

CHAPTER TWENTY

DISPUTE SETTLEMENT

ARTICLE 20.1: 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 20.2: SCOPE OF APPLICATION

1. Except for any matter arising under Chapter 5 (Sanitary and Phytosanitary Measures), 13 (Competition and Consumer Policy), 16 (Trade and Sustainable Development), 17 (Cooperation) or as otherwise provided in this Agreement or as the Parties otherwise agree, this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that:

- (a) a measure of the other Party is inconsistent with its obligations under this Agreement;
- (b) the other Party has otherwise failed to carry out its obligations under this Agreement; or
- (c) a benefit the Party could reasonably have expected to accrue to it under Chapter 2 (National Treatment and Market Access for Goods), 3 (Rules of Origin and Origin Procedures), 9 (Cross-Border Trade in Services), or 14 (Government Procurement), is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.

2. A Party may not invoke paragraph 1(c) with respect to any measure subject to an exception under Article 21.1 (General Exceptions).

ARTICLE 20.3: CHOICE OF FORUM

1. Where a dispute regarding any matter arises under this Agreement and under the WTO Agreement or any other trade agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.

2. Once the complaining Party has requested 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 other fora.

ARTICLE 20.4: CONSULTATIONS

1. Either Party may request consultations with the other Party with respect to any matter described in Article 20.2 by delivering written notification to the other Party. The complaining Party 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. The other Party shall reply in writing within 10 days of the date of receipt of the request and enter into consultations.
2. Each Party shall:
 - (a) provide sufficient information in the consultations to enable a full examination of how the matter subject to consultations might affect the operation 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.
3. Consultations are confidential and without prejudice to the rights of the Parties in proceedings under this Chapter.

ARTICLE 20.5: REFERRAL TO THE JOINT COMMISSION

1. If the Parties fail to resolve a matter within 60 days of the receipt of a request for consultations under Article 20.4 or 20 days where the matter concerns cases of urgency, including those concerning perishable goods¹, or goods or services that rapidly lose their trade value such as certain seasonal goods or services, only the consulting Party may request the intervention of the Joint Commission by delivering written notification to the other Party.
2. The requesting Party shall deliver the request to the other Party, and shall set out in the request, the reasons thereof including identification of the measure at issue and an indication of the legal and factual basis for the complaint.
3. Unless it decides otherwise, the Joint Commission shall convene within 10 days of delivery of the request and shall endeavor to resolve the dispute promptly, with the objective to arrive at a mutually satisfactory resolution.
4. The Joint Commission may meet in person or through any other technological means available to the Parties.

ARTICLE 20.6: GOOD OFFICES, CONCILIATION, OR MEDIATION

1. Good offices, conciliation, and mediation are procedures undertaken voluntarily if the Parties so agree.

¹ For greater certainty, **perishable goods** means perishable agricultural and fish goods classified in HS Chapters 1 through 24.

2. Proceedings involving good offices, conciliation, and mediation, and in particular positions taken by the Parties during these proceedings, shall be confidential and without prejudice to the rights of either Party in any further proceedings.

3. Good offices, conciliation, or mediation may be requested at any time by any Party. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation, or mediation are concluded without an agreement between the Parties, the complaining Party may request the establishment of a panel.

ARTICLE 20.7: ESTABLISHMENT OF PANEL

1. The requesting Party may deliver a written request to establish a dispute settlement panel to the other Party, provided that a matter has not been resolved in any of the following cases:

- (a) within 30 days following the receipt of the request to refer the matter to the Joint Commission or any other period agreed by the Parties, or when the meeting has not been held pursuant to the provisions established in Article 20.5.3;
- (b) when the Parties have not settled the dispute during consultations within the 45 day period established in Article 20.4 or 20 days where the matter concerns cases of urgency, including those concerning perishable goods, or goods or services that rapidly lose their trade value such as certain seasonal goods or services, or within any other period that the Parties may agree during consultations; or
- (c) when the requesting Party that referred the matter to the Joint Commission considers, once the period indicated by the Joint Commission has expired, that the measures aimed at complying with the agreement reached pursuant to Article 20.5, were not adopted.

2. The complaining Party shall set out the reasons for the request, including identification of the measure or other matter at issue and a brief summary of the legal basis for the complaint sufficient to present the problem clearly.

3. A panel shall be established upon the date of receipt of the request referred to in paragraph 1.

4. Unless the Parties otherwise agree, the Parties shall apply the following procedures in selecting a panel:

- (a) the panel shall be composed of three members;
- (b) each Party shall appoint one panelist within 30 days after the date of receipt of the request for panel establishment. If a Party fails to appoint a panelist within that period, the panelist shall be appointed by the other Party, unless the Parties otherwise decide; and

- (c) the Parties shall endeavor to agree on a third panelist who shall serve as chair within 30 days after the date the second panelist has been appointed. If the Parties are unable to agree on the chair of the panel within this period, they shall within the next 10 days exchange their respective list comprising four nominees who shall not be nationals of either Party. The chair shall then be appointed by lot from the lists within 10 days of exchange of lists. If a Party fails to submit its list of four nominees, the chair shall be appointed by lot from the list already submitted by the other Party.

5. If a panelist appointed under this Article becomes unable to serve on the panel, a successor shall be appointed in the same manner as prescribed for the appointment of the original panelist and the successor shall have all the powers and duties of the original panelist. In such a case, any time period applicable to the panel proceedings shall be suspended for a period beginning on the date when the original panelist becomes unable to serve and ending on the date when the new panelist is appointed.

6. Panelists shall:

- (a) be chosen strictly on the basis of objectivity, reliability, and sound judgment;
- (b) have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements;
- (c) be independent of, and not be affiliated with or take instructions from, either Party; and
- (d) comply with the code of conduct established in Annex 20-A.

7. If a Party believes that a panelist has violated or 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 20.8: RULES OF PROCEDURE

1. Unless the Parties otherwise agree, the panel shall follow the model rules of procedure established in Annex 20-B, which shall ensure:

- (a) a right to at least one hearing before the panel;
- (b) that, subject to subparagraph (e), any hearing before the panel shall be open to the public;
- (c) an opportunity for each Party to provide initial and rebuttal submissions;
- (d) that each Party's written submissions, written versions of its oral statement, and written response to a request or questions from the panel may be made

available to the public; and

- (e) the protection of information designated by either Party for confidential treatment.

2. Unless the Parties otherwise agree, the panel shall follow the model rules of procedure and may, after consulting with the Parties, adopt additional rules of procedure not inconsistent with the model rules.

3. Unless the Parties otherwise agree within 20 days of the delivery of the request for the establishment of the panel, the panel's terms of reference shall be:

“To examine, in the light of the relevant provisions of this Agreement, the matter referenced in the request for the establishment of the panel, to make findings, determinations, and recommendations as provided in Article 20.9.1 and 20.9.2, and to present the written reports referred to in Article 20.9.1 and 20.9.4.”

4. Upon 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, provided that the Parties so agree and subject to such terms and conditions as the Parties may agree.

5. The decisions of the panel, including the adoption of the report, shall be adopted by a majority of its members. No panel may disclose which panelists are associated with majority or minority opinions.

ARTICLE 20.9: PANEL REPORT

1. Unless the Parties otherwise agree, the panel shall, within 90 days after the chair is appointed, present to the Parties an initial report containing findings of fact and its determination as to:

- (a)
 - (i) whether the measure at issue is inconsistent with the obligations of this Agreement;
 - (ii) whether a Party has otherwise failed to carry out its obligations under this Agreement; or
 - (iii) whether the measure at issue is causing nullification or impairment in the sense of Article 20.2.1(c); and
- (b) any other matter that the Parties have jointly requested that the panel address, as well as the reasons for its findings and determinations.

2. The panel shall base its report on the relevant provisions of this Agreement and the submissions and arguments of the Parties. The panel shall consider this Agreement in accordance with customary rules of interpretation of public international law, such as the ones established in the *Vienna Convention on the Law of Treaties* (1969). The panel may, at the request of the Parties, make recommendations for the resolution of the dispute.

3. Each Party may submit written comments to the panel on its initial report within 14 days of the presentation of the report. After considering any written comments by the Parties on the initial report, the panel may modify its report and make any further examination it considers appropriate.

4. The panel shall present a final report to the Parties within 30 days of the presentation of the initial report, unless the Parties otherwise agree. The Parties shall make the final report available to the public within 15 days thereafter, subject to the protection of confidential information.

ARTICLE 20.10: IMPLEMENTATION OF THE FINAL REPORT

1. Upon receipt of the final report of a panel, the Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel.

2. If, in its final report, the panel determines that a Party has not conformed with its obligations under this Agreement or that a Party's measure is causing nullification or impairment in the sense of Article 20.2.1(c), the resolution, whenever possible, shall be to eliminate the non-conformity or the nullification or impairment.

ARTICLE 20.11: NON-IMPLEMENTATION AND SUSPENSION OF BENEFITS

1. If a Panel has made a determinations of the type described in Article 20.10.2, and the Parties are unable to reach an agreement on a resolution pursuant to Article 20.10.1, within 30 days of receiving the final report, or such other period as the Parties may agree, the Party complained against shall enter into negotiations with the complaining Party with a view to developing mutually acceptable compensation.

2. If the Parties:

- (a) are unable to agree on compensation within 30 days after the period for developing such compensation has begun; or
- (b) have agreed on compensation or on a resolution pursuant to Article 20.10.1, and the complaining Party considers that the Party complained against has failed to observe the terms of the agreement,

the complaining Party may at any time thereafter provide written notice to the Party complained against that it intends to suspend the application to the Party complained against of benefits of equivalent effect. The notice shall specify the level of benefits that the complaining Party proposes to suspend. The complaining Party may begin suspending benefits of equivalent effect 15 days after the later of the date on which it provides notice to the other Party under this paragraph or the panel issues its determination under paragraph 5, as the case may be.

3. In considering which benefits to suspend pursuant to paragraph 2:
- (a) the complaining Party should first seek to suspend benefits or other obligations in the same sector or sectors as those 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 Article 20.2.1(c); and
 - (b) the 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.

4. 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 under Article 20.2.1(c) has been brought into conformity with this Agreement, or until such time as the Parties have otherwise reached an agreement on a resolution of the dispute.

5. If the Party complained against considers that:

- (a) the level of benefits that the complaining Party has proposed to be suspended is manifestly excessive; or
- (b) it has eliminated the non-conformity or the nullification or impairment that the panel has found,

it may, within 30 days after the complaining Party provides notice under paragraph 2, request that the original panel be reconvened to consider the matter. The panel shall reconvene as soon as possible after delivery of the request and shall present its determination to the Parties within 90 days after it reconvenes to review a request under either subparagraph (a) or (b), or within 120 days for a request under both subparagraphs (a) and (b). If the panel determines that the level of benefits proposed to be suspended is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect.

6. The complaining Party may suspend benefits up to the level the panel has determined under paragraph 5 or, if the panel has not determined the level, the level the Party has proposed to suspend under paragraph 2, unless the panel has determined that the Party complained against has eliminated the non-conformity or the nullification or impairment.

ARTICLE 20.12: COMPLIANCE REVIEW

1. Without prejudice to the procedures set out in Article 20.11.3, if the Party complained against considers that it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may refer the matter to the panel by providing written notice to the complaining Party. The panel shall reconvene as soon as possible after delivery of the request and shall issue its report on the matter within 60 days after the Party complained against provides notice.

2. If the panel decides that the Party complained against has eliminated the non-conformity or the nullification or impairment, the complaining Party shall promptly reinstate any benefits it has suspended under Article 20.11.

ANNEX 20-A CODE OF CONDUCT

Definitions

1. For purposes of this Annex:

assistant means a person who, under the terms of appointment of a panelist, conducts research or provides support for the panelist;

panelist means a member of a panel established under Article 20.7;

proceeding, unless otherwise specified, means a panel proceeding under this Chapter; and

staff, in respect of a panelist, means persons under the direction and control of the panelist, other than assistants.

Responsibilities to the Process

2. Every panelist shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process are preserved.

Disclosure Obligations

3. Prior to confirmation of his or her selection as a panelist under this Agreement, a candidate shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.

4. Once selected, a panelist shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 3 and shall disclose them by communicating them in writing to the Joint Commission for consideration by the Parties. The obligation to disclose is a continuing duty, which requires a panelist to disclose any such interests, relationships or matters that may arise during any stage of the proceeding.

Performance of Duties by Panelists

5. A panelist shall comply with the provisions of this Chapter and the applicable rules of procedure.

6. Upon selection, a panelist shall perform his or her duties thoroughly and expeditiously throughout the course of the proceeding with fairness and diligence.

7. A panelist shall consider only those issues raised in the proceeding and necessary to render a decision and shall not delegate the duty to decide to any other person.
8. A panelist shall take all appropriate steps to ensure that the panelist's assistant and staff are aware of, and comply with paragraphs 2, 3, 4, 18, 19 and 20.
9. A panelist shall not engage in *ex parte* contacts concerning the proceeding.
10. A panelist shall not communicate matters concerning actual or potential violations of this Annex unless the communication is to both Parties or is necessary to ascertain whether that panelist has violated or may violate this Annex.

Independence and Impartiality of Panelists

11. A panelist shall be independent and impartial. A panelist shall act in a fair manner and shall avoid creating an appearance of impropriety or bias.
12. A panelist shall not be influenced by self-interest, outside pressure, political considerations, public clamor, loyalty to a Party, or fear of criticism.
13. A panelist shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of the panelist's duties.
14. A panelist shall not use his or her position on the panel to advance any personal or private interests. A panelist shall avoid actions that may create the impression that others are in a special position to influence the panelist.
15. A panelist shall not allow past or existing financial, business, professional, family or social relationships, or responsibilities to influence the panelist's conduct or judgment.
16. A panelist shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect the panelist's impartiality or that might reasonably create an appearance of impropriety or bias.

Duties in Certain Situations

17. A panelist or former panelist shall avoid actions that may create the appearance that the panelist was biased in carrying out the panelist's duties or would benefit from the decision or ruling of the panel.

Maintenance of Confidentiality

18. A panelist or former panelist shall not at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding except for purposes of

the proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of others.

19. A panelist or former panelist shall not disclose a panel ruling or parts thereof prior to its publication.

20. A panelist or former panelist shall not at any time disclose the deliberations of a panel or any panelist's view except as required by law.

Mediators

21. The provisions described in this code of conduct shall apply, *mutatis mutandis*, to mediators.

ANNEX 20-B
MODEL RULES OF PROCEDURE

Application

1. The following rules of procedure are established under Article 20.8 and shall apply to dispute settlement proceedings under this Chapter unless the Parties otherwise agree.

Definitions

2. For purposes of this Annex:

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

assistant means a person who, under the terms of appointment by a panelist, conducts research or provides assistance to that panelist;

complaining Party means a Party that requests the establishment of a panel under Article 20.7;

court reporter means a designated note-taker;

days means a calendar day;

legal holiday means every Saturday and Sunday and any other day designated by a Party as an official holiday;

panel means a panel established under Article 20.7;

panelist means a member of a panel established under Article 20.7;

Party complained against means a Party that received the request for the establishment of a panel under Article 20.7;

proceedings means a panel proceeding; and

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

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

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 deadlines are counted from the following date of the receipt of such submission or documents. The complaining Party shall deliver a complete initial written submission to the Party complained against 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 following the date of receipt of the initial written submission of the complaining Party.

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 its obligations under this Agreement, or that the other Party has otherwise failed to carry out its obligations under this Agreement, or that a benefit the Party could reasonably have expected to accrue is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement shall have the burden of proving its assertions.

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

Operation of Panels

11. The chair of the panel shall preside at all of its meetings. A panel may delegate to the chair of the panel authority to make administrative decisions regarding the proceedings.

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

13. 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.

14. Where a procedural question arises that is not addressed by these rules, a panel may adopt an appropriate procedure that is consistent with this Agreement.

15. The time-period applicable to the panel proceeding shall be suspended for a period that begins on the date on which any member of the panel becomes unable to act and ends on the date on which the successor is appointed.

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

Hearings

17. 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.

18. Unless the Parties otherwise agree, the hearings shall be held in the capital of the Party complained against.

19. The panel may convene additional hearings if the Parties so agree.

20. All panelists shall be present during the entirety of any hearing.

21. 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.

22. 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.

23. Hearings shall be open to the public, except as necessary to protect information designated by either Party for confidential treatment. The Panel may, in consultation with the Parties, adopt appropriate logistical arrangements and procedures to ensure that hearings are not disrupted by the attendance of the public.

24. 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

25. 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.

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

Availability of Information

27. The Parties shall maintain the confidentiality of the panel's hearings, deliberations and initial report, and all written submissions to, and communications with, the panel, in accordance with the following procedures:

- (a) a Party may make available to the public at any time its own written submissions;
- (b) to the extent it considers strictly necessary to protect personal privacy or legitimate commercial interests of particular enterprises, public or private, or to address essential confidentiality concerns, a Party may designate specific information included in its written submissions, or that it has presented in the panel hearing, for confidential treatment;
- (c) a Party shall treat as confidential any information submitted by the other Party to the panel that the latter Party has designated as confidential pursuant to subparagraph (b); and
- (d) each Party shall take such reasonable steps necessary to ensure that its experts, interpreters, translators, court reporters (designated note takers) and other individuals involved in the panel proceedings maintain the confidentiality of the panel proceedings.

Remuneration and Payment of Expenses

28. Unless the Parties otherwise agree, the expenses of the panel, the remuneration of the panelists and their assistants, their travel and lodging expenses, and all general expenses shall be borne 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 the panel shall keep a record and render a final account of all general expenses.

Language

30. During the panel procedure, the Parties have the right to use either their own languages or English. Written submissions and oral arguments may be submitted in Korean with English translation or in Spanish with English translation.

Questions in Writing

31. The panel may at any time during the proceedings address questions in writing to one or both Parties. The Parties shall receive a copy of any questions put forward by the Panel.
32. Each Party shall also provide a copy of its written response to the panel's questions to the other Party. The Parties shall be given the opportunity to provide written comments on the reply of the other Party within five days of the date of delivery.

Role of Experts

33. Upon 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 34 and 35, and such additional terms and conditions as the Parties may agree upon. The requirements set out in Article 20.8 shall apply to the experts or bodies, as appropriate.
34. 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 33 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 33 and provide them with an adequate period of time to submit comments.
35. When the panel takes into consideration the information or technical advice received pursuant to paragraph 33 for the preparation of its report, it shall also take into consideration any comments or observations submitted by the disputing Parties with respect to such information or technical advice.