to subparagraph (e), shall be open to the public;
  - (b) an opportunity for each Party to provide initial and rebuttal written submissions;

- (c) that each participating Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the arbitral group shall be public, subject to subparagraph (e);
- (d) that the arbitral group will consider requests from non-governmental entities in the Parties' territories to provide written views regarding the dispute that may assist the arbitral group in evaluating the submissions and arguments of the Parties; and
- (e) the protection of confidential information.

2. Unless the Parties otherwise agree, the arbitral group shall conduct its proceedings in accordance with the Model Rules of Procedure.

3. The Commission may modify the Model Rules of Procedure.

4. Unless the Parties otherwise agree within 20 days from the date of the receipt of the request for the establishment of the arbitral group, the terms of reference shall be:

*“To examine, in the light of the relevant provisions of this Agreement, the matter referenced in the arbitral group request and to make findings, determinations, and recommendations as provided in Articles 22.11.6 and 22.13.3 and to deliver the written reports referred to in Articles 22.13 and 22.14.”*

5. If the complaining Party in its arbitral group request has identified that a measure has nullified or impaired benefits, in the sense of Annex 22.02, the terms of reference shall so indicate.

6. If a Party wishes the arbitral group to make findings as to the degree of adverse trade effects on any Party of a Party's inconsistency to conform with the obligations of this Agreement or of a Party's measure found to have caused nullification or impairment in the sense of Annex 22.02, the terms of reference shall so indicate.

#### **Article 22.12 Role of Experts**

On request of a Party, or on its own initiative, the arbitral group may seek information and technical advice from any person or body that it deems appropriate, provided that the Parties so agree and subject to such terms and conditions as such Parties may agree.

#### **Article 22.13 Preliminary Report**

1. Unless the Parties otherwise agree, the arbitral group shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the Parties, and on any information before it pursuant to Article 22.12.

2. If the Parties request, the arbitral group may make recommendations for resolution of the dispute.

3. Unless the Parties otherwise agree, the arbitral group shall, within 120 days after the last panelist is selected or such other period as the Model Rules of Procedure established pursuant to Article 22.11 may provide, present to the Parties an preliminary report containing:

- (a) findings of fact, including any findings pursuant to a request under Article 22.11.6;
- (b) its determination as to whether a Party's measure is or might be inconsistent with the obligations under this Agreement or that a Party's measure is causing nullification or impairment in the sense of Annex 22.02, or any other determination requested in the terms of reference; and
- (c) its recommendations, if the Parties have requested them, for resolution of the dispute.

4. When the arbitral group considers that it cannot provide its report within 120 days, it shall inform the Parties in writing of the reasons for the delay together with an estimate time to provide its report. In no case should the period to provide the report exceed 180 days. The arbitral group shall inform the Parties of any determination under this paragraph no later than seven days after the initial written submission of the complaining Party and shall adjust the remainder of the schedule accordingly.

5. Panelists may furnish separate opinions on matters not unanimously agreed.

6. A Party may submit written comments to the arbitral group on its preliminary report within 14 days of presentation of the report or within such other period as the Parties may agree.

7. After considering any written comments on the preliminary report, the arbitral group may reconsider its report and make any further examination it considers appropriate.

#### **Article 22.14 Final Report**

1. The arbitral group shall present a final report to the Parties, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the preliminary report, unless the Parties otherwise agree. The Parties shall release the final report to the public within 15 days thereafter, subject to the protection of confidential information.

2. No arbitral group may, either in its preliminary report or its final report, disclose which panelists are associated with majority or minority opinions.

## **Article 22.15 Implementation of Final Report**

1. The final report shall make mandatory for the Parties the requirements and periods that it orders. The timeframe for implementing the final report shall not exceed six months from the date on which the final report was notified to the Parties, unless the Parties agree on a different timeframe.
2. If the final report of the arbitral group states that the measure is inconsistent with this Agreement, the Party complained against shall refrain from executing the measure or shall repeal it.
3. If the final report states that the measure is a cause of nullification or impairment as set out in Annex 22.02, it shall specify the degree of nullification or impairment and may suggest the adjustments that it considers mutually satisfactory for the Parties.
4. Within five days after the expiration of the timeframe determined by the arbitral group, the Party complained against shall inform the arbitral group and the other Party of actions adopted to comply with the final report. Within 30 days after expiration of the timeframe as referred to in paragraphs 1, the arbitral group shall determine whether the Party complained against has complied with the final report. In case the arbitral group determines that the Party complained against has not complied with the final report, the complaining Party may suspend benefits in accordance with Article 22.16.

## **Article 22.16 Suspension of Benefits**

1. The complaining Party may suspend the benefits to the defendant Party arising from this Agreement that have an effect equivalent to the benefits not received, if the arbitral group decides that:
  - (a) a measure is inconsistent with the obligations of this Agreement and that the defendant Party has not complied with the final report within the timeframe determined by the arbitral group in the final report; or
  - (b) a measure is a cause of nullification or impairment as set out in Annex 22.02 and the Parties have not reached a mutually satisfactory agreement on the dispute within the timeframe determined by the arbitral group.
2. The suspension of benefits shall last until the Party complained against complies with the final report or until the Parties reach a mutually satisfactory agreement on the dispute, as the case may be. When the Party complained against, after suspension of benefits, considers that it has adopted measures necessary to implement the final report and the complaining Party does not restore benefits previously suspended, it may ask for the establishment of an arbitral group in accordance with paragraph 4 to determine if it has complied with the final report.



3. In considering the benefits to be suspended in accordance with this Article:
  - (a) the complaining Party shall endeavor first to suspend benefits within the same sector or sectors affected by the measure or by other matter considered by the arbitral group as inconsistent with the obligations arising from this Agreement or that has been a cause of nullification or impairment as set out in Annex 22.02; and
  - (b) if the complaining Party considers that it is not feasible nor effective to suspend benefits in the same sector or sectors, it may suspend benefits in other sectors.

4. Once the benefits have been suspended pursuant to this Article, the Parties, by request in writing from a Party, shall establish an arbitral group if necessary to determine if the final report has been complied with or if the level of benefits suspended to the Party complained against by the complaining Party under this Article is obviously excessive; the Request shall be delivered to the other Party and to the designated office. To the extent practicable, the arbitral group shall be composed of the same arbitrators who have knowledge over the dispute.

5. The proceedings before the arbitral group established for purposes of paragraph 4 shall be carried forward pursuant to the Model Rules of Procedure set out in Article 22.11 and the final report shall be issued within 60 days of the nomination of the last arbitrator, or any other timeframe agreed upon by the Parties. If this arbitral group was composed of the same arbitrators who have knowledge over the dispute, it shall present its final report within 30 days of the presentation of the request referred to in paragraph 4.

#### **Article 22.17 Compliance Review**

1. Without prejudice to the procedures set out in Article 22.16.4, if the Party complained against considers that it has eliminated the inconsistency or the nullification or impairment that the arbitral group has found, it may refer the matter to the arbitral group by providing written notice to the complaining Party. The arbitral group shall issue its report on the matter within 90 days after the Party complained against provides notice.

2. If the arbitral group decides that the Party complained against has eliminated the inconsistency or the nullification or impairment, the complaining Party shall promptly reinstate any benefits that Party has suspended under Article 22.16.

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

#### **Article 22.18 Referral of Matters from Judicial or Administrative Proceedings**

1. If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers

would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify to the other Party and the designated office. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible.

2. The Party in whose territory the court or administrative body is located shall submit any agreed 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 agree, a Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

#### **Article 22.19 Private Rights**

No Party may provide for a right of action under its domestic law against the other Party on the grounds that a measure of that Party is inconsistent with this Agreement.

#### **Article 22.20 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 international agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes, for which the Parties will fulfill the dispositions of the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* or the 1975 *Inter-American Convention on International Commercial Arbitration*.

3. The Commission may establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes.

4. This committee shall:

- (a) report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use, and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area; and
- (b) when the committee considers appropriate, promote technical cooperation between the Parties, in furtherance of the objectives identified in paragraph 1.

## **Annex 22.02**

### **Nullification or Impairment**

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

- (a) Chapters 3 through 5 (National Treatment and Market Access for Goods, Rules of Origin and Related Customs Procedures, and Trade Facilitation);
- (b) Chapters 8 (Sanitary and Phyto-Sanitary Measures);
- (c) Chapter 9 (Technical Barriers to Trade);
- (d) Chapter 11 (Cross Border Trade in Services); or
- (e) Chapter 17 (Intellectual Property Rights);

is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the party may have recourse to dispute settlement under this Chapter.

2. A Party may not invoke paragraph (d) or (e) with respect to any measure subject to an exception under Article 23.01 (General Exceptions).

3. To determine the elements of nullification and impairment, the Parties may take into account the principles set out in the jurisprudence of paragraph 1(b) of Article XXIII of GATT 1994.

## **Annex 22.11.1.(a),(c)**

### **Model Rules of Procedure, Public Access to Documents and Public Hearings**

#### **Public Access to Documents**

1. Subject to paragraph 2 of this Annex, all documents<sup>2</sup> submitted to, or issued by, an arbitral group and all notifications made pursuant to this chapter are public. The designated office of each Party shall make such documents and notifications available to the public as soon as is reasonably possible after they are received.
2. The following documents are confidential and may not be made available to the public:
  - (a) A preliminary report presented to the Parties pursuant to Article 13 (Preliminary Report) and any comments to it; and
  - (b) any document submitted to a arbitral group by a Party that contains information designated by the Party as confidential, in the terms established on Annex 22.11.1.(e) of this chapter.
3. Where a Party designates information contained in a document it submits to the arbitral group as confidential, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public, no later than fifteen (15) days after the date of the request<sup>3</sup>.

#### **Public Hearings**

4. All hearings of the arbitral group shall be open for the public to observe, unless the Parties otherwise agree.<sup>4</sup> Nevertheless, the arbitral group shall meet in closed sessions when the submission and arguments of the Parties contains confidential information. The Parties shall maintain the confidentiality of the arbitral group's hearings, to the extent that the arbitral group holds the hearing in closed session. Each Party shall treat as confidential the information submitted by the other Party to the arbitral group which that Party has designated as confidential. Nothing in this Annex shall preclude a Party from disclosing statements of its own positions to the public.

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<sup>2</sup> The term "documents" is not intended to include documents that are purely administrative in nature. The scope and coverage of the term "documents" is established in the definitions of paragraph 3 of Annex 22.11.1.(e) of this chapter.

<sup>3</sup> Under no circumstances shall an entire submission or significant parts of it be designated as confidential information. To the extent possible, confidential information should be submitted in an exhibit or annex to a submission.

<sup>4</sup> The expression "observe" does not require physical presence at the hearing. To facilitate public observation of hearings of the arbitral group, such hearings may be transmitted simultaneously to a public viewing location designated by the arbitral group.

5. A Party that wishes to submit confidential information during a hearing of the arbitral group shall inform the arbitral group prior to so doing. The arbitral group shall close the hearing to observation by the public for the duration of the submission and any discussion of such confidential information.

6. The deliberations of the arbitral group shall be conducted in private and kept confidential. Nevertheless, the arbitral group may permit their assistants and experts to be present during such deliberations.

## **Annex 22.11.1.(d)**

### **Model Rules of Procedure, Non-governmental Entity Participation**

1. Unless the Parties otherwise agree, within three (3) days following the date of establishment of the arbitral group, the arbitral group may grant leave to any non-governmental entity to file a written submission directly relevant to any legal or factual issue under consideration by the arbitral group.
2. A non-governmental entity wishing to make a written submission to the arbitral group must apply to the arbitral group for leave to file the submission within ten (10) days of the establishment of the arbitral group.
3. The application for leave to file a non-governmental entity written submission shall:
  - (a) contain a description of the non-governmental entity, including nationality, the nature of the non-governmental entity's activities, membership, legal status, and sources of financing;
  - (b) contain a statement disclosing whether the non-governmental entity has any relationship, direct or indirect, with any Parties to the Agreement, as well as whether it has received, or will receive, any assistance, financial or otherwise, from the Parties to the Agreement in the preparation of the application for leave or the written submission;
  - (c) contain a statement disclosing whether the non-governmental entity has a associative, subsidiary or other kind of relationship, direct or indirect, with a non-governmental entity from another country, as well as whether it has received, or will receive, any assistance, financial or otherwise, from a nongovernmental entity from another country;
  - (d) identify the specific issues of law or fact under consideration by the arbitral group that the non-governmental entity intends to address in the submission;
  - (e) indicate the substantial interest of the non-governmental entity in the proceeding and why the submission would assist the arbitral group in the determination of a legal or factual issue under consideration by the arbitral group by bringing a perspective, particular knowledge or insight that is different from that of the Parties;
  - (f) be delivered to the arbitral group, along with three hard copies and one digital copy;
  - (g) be dated and signed by the non-governmental entity or the non-governmental entity's legal representative, and include the address and other contact details of the non-governmental entity;

- (h) be no longer than three typed pages;
  - (i) be made in each language being used in the proceeding; and
  - (j) conform with any additional requirements established in the Model Rules of Procedure.
4. A non-governmental entity shall notify the application for leave to file a non-governmental entity written submission to the designated offices of all the Parties.
5. The arbitral group shall not grant leave to file a written non-governmental entity submission if the application does not conform to the requirements established in the paragraph 3.
6. Each Party has ten (10) days from the date of notification of an application for leave to file a non-governmental entity written submission to make written comments to the arbitral group on the application.
7. In deciding whether to grant leave, the arbitral group shall take into account all relevant considerations, including:
- (a) the submission would assist the arbitral group in the determination of any legal or factual issue under consideration by the arbitral group by bringing a perspective, particular knowledge or insight that is different from that of the Parties;
  - (b) the non-governmental entity has a substantial interest in the proceeding<sup>5</sup>; and
  - (c) there is a public interest in the proceeding.
8. To minimize the complexity, cost or length of the proceeding, the arbitral group may direct two or more non-governmental entities that have filed separate applications for leave to file a single joint non-governmental entity written submission.
9. The arbitral group shall render its decision on an application to file a non-governmental entity written submission within thirty (30) days from the date of delivery of the application to the arbitral group. The arbitral group shall communicate forthwith to all designated offices of each Party and the non-governmental entity that made the application of the decision of the arbitral group.
10. A non-governmental entity granted leave to file a written submission shall deliver the submission to the arbitral group within ten (10) days from the date the arbitral group notified its decision pursuant to paragraph 9. The non-governmental

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<sup>5</sup> For greater certainty, an interest in the development of the “jurisprudence”, in the interpretation of the agreement, or in the subject matter of the dispute alone does not suffice in establishing the presence of a substantial interest in the arbitration by a non-governmental entity.

entity submission shall:

- (a) be dated and signed by the non-governmental entity or the non-governmental entity's representative;
- (b) be concise and in no case longer than five (5) typed pages, including any appendices;
- (c) contain a summary of the non-governmental entity's position on those legal or factual issues under consideration by the arbitral group that are addressed in the submission;
- (d) be delivered to the arbitral group, along with three hard copies and one digital copy;
- (e) be made in each language being used in the proceeding; and
- (f) conform with any additional requirements established in the Model Rules of Procedure.

11. A non-governmental entity shall notify the written submission pursuant paragraph 10 to the designated offices of the Parties.

12. The arbitral group shall not consider any non-governmental entity written submission that does not conform to requirements set forth in paragraphs 10 and 11.

13. Each Party has ten (10) days from the date of notification of a non-governmental entity written submission to make written comments to the arbitral group on the submission.

14. The arbitral group is not required to address in its report legal or factual arguments made in non-governmental entity submissions.

15. This Annex does not grant non-governmental entity any right or privilege other than those expressly provided in the present Annex<sup>6</sup>.

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<sup>6</sup> This is aimed at preventing arbitral group provide any incidental or additional rights or privileges, such as: (i) permitting a non-governmental entity to make a supplemental written submission addressing the submission of a party made pursuant to paragraph 13; (ii) permitting non-governmental entities to obtain copies of any written submissions that have not been made available to the public; or (iii) permitting non-governmental entities to speak at an arbitral group hearing.



## Annex 22.11.1.(e)

### Model Rules of Procedure, Confidential Information

#### Confidential Information

1. A Party may designate information that it submits to the arbitral group as confidential information. The Information so designated shall be treated in accordance with the procedures established in this Annex.
2. The Free Trade Commission may amend the procedures governing the treatment of confidential information established in this Annex.

#### Definitions

3. In this Annex,

**approved person** means: a person who is (i) an authorized representative of a Party; (ii) an authorized employee of the arbitral group, designated in accordance with paragraphs 13 and 14 of this Annex; or (iii) a member of the arbitral group.

**authorized employee of the arbitral group** means a person employed or appointed by the arbitral group who has been authorized by the arbitral group to work on the dispute, and includes assistants, experts, translators and interpreters and transcribers present at the arbitral group hearings.

**authorized representative** means:

- (a) an employee of a Party; or
- (b) a legal counsel or other advisor or consultant of a Party who has been authorized by the Party to act on its behalf in the course of the dispute and whose authorization has been notified to the arbitral group and to the Parties, but excludes in all circumstances a person or an employee, officer or agent of any entity that could reasonably be expected to benefit from the receipt of the confidential information.

**confidential information** means any reserved or sensitive information that is not available in the public domain and is designated as confidential

**document** includes any written matter, whether in printed or binary-encoded form.

**information** means information however recorded or stored, including in printed documents and binary-encoded files, and spoken information.

**record** means any medium on which information is recorded or stored.

## **General Principles**

4. Each Party shall ensure that its authorized representatives comply with the procedures set forth in this Annex. The arbitral group shall ensure that all other approved persons comply with these procedures.
5. Each Party shall exercise the utmost restraint in designating information as confidential<sup>7</sup>.

## **Identification of Confidential Information**

6. A Party that designates information as confidential information shall identify confidential information by:
  - (a) clearly marking information recorded in printed records, with the notation 'CONFIDENTIAL INFORMATION';
  - (b) clearly marking information recorded in binary-encoded files with the notation 'CONFIDENTIAL INFORMATION' on a label on the record and by clearly annotating the information where it appears in the files with the notation 'CONFIDENTIAL INFORMATION'; and
  - (c) declaring spoken information to be "Confidential Information" prior to its disclosure.
7. Where a Party submits confidential information first submitted by the other Party, it shall identify that information as confidential information by:
  - (a) clearly marking the information recorded in printed records with the notation 'CONFIDENTIAL INFORMATION' and with the name of the Party that first submitted the information;
  - (b) clearly marking the information recorded in binary-encoded files with the notation 'CONFIDENTIAL INFORMATION' on a label on the record and by clearly annotating the information where it appears in the files with the notation 'CONFIDENTIAL INFORMATION' and with the name of the Party that first submitted the information; and
  - (c) prior to its disclosure, declaring spoken information to be "Confidential Information" and identifying the Party that first submitted the information.

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<sup>7</sup> The treatment of information as confidential under this paragraph imposes a substantial burden on the arbitral group and the Parties. The indiscriminate designation of information as confidential could limit the ability of a Party to fully include in its litigation team individuals who have particular knowledge and expertise relevant to presenting its case, impede the work of the arbitral group and complicate the arbitral group's task in formulating credible public findings and conclusions.

## **Submission of Confidential Information by a Party**

8. A Party submitting an exhibit containing confidential information shall submit copies of the exhibit to the arbitral group and to the other Party through its designated office.
9. If a Party objects to the designation of information as confidential information, to the other Party, the arbitral group shall decide if the information meets the definition of confidential information of this Annex. If the arbitral group considers that the information does not meet the definition, the Party submitting the information may:
  - (a) withdraw the information, in which case the arbitral group and the other Party shall promptly return any record containing the information to the Party submitting it; or
  - (b) withdraw the designation of the information as confidential information.
10. A Party submitting a document containing confidential information shall also provide, upon request of the other Party and no later than 15 days after the date of the request:
  - (a) a version of the document edited to remove the confidential information, redacted in such a manner as to convey a reasonable understanding of the substance of the confidential information; or
  - (b) in exceptional circumstances, a written statement that:
    - (i) an edited version cannot be made, or
    - (ii) an edited version would disclose facts that the Party has a proper reason for wishing to keep confidential.
11. If the arbitral group considers that an edited version of a document does not fulfill the requirements of paragraph 10(a) or that exceptional circumstances do not exist to justify a statement pursuant to paragraph 10(b), the arbitral group may decline to consider the confidential information in question. In such a case, the Party submitting the information may:
  - (a) withdraw the information, in which case the arbitral group and the other Party shall promptly return the document containing the information to the Party submitting it; or
  - (b) comply with the provisions of paragraph 10 to the satisfaction of the arbitral group.

## **Approved Persons**

12. Each Party shall submit to the other Party and the arbitral group a list of its authorized representatives who need access to confidential information submitted by the other Party and whom it wishes to have designated as approved persons. Each Party shall keep the number less than 30 persons on its list. The arbitral group shall, in the same manner, submit to the Parties a list of the authorized employees who have access to confidential information in the dispute. The Parties may submit amendments to their lists at any time.

13. Subject to paragraph 14 of this Annex, the arbitral group shall designate the approved persons of the Parties on the lists submitted under paragraph 12 of this Annex. All approved persons of the Parties, even the authorized employees of the arbitral group, must file and present to the arbitral group the Declaration of Non-Disclosure included in this Annex.

14. In the event that a Party submitting confidential information objects to a person being designated as approved person, the arbitral group shall decide on the objection forthwith. If the arbitral group allows the designation, the information may not be disclosed to the approved person until the Party submitting the information has had a reasonable opportunity to:

- (a) withdraw the information, in which case the arbitral group and the other Party shall promptly return any record containing the information to the Party submitting it; or
- (b) withdraw the designation of the information as confidential.

#### **Rules for Use and Storage of Confidential Information Governed by this Annex**

15. Records containing confidential information shall not be copied, distributed or removed from a locked storage receptacle, except as specifically provided in these procedures.

16. Each Party and the arbitral group shall store in a locked storage receptacle to which only approved persons have access any record containing confidential information submitted to it by the Parties.

17. An approved person shall take all necessary precautions to safeguard confidential information when a record containing the information is in use or being stored.

18. Only approved persons may view or hear confidential information. No approved person who views or hears confidential information may disclose it, or allow it to be disclosed, to any person other than another approved person for the dispute.

19. Approved persons who view or hear confidential information shall use that information only for the purposes of the arbitral group proceedings and for no other purposes.

20. The arbitral group shall not disclose confidential information in its report, but may state conclusions drawn from that information.

21. An approved person viewing or hearing confidential information may take written summary notes of that information for the sole purpose of the arbitral group proceeding. Those notes are subject to the requirements of paragraphs 16, 17 and 25 of this Annex.

22. A Party may bring with it to an arbitral group hearing, for the sole purpose of that hearing, records containing confidential information that it has received from the other Party, but shall immediately thereafter return those records to their locked storage receptacle pursuant to paragraph 16 of this Annex.

23. A Party that intends to submit confidential information during an arbitral group hearing shall inform the arbitral group prior to so doing. Only approved persons may attend or observe the hearing for the duration of the submission and discussion of that information.

#### **Disposal of Confidential Information**

24. After the conclusion of the arbitral group proceeding, within a period fixed by the arbitral group, a Party shall return to the other Party that first submitted confidential information any record containing the confidential information, unless the Party that first submitted the confidential information otherwise agree.

#### **Additional or Alternative Procedures**

25. The arbitral group may apply any additional procedures that it considers necessary to protect the confidentiality of confidential information.

26. The arbitral group may, at the request of or with the consent of the Parties, modify or waive any part of the procedures set forth in this Annex.

#### **Punishment of disclosing confidential information**

27. Any approved person of a Party revealing the confidential information provided by a Party, shall be subject to prosecution and punishment in the territory of the approved person's Party in accordance with the criminal laws of that territory.

**Declaration of Non-Disclosure Form**

1. I acknowledge having received a copy of the procedures governing the treatment of confidential information (the "Procedures") found in Annex 22.1.1.(e) (Confidential Information) of chapter 22 (Dispute Settlement).
2. I acknowledge having read and understood the Procedures.
3. I agree to be bound by, and to adhere to, the provisions of the Procedures and, accordingly, without limitation, to treat confidentially all confidential information that I may view or hear from time to time in accordance with the Procedures.

Executed on this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

BY: \_\_\_\_\_(Signature)\_\_\_\_\_

Name: