

## ANNEX 14-C – ARBITRATION MECHANISM

### Article 14C.1: Consultations

1. Any Party may request consultations with any other Party with respect to any matter described in Article 14.3 (Scope). The Party making the request for consultations shall do so in writing, and shall set out the reasons for the request, including identification of the actual or proposed measure<sup>18</sup> or other matter at issue and an indication of the legal basis for the complaint. The requesting Party shall circulate the request concurrently to the other Parties through the overall contact points designated under Article 12.6 (Contact Points).
2. The Party to which a request for consultations is made shall, unless the consulting Parties agree otherwise, reply in writing to the request no later than seven days after the date of its receipt of the request.<sup>19</sup> That Party shall circulate its reply concurrently to the other Parties through the overall contact points and enter into consultations in good faith.
3. A Party other than a consulting Party that considers that it has a substantial interest in the matter may participate in the consultations by notifying the other Parties in writing no later than seven days after the date of circulation of the request for consultations. The Party shall include in its notice an explanation of its substantial interest in the matter.
4. Unless the consulting Parties agree otherwise, they shall enter into consultations no later than:
  - (a) 15 days after the date of receipt of the request for matters concerning perishable goods; or
  - (b) 30 days after the date of receipt of the request for all other matters.
5. Consultations may be held in person or by any technological means available to the consulting Parties. If the consultations are held in person, they shall be held in the capital of the Party to which the request for consultations was made, unless the consulting Parties agree otherwise.
6. The consulting Parties shall make every attempt to reach a mutually satisfactory resolution of the matter through consultations under this Article. To this end:
  - (a) each consulting Party shall provide sufficient information to enable a full examination of how the actual or proposed measure might affect the operation or application of this Agreement; and

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<sup>18</sup> The Parties shall, in the case of a proposed measure, make every effort to make the request for consultation under this provision within 60 days of the date of publication of the proposed measure, without prejudice to the right to make such request at any time.

<sup>19</sup> For greater certainty, if the Party to which a request for consultations is made does not reply within the time period specified in this paragraph, it shall be deemed to have received the request seven days after the date on which the Party making the request for consultations transmitted that request.

- (b) a Party that participates in the consultations shall treat any information exchanged in the course of the consultations that is designated as confidential on the same basis as the Party providing the information.

7. In consultations under this Article, a consulting Party may request that another consulting Party make available personnel of its government agencies or other regulatory bodies who have expertise in the matter at issue.

8. Consultations shall be confidential and without prejudice to the rights of any Party in any other proceedings.

#### **Article 14C.2: Appointment of Arbitral Tribunals**

1. A Party that requested consultations under Article 14C.1 may request, by means of a written notice addressed to the responding Party, the appointment of an arbitral tribunal if the consulting Parties fail to resolve the matter within:

- (a) a period of 60 days after the date of receipt of the request for consultations under Article 14C.1;
- (b) a period of 30 days after the date of receipt of the request for consultations under Article 14C.1 in a matter regarding perishable goods; or
- (c) any other period as the consulting Parties may agree.

2. The complaining Party shall circulate the request concurrently to all Parties through the overall contact points designated under Article 12.6 (Contact Points).

3. The complaining Party shall include in the request to appoint an arbitral tribunal an identification of the measure or other matter at issue and a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4. Unless otherwise agreed by the disputing Parties, the arbitral tribunal shall be established and perform its functions in a manner consistent with this Annex.

5. Unless the disputing Parties agree otherwise, the arbitral tribunal shall be composed in a manner consistent with this Annex and the Rules of Procedure.

6. If an arbitral tribunal has been established regarding a matter and another Party requests the establishment of an arbitral tribunal regarding the same matter, a single arbitral tribunal should be established to examine those complaints whenever feasible.

7. An arbitral tribunal shall not be established to review a proposed measure.

### **Article 14C.3: Terms of Reference**

Unless the disputing Parties agree otherwise, no later than 20 days after the date of delivery of the request for the establishment of an arbitral tribunal, the terms of reference shall be to:

- (a) examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of an arbitral tribunal under Article 14C.2; and
- (b) make findings and determinations, and any jointly requested recommendations, together with its reasons therefor, as provided for in Article 14C.10.

### **Article 14C.4: Composition of Arbitral Tribunals**

1. An arbitral tribunal shall be composed of three members.
2. Unless the disputing Parties agree otherwise, they shall apply the following procedures to compose an arbitral tribunal:
  - (a) Within a period of 20 days after the date of delivery of the request for the establishment of an arbitral tribunal under Article 14C.2, the complaining Party or Parties, on the one hand, and the responding Party, on the other, shall each appoint an arbitrator and notify each other of those appointments.
  - (b) If the complaining Party or Parties fail to appoint an arbitrator within the period specified in subparagraph (a), the dispute settlement proceedings shall lapse at the end of that period.
  - (c) For appointment of the third arbitrator, who shall serve as chair, the disputing Parties shall endeavour to agree on the appointment of a chair.
  - (d) If the responding Party fails to appoint an arbitrator or if the chair of the arbitral tribunal has not been appointed within 30 days of the date of delivery of the request referred to in subparagraph (a), at the request of any Party to the dispute the necessary designations shall be made by the Director-General of the WTO within 30 days of the request being made to the Director-General.
  - (e) If the Director-General of the WTO notifies the disputing Parties that he or she is unavailable, or does not appoint the remaining arbitrators within 30 days after the date of the request referred to in subparagraph (d), either Party may request the Secretary-General of the Permanent Court of Arbitration to make the remaining appointment promptly.
3. Unless the disputing Parties agree otherwise, the chair shall not be a national of, or be employed by, any of the disputing Parties or a third Party.

4. Each disputing Party shall endeavour to select arbitrators who have expertise or experience relevant to the subject matter of the dispute.

5. If an arbitrator selected under paragraph 2 is unavailable, the complaining Party, the responding Party, or the disputing Parties, as the case may be, shall, no later than 20 days after learning that the arbitrator is unavailable, select another arbitrator in accordance with the same method of selection that was used to select the arbitrator who is unavailable, unless the disputing Parties agree otherwise. The replacement arbitrator shall have all the powers and duties of the original arbitrator. The work of the arbitral tribunal shall be suspended pending the appointment of the replacement arbitrator, and all time frames set out in this Annex and in the Rules of Procedure shall be extended by the amount of time that the work was suspended.

6. If a disputing Party considers that an arbitrator is in violation of the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* referred to in Article 14C.5.1(d), the disputing Parties shall consult and, if they agree, the arbitrator shall be removed and a new arbitrator shall be selected in accordance with this Article.

#### **Article 14C.5: Qualifications of Arbitrators**

1. All arbitrators shall:

- (a) have expertise or experience in law, international trade, digital economy, other matters covered by this Agreement or the resolution of disputes arising under international trade agreements;
- (b) be chosen strictly on the basis of objectivity, reliability and sound judgment;
- (c) be independent of, and not affiliated with or take instructions from, any Party; and
- (d) comply with the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (as contained in document *WT/DSB/RC/1* and any subsequent amendments), *mutatis mutandis*.

2. An individual shall not serve as an arbitrator for a dispute in which that person has participated under Article 14.4 (Good Offices and Conciliation).

#### **Article 14C.6: Function of Arbitral Tribunals**

1. An arbitral tribunal's function is to make an objective assessment of the matter before it, which includes an examination of the facts and the applicability of and conformity with this Agreement, and to make the findings, determinations and recommendations as are called for in its terms of reference and necessary for the resolution of the dispute.

2. Unless the disputing Parties agree otherwise, the arbitral tribunal shall perform its functions and conduct its proceedings in a manner consistent with this Annex and the Rules of Procedure.

3. The arbitral tribunal shall consider this Agreement in accordance with the rules of interpretation under international law as reflected in Article 31 and Article 32 of the *Vienna Convention on the Law of Treaties (1969)*. With respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the arbitral tribunal shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body. The findings, determinations and recommendations of the arbitral tribunal shall not add to or diminish the rights and obligations of the Parties under this Agreement.

4. An arbitral tribunal shall take its decisions by consensus, except that, if the arbitral tribunal is unable to reach consensus, it may take its decisions by majority vote.

#### **Article 14C.7: Third Party Participation**

A Party that is not a disputing Party and that considers it has an interest in the matter before the arbitral tribunal shall, on delivery of a written notice to the disputing Parties, be entitled to attend all hearings, make written submissions, present views orally to the arbitral tribunal, and receive written submissions of the disputing Parties. The Party shall provide written notice no later than 10 days after the date of circulation of the request for the appointment of the arbitral tribunal under Article 14C.2.

#### **Article 14C.8: Role of Experts**

At the request of a disputing Party, or on its own initiative, an arbitral tribunal may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties agree and subject to any terms and conditions agreed by the disputing Parties. The disputing Parties shall have an opportunity to comment on any information or advice obtained under this Article.

#### **Article 14C.9: Suspension or Termination of Proceedings**

1. The arbitral tribunal may suspend its work at any time at the request of the complaining Party or, if there is more than one complaining Party, at the joint request of the complaining Parties, for a period not to exceed 12 consecutive months. The arbitral tribunal shall suspend its work at any time if the disputing Parties request it to do so. In the event of a suspension, the time frames set out in this Annex and in the Rules of Procedure shall be extended by the amount of time that the work was suspended. If the work of the arbitral tribunal is suspended for more than 12 consecutive months, the arbitral tribunal proceedings shall lapse unless the disputing Parties agree otherwise.

2. The arbitral tribunal shall terminate its proceedings if the disputing Parties request it to do so.

#### **Article 14C.10: Initial Report**

1. The arbitral tribunal shall draft its report without the presence of any Party.
2. The arbitral tribunal shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the disputing Parties and any third Parties. At the joint request of the disputing Parties, the arbitral tribunal may make recommendations for the resolution of the dispute.
3. The arbitral tribunal shall present an initial report to the disputing Parties no later than 150 days after the date of the appointment of the last arbitrator. In cases of urgency, including those related to perishable goods, the arbitral tribunal shall endeavour to present an initial report to the disputing Parties no later than 120 days after the date of the appointment of the last arbitrator.
4. The initial report shall contain:
  - (a) findings of fact;
  - (b) the determination of the arbitral tribunal as to whether:
    - (i) the measure at issue is inconsistent with obligations in this Agreement; or
    - (ii) a Party has otherwise failed to carry out its obligations in this Agreement;
  - (c) any other determination requested in the terms of reference;
  - (d) recommendations, if the disputing Parties have jointly requested them, for the resolution of the dispute; and
  - (e) the reasons for the findings and determinations.
5. In exceptional cases, if the arbitral tribunal considers that it cannot release its initial report within the time period specified in paragraph 3, it shall inform the disputing Parties in writing of the reasons for the delay together with an estimate of when it will issue its report. A delay shall not exceed an additional period of 30 days unless the disputing Parties agree otherwise.
6. Arbitrators may present separate opinions on matters not unanimously agreed.
7. A disputing Party may submit written comments to the arbitral tribunal on its initial report no later than 15 days after the presentation of the initial report or within another period as the disputing Parties may agree.

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

#### **Article 14C.11: Final Report**

1. The arbitral tribunal shall present a final report to the disputing Parties, including any separate opinions on matters not unanimously agreed, no later than 30 days after presentation of the initial report, unless the disputing Parties agree otherwise. After taking steps to protect confidential information, and no later than 15 days after the presentation of the final report, the disputing Parties shall release the final report to the public.

2. No arbitral tribunal shall, either in its initial report or its final report, disclose which arbitrators are associated with majority or minority opinions.

#### **Article 14C.12: Implementation of Final Report**

1. The Parties recognise the importance of prompt compliance with determinations made by arbitral tribunals under Article 14C.11 in achieving the aim of the dispute settlement procedures in this Annex, which is to secure a positive solution to disputes.

2. If in its final report the arbitral tribunal determines that:

(a) the measure at issue is inconsistent with a Party's obligations in this Agreement;  
or

(b) a Party has otherwise failed to carry out its obligations in this Agreement,

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

3. Unless the disputing Parties agree otherwise, the responding Party shall have a reasonable period of time in which to eliminate the non-conformity if it is not practicable to do so immediately.

4. The disputing Parties shall endeavour to agree on the reasonable period of time. If the disputing Parties fail to agree on the reasonable period of time within a period of 45 days after the presentation of the final report under Article 14C.11, any disputing Party may, no later than 60 days after the presentation of the final report under Article 14C.11, refer the matter to the chair to determine the reasonable period of time through arbitration.

5. The chair shall take into consideration as a guideline that the reasonable period of time should not exceed 15 months from the presentation of the final report under Article 14C.11. However, that time may be shorter or longer, depending upon the particular circumstances.

6. The chair shall determine the reasonable period of time no later than 90 days after the date of referral to the chair under paragraph 4.

7. The disputing Parties may agree to vary the procedures set out in paragraphs 4 through 6 for the determination of the reasonable period of time.

#### **Article 14C.13: Non-Implementation – Compensation and Suspension of Benefits**

1. The responding Party shall, if requested by the complaining Party or Parties, enter into negotiations with the complaining Party or Parties no later than 15 days after receipt of that request, with a view to developing mutually acceptable compensation, if:

- (a) the responding Party has notified the complaining Party or Parties that it does not intend to eliminate the non-conformity; or
- (b) following the expiry of the reasonable period of time established in accordance with Article 14C.12, there is disagreement between the disputing Parties as to whether the responding Party has eliminated the non-conformity.

2. A complaining Party may suspend benefits in accordance with paragraph 3 if that complaining Party and the responding Party have:

- (a) been unable to agree on compensation within a period of 30 days after the period for developing compensation has begun; or
- (b) agreed on compensation but the relevant complaining Party considers that the responding Party has failed to observe the terms of the agreement.

3. A complaining Party may, at any time after the conditions set out in paragraph 2 are met in relation to that complaining Party, provide written notice to the responding Party that it intends to suspend benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend.<sup>20</sup> The complaining Party may begin suspending benefits 30 days after the later of the date on which it provides notice under this paragraph or the date that the arbitral tribunal issues its determination under paragraph 5, as the case may be.

4. In considering what benefits to suspend under paragraph 3, the complaining Party shall apply the following principles and procedures:

- (a) it should first seek to suspend benefits in the same subject matter as that in which the arbitral tribunal has determined non-conformity to exist;
- (b) if it considers that it is not practicable or effective to suspend benefits in the same subject matter, and that the circumstances are serious enough, it may suspend

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<sup>20</sup> For greater certainty, the phrase “the level of benefits that the Party proposes to suspend” refers to the level of concessions under this Agreement, the suspension of which a complaining Party considers will have an effect equivalent to that of the non-conformity, determined to exist by the arbitral tribunal in its final report issued under Article 14C.11.

benefits in a different subject matter. In the written notice referred to in paragraph 3, the complaining Party shall indicate the reasons on which its decision to suspend benefits in a different subject matter is based; and

- (c) in applying the principles set out in subparagraph (a) and subparagraph (b), it shall take into account:
  - (i) the trade in the subject matter in which the arbitral tribunal has found the non-conformity, and the importance of that trade to the complaining Party; and
  - (ii) the broader economic consequences of the suspension of benefits.

5. If the responding Party considers that:

- (a) the level of benefits proposed to be suspended is manifestly excessive or the complaining Party has failed to follow the principles and procedures set out in paragraph 4; or
- (b) it has eliminated the non-conformity that the arbitral tribunal has determined to exist,

it may, within 30 days of the date of delivery of the written notice provided by the complaining Party under paragraph 3, request that the arbitral tribunal be reconvened to consider the matter. The responding Party shall deliver its request in writing to the complaining Party. The arbitral tribunal shall reconvene as soon as possible after the date of delivery of the request and shall present its determination to the disputing Parties no later than 90 days after it reconvenes to review a request under subparagraph (a) or subparagraph (b), or 120 days after it reconvenes for a request under both subparagraph (a) and subparagraph (b). If the arbitral tribunal determines that the level of benefits the complaining Party proposes to suspend is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect.

6. Unless the arbitral tribunal has determined that the responding Party has eliminated the non-conformity, the complaining Party may suspend benefits up to the level the tribunal has determined under paragraph 5 or, if the tribunal has not determined the level, the level the complaining Party has proposed to suspend under paragraph 3. If the arbitral tribunal determines that the complaining Party has not followed the principles and procedures set out in paragraph 4, the tribunal shall set out in its determination the extent to which the complaining Party may suspend benefits in which subject matter in order to ensure full compliance with the principles and procedures set out in paragraph 4. The complaining Party may suspend benefits only in a manner consistent with the arbitral tribunal's determination.

7. Compensation and suspension of benefits shall be temporary measures. None of these measures are preferred to full implementation through elimination of the non-conformity. Compensation and suspension of benefits shall only be applied until the responding Party has eliminated the non-conformity, or until a mutually satisfactory solution is reached.

**Article 14C.14: Compliance Review**

1. Without prejudice to the procedures in Article 14C.13, if a responding Party considers that it has eliminated the non-conformity found by the arbitral tribunal, it may refer the matter to the arbitral tribunal by providing a written notice to the complaining Party or Parties. The arbitral tribunal shall issue its report on the matter no later than 90 days after the responding Party provides written notice.
2. If the arbitral tribunal determines that the responding Party has eliminated the non-conformity the complaining Party or Parties shall promptly reinstate any benefits suspended under Article 14C.13.