

CHAPTER TWENTY-ONE

DISPUTE SETTLEMENT

Article 2101: Cooperation

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

Article 2102: Scope and Coverage

1.# Except for the matters covered in Chapters Sixteen (Labour) and Seventeen (Environment) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the settlement of all 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 the obligations of this Agreement;
- (b)# the other Party has otherwise failed to carry out its obligations under this Agreement; or

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(c)# any benefit that the Party could reasonably have expected to accrue to it under any provision of:

(i)# Chapters Two (National Treatment and Market Access for Goods), Three (Rules of Origin), Four (Origin Procedures and Trade Facilitation) or Fourteen (Government Procurement), or

(ii)# Chapter Nine (Cross-Border Trade in Services),

is being nullified or impaired as a result of the application of any measure of the other Party that is not inconsistent with this Agreement.

2.# In any dispute in respect of subparagraph 1(c), a panel established under this Chapter shall take into consideration the jurisprudence interpreting Article XXIII:1(b) of the GATT 1994 and Article XXIII(3) of GATS. A Party may not invoke subparagraph 1(c)(i) with respect to any measure subject to an exception under Article 2201 (Exceptions - General Exceptions) nor invoke subparagraph 1(c) with respect to any measure subject to the exception under Article 2205 (Exceptions - Cultural Industries).

Article 2103: Choice of Forum

1.# Subject to paragraph 2, disputes regarding any matter arising under both this Agreement and the WTO Agreement or any other free trade agreement to which both Parties are party, or any successor agreement thereto, may be settled in either forum at the discretion of the complaining Party.

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2.# In any dispute referred to in paragraph 1 where the Party complained against claims that its measures are subject to Article 103 (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, in respect of that matter, may have recourse to dispute settlement procedures only under this Agreement.

3.# Where 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 2104: Consultations

1.# A Party may request in writing consultations with the other Party regarding any matter referred to in Article 2102.

2.# The requesting Party shall deliver the request to the other Party, and shall set out the reasons for the request, including the identification of the measure or other matter at issue under Article 2102 and an indication of the legal basis for the complaint.

3.# The other Party shall respond in writing and, subject to paragraph 4, the Parties shall, unless they otherwise agree, enter into consultations within 30 days of the date of receipt of the request by the other Party.

4.# In cases of urgency, including those concerning perishable goods or otherwise involving goods or services that rapidly lose their trade value, such as certain seasonal goods or services, consultations shall commence within 15 days of the date of receipt of the request by the other Party.

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5.# The requesting Party may request the other Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.

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

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

7.# Consultations are confidential and without prejudice to the rights of the Parties in proceedings under this Chapter.

8.# Consultations may be held in person or by any other means agreed to by the Parties.

Article 2105: Good Offices, Conciliation and Mediation

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

2.# Such alternative methods of dispute resolution shall be conducted according to procedures agreed to by the Parties.

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3.# Proceedings established under this Article may begin at any time and be suspended or terminated at any time by either Party.

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

Article 2106: Establishment of a Panel

1.# Unless the Parties agree otherwise, and subject to paragraph 3, if a matter referred to in Article 2104 has not been resolved within:

(a)# 45 days after the date of receipt of the request for consultations; or

(b)# 25 days after the date of receipt of the request for consultations for matters referred to in paragraph 4 of Article 2104;

the complaining Party may refer the matter to a dispute settlement panel.

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 measures or other matters 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 2107: Qualifications of Panelists

1. Each panelist shall:

- (a) have expertise or experience in law, international trade, 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, either Party;
- (d) not be a national of either Party, nor have his or her usual place of residence in the territory of either of the Parties, nor be employed by either of them; and
- (e) comply with a Code of Conduct that the Commission shall establish at its first session following the entry into force of this Agreement.

2. Individuals who have been involved in any of the possible alternative dispute settlement proceedings referred to in Article 2105 may not serve as panelists in the same dispute.

Article 2108: Panel Selection

1. The panel shall comprise three panelists.
2. Each Party shall, within 30 days after the date of receipt of the request for panel establishment, appoint a panelist, propose up to four candidates to serve as the chair of the panel and notify the other Party in writing of the appointment and its proposed candidates to serve as the chair. If a Party fails to appoint a panelist within this time, the panelist shall be selected by the other Party from the candidates proposed for the chair.
3. The Parties shall, within 30 days after the date of receipt of the request for panel establishment, endeavour to agree on and appoint the chair from among the candidates proposed. If the Parties fail to agree on the chair within this time period, within a further seven days the chair shall be selected by lot from the candidates proposed.
4. If a panelist 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. If the chair of the panel withdraws, is removed, or becomes unable to serve, the Parties shall agree 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. If there are no remaining candidates, each Party shall propose up to three additional candidates within a further 30 days and the panelist or chair shall be selected by lot within seven days thereafter from among the candidates proposed. In any case, any time period applicable to the proceeding shall be suspended beginning on the date the panelist or chair withdraws, is removed, or becomes unable to serve and ending on the date the replacement is selected.

Article 2109: Rules of Procedure

1.# Within six months following the date of entry into force of this Agreement, the Commission shall approve Model Rules of Procedure.

2.# Any panel established under this Chapter shall follow the Model Rules of Procedure. A panel may establish, in consultation with the Parties, supplementary rules of procedure that do not conflict with the provisions of this Chapter.

3.# Unless the Parties agree otherwise, the rules of procedure shall ensure:

- (a) the opportunity for each Party to provide initial and rebuttal written submissions;
- (b)# the right to at least one hearing before the panel, and that subject to subparagraph (g), hearings shall be open to the public;
- (c)# that the Parties have the right to present and receive written submissions and present and hear oral arguments in any of the Parties' official languages;
- (d)# subject to subparagraph (g), that each Party's written submissions, written versions of its oral statements and written responses to requests or questions from the panel may be made public;
- (e)# that the panel allow non-governmental entities in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties;

(f)# all submissions and comments made to the panel shall be available to the other Party; and

(g)# the protection of information designated by either Party for confidential treatment.

4.# Unless the Parties otherwise agree within 15 days after the date of the establishment of the panel, the terms of reference shall be:

“To examine, objectively and 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 2110.”

5. If the complaining Party wishes to argue that a matter has nullified or impaired benefits, in the sense of subparagraph 1(c) of Article 2102, the terms of reference shall so indicate.

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

(a) to be inconsistent with the obligations of the Agreement; or

(b) to have caused nullification or impairment in the sense of subparagraph 1(c) of Article 2102,

the terms of reference shall so indicate.

7. On the request of a Party, or on its own initiative, the panel may seek information and technical advice from any person or body it deems appropriate in accordance with the Model Rules of Procedure.

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8. The panel may rule on its own jurisdiction.
9. The panel may delegate to the chair authority to make administrative and procedural decisions.
10. The panel may, in consultation with the Parties, modify any time-period applicable in the panel proceedings and make other procedural or administrative adjustments as may be required for the fairness or efficiency of the proceeding.
11. Findings, determinations and recommendations of the panel in the sense of Article 2110 shall be made by a majority of its members.
12. Panelists may furnish separate opinions on matters not unanimously agreed. No panel may disclose which panelists are associated with majority or minority opinions.
13. The Parties shall bear the expenses of a panel, including the remuneration of the panelists, in accordance with the Model Rules of Procedure.

Article 2110: Panel Reports

- 1.# Unless the Parties otherwise agree, 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 on any information and technical advice put before it pursuant to the provisions of this Chapter.

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3.# The panel shall present to the Parties an initial report within 90 days after the last panelist is selected. The report shall contain:

- (a)# findings of fact;
- (b)# determinations as to whether or not a Party has conformed with its obligations under this Agreement and any other finding or determination requested in the terms of reference; and
- (c)# recommendations for resolution of the dispute, if requested by a Party.

4.# Notwithstanding the provisions of Article 2109, 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 any such 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)# make any 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 transmitted to the Parties, subject to subparagraph 3(g) of Article 2109.

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Article 2111: Request for Clarification of the Report

1. Within 10 days after the presentation of the final report, a Party may submit a written request to the panel for clarification of any determinations or recommendations in the report that the Party considers ambiguous. The panel shall respond to the request within 10 days after the presentation of such request.
2. The submission of a request pursuant to paragraph 1 shall affect the time periods referred to in paragraph 3 of Article 2113 and paragraph 1 of Article 2114, unless the panel decides otherwise.

Article 2112: Suspension and Termination of Proceedings

- 1.# The Parties may agree to suspend the work of the panel at any time for a period not exceeding 12 months following the date of such agreement. If the work of the panel has been suspended for more than 12 months, the authority of the panel shall lapse, unless the Parties agree otherwise. If the authority of the panel lapses and the Parties have not reached an agreement on the settlement of the dispute, nothing in this provision shall prevent a Party from requesting a new proceeding regarding the same matter.
- 2.# The Parties may agree to terminate the proceeding before a panel at any time by jointly notifying the chair of the panel.

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Article 2113: Implementation of the Final Report

1.# On receipt of the final report of a panel, the Parties shall agree on the resolution of the dispute, which shall be in conformity with the determinations and the recommendations, if any, of the panel, unless otherwise agreed by the Parties.

2.# Wherever possible, the resolution shall be removal of any measure not conforming to this Agreement or removal of the nullification or impairment in the sense of subparagraph 1(c) of Article 2102.

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

Article 2114: Non-Implementation – Suspension of Benefits

1.# If no agreement on compensation has been reached pursuant to paragraph 3 of Article 2113 within 20 days after the date of the complaining Party's request, or if 30 days have passed following the presentation of the final report where compensation is not requested pursuant to paragraph 3 of Article 2113, or the Parties have agreed on the resolution of the dispute or on a compensation, and the complaining Party considers that the other Party has failed to observe the terms of the agreement, the complaining Party may suspend the application to the other Party of benefits of equivalent effect, following notice to the other Party, until such time as they have reached agreement on a resolution of the dispute. The notice shall specify the level of benefits that the complaining Party proposes to suspend.

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2.# In considering which benefits to suspend pursuant to paragraph 1:

(a)# the complaining Party should first seek to suspend benefits or other obligations in the same sector or sectors as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Agreement or to have caused nullification or impairment in the sense of subparagraph 1(c) of Article 2102; and

(b)# a complaining Party that considers it is not practicable or effective to suspend benefits or other obligations in the same sector or sectors may suspend benefits in other sectors.

3.# The suspension of benefits shall be temporary and be applied by the complaining Party only until the measure found to be inconsistent with the obligations of this Agreement or otherwise nullifying or impairing benefits in the sense of subparagraph 1(c) of Article 2102 has been brought into conformity with this Agreement, including as a result of the panel process described in Article 2115, or until such time as the Parties have otherwise reached agreement on a resolution of the dispute.

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Article 2115: Review of Compliance and Suspension of Benefits

1.# A Party may, by written notice to the other Party, request that a panel established pursuant to Article 2106 be reconvened to make a determination with respect to:

- (a)# whether the level of benefits suspended by a Party pursuant to paragraph 1 of Article 2114 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.¹

2.# In the written notice of the request, the Party shall identify the specific measures or matters 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 upon receipt by the other Party of the written notice of the request. In the event that any original panelist is unable to serve on the panel the provisions of Article 2108 shall apply *mutatis mutandis*.

4. The provisions of Articles 2109 and 2110 apply *mutatis mutandis* to procedures adopted and reports issued by a panel reconvened under this Article, with the exception that, subject to paragraph 10 of Article 2109, the panel shall present an initial report within 60 days of being reconvened where the request concerns paragraph 1(a) only, and otherwise within 90 days.

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

¹ In interpreting the terms “the existence or consistency with” and “measures taken to comply”, a compliance panel established under this paragraph shall take into account relevant jurisprudence under the Dispute Settlement Understanding.

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Article 2116: Referrals 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 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 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, each Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

Article 2117: Private Rights

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

Article 2118: 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.

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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 be in compliance with paragraph 2 if it is a party to and is in compliance with the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on 10 June 1958.

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Annex 2109
Model Rules of Procedure

Application

1. The following rules of procedure apply to dispute settlement proceedings under Chapter 21 unless the Parties otherwise agree.

Definitions

2. For the purposes of this Annex:

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

complaining Party means a Party that requests the establishment of a panel under Article 2106;

court reporter means a designated note-taker.

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

panel means a panel established under Article 2106; and

representative means an employee of a government department or agency or of any other government entity of a Party;

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3. Any reference made in these rules of procedure to an Article is a reference to the appropriate Article in Chapter 21.

Written Submissions and Other Documents

4. Each Party shall deliver the original and no less than four copies of any written submission to the panel and one copy to the Embassy of the other Party. Delivery of submissions and any other document related to the panel proceeding may be made by facsimile or other means of electronic transmission if the Parties so agree. Where 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 such submissions or other document.

5. The complaining Party shall deliver an initial written submission no later than 10 days after the date on which the last panelist is appointed. The Party complained against shall, in turn, 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.

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

7. A Party may at any time 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.

8. If the last day for delivery of a document falls on a legal holiday observed by a Party or on any other day on which the government offices of that 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

9. A 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.

10. A Party asserting that a measure is subject to an exception under this Agreement shall have the burden of establishing that the exception applies.

Written Submission by a Non-Governmental Entity

11. A panel may, on application, grant leave to a non-governmental entity to file a written submission. In making its decision to grant leave, the panel shall consider, *inter alia*:

- (a) whether there is a public interest in the proceeding;
- (b) whether the non-governmental entity has a substantial interest in the proceeding;²
- (c) whether the written submission would assist the panel in the determination of 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) any submissions by the Parties on the application for leave.

² An interest in the development of trade law jurisprudence, the interpretation of the Agreement, or in the subject matter of the dispute does not alone suffice in establishing the presence of a substantial interest in the proceeding by a non-governmental entity.

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

- (a) the written submission does not introduce new issues to the dispute and is within the terms of reference of the dispute as defined by the Parties;
- (b) the non-governmental entity follows any rules adopted by the Commission for the filing of such written submissions;
- (c) the written submission avoids disrupting the proceeding and preserves the equality of the Parties; and
- (d) the Parties have the opportunity to respond to the written submission.

Role of Experts

13. On request of a Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate subject to paragraphs 14 and 15 and such additional terms and conditions as the Parties may agree upon. The requirements set out in Article 2107 shall apply to the experts or bodies, as appropriate.

14. Before the panel seeks information or technical advice, it shall:

- (a) notify the Parties of its intention to seek information or technical advice pursuant to paragraph 13 and provide them with an adequate period of time to submit comments; and
- (b) provide the Parties with a copy of any information or technical advice received pursuant to paragraph 13 and provide them with an adequate period of time to submit comments.

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

Operation of Panels

16. The chair of the panel shall preside at all of its meetings.

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

18. Only panelists may take part in the deliberations of the panel. The panel may, in consultation with the Parties, employ such number of assistants, interpreters or translators, or court reporters 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 any information that is protected pursuant to Article 2109 and Annex 2109.

19. A panel may, in consultation with the Parties, modify any time-period applicable in the panel proceedings and make other procedural or administrative adjustments as may be required in the proceeding.

Hearings

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

21. 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.

22. No later than five days before the date of a hearing, each Party shall deliver to the other Party and the panel a list of the names of those 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.

23. 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.

24. Hearings shall be open to the public, except as necessary to protect information designated by either Party for confidential treatment. The panel shall, in consultation with the Parties, adopt appropriate logistical arrangements and procedures to ensure that hearings are not disrupted by the attendance of the public. Such procedures may include, *inter alia*, the use of live web-broadcasting or of closed-circuit television.

25. 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

26. No Party may 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.

27. No panelist may discuss any aspect of the substantive subject matter of the proceeding with the Parties in the absence of the other panelists.

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Remuneration and Payment of Expenses

28. Unless the Parties agree otherwise, the expenses of the Panel, the remuneration of the panelists and their assistants, their travel and lodging expenses, and all general expenses shall be born in equal shares between the Parties.

29. Each panelist shall keep a record and render a final account of his or her time and expenses, and those of any assistant, and shall keep a record and render a final account of all general expenses.