

CHAPTER TWENTY-THREE

DISPUTE SETTLEMENT

ARTICLE 23.1: 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 or consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

ARTICLE 23.2: SCOPE OF APPLICATION

Except as otherwise provided for in this Agreement, this Chapter applies 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; or
- (b) the other Party has otherwise failed to carry out its obligations under this Agreement.

ARTICLE 23.3: CHOICE OF FORUM

1. Where a dispute regarding any matter arises under this Agreement and under another trade agreement to which both Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.
2. Unless otherwise agreed by the Parties, once the complaining Party has requested the establishment of a dispute settlement panel under an agreement referred to in paragraph 1 or the intervention of the Joint Commission, the forum selected shall be used to the exclusion of the others in respect of that matter.

ARTICLE 23.4: CONSULTATIONS

1. A Party may request in writing consultations with the other Party with respect to any matter referred to in Article 23.2.
2. The requesting Party shall deliver the request to the other Party and set out in the request the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal and factual basis for the complaint.
3. The requested Party shall respond in writing within 10 days following the date of the receipt of the request.
4. The Parties shall hold the consultations within:

- (a) 15 days following the date of the receipt of the request for consultations regarding urgent matters¹;
- (b) 30 days following the date of the receipt of the request for consultations for all other matters; or
- (c) such other period as the Parties may agree.

5. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter at issue through consultations under this Article or any other consultation provision of this Agreement.

6. A 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.

7. Consultations may be held in person or by any technological means available to the Parties. Unless otherwise agreed by the Parties, consultations shall be held in the capital of the requested Party.

8. In a consultation, each Party shall:

- (a) provide sufficient information to enable a full examination of how the measure or other matter at issue 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.

9. The consultation period shall not exceed 60 days, or 25 days in the case of urgent matters, following the date of the receipt of the request for consultations, unless otherwise agreed by the Parties.

ARTICLE 23.5: INTERVENTION OF THE JOINT COMMISSION

1. If the Parties fail to settle a dispute within the period established in Article 23.4.9, only the requesting Party under Article 23.4.2 may request in writing the intervention of the Joint Commission.

¹ For greater certainty, “urgent matters” means the matters which concern:

- (a) perishable goods, including agricultural and fishery goods, that lose their quality or current condition in a short period of time; or
- (b) goods, other than perishable goods, or services that lose a substantial portion of their trade value after a certain date in the near future.

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

3. Unless otherwise agreed by the Parties, the Joint Commission shall convene within 10 days following the receipt of the request and shall endeavor to resolve the dispute promptly. The Joint Commission may:

- (a) seek information and technical advice from such person or body, or establish such working groups or expert groups, as it deems necessary;
- (b) have recourse to good offices, conciliation, mediation, or other dispute settlement procedures; or
- (c) make recommendations.

4. The Joint Commission may convene in person or by any technological means available to the Parties. Unless otherwise agreed by the Parties, meetings shall be held in the capital of the requested Party.

5. If the Joint Commission fails to settle the dispute within 20 days, or 10 days in the case of urgent matters, following the date on which the Joint Commission convenes in accordance with paragraph 4, the complaining Party may request the establishment of a panel.

ARTICLE 23.6: REQUEST FOR A PANEL

1. Upon expiry of the consultation period, or the period for the intervention of the Joint Commission, if such intervention has been requested, or any other period agreed by the Parties, the complaining Party may request in writing the establishment of a panel to consider the matter.

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

3. Unless otherwise agreed by the Parties, the panel shall be selected and perform its functions in a manner consistent with this Chapter, including Annex 23A.

4. A panel may not be established to review a proposed measure.

ARTICLE 23.7: QUALIFICATIONS OF PANELISTS

1. Panelists shall:

- (a) have expertise or experience in law, international trade, 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, impartiality, reliability, and sound judgment;
- (c) be independent of, and not be affiliated with or take instructions from, either Party; and
- (d) comply with the code of conduct established by the Joint Commission.

2. Individuals who have participated in consultations under Article 23.4 may not serve as panelists for the dispute.

ARTICLE 23.8: PANEL SELECTION

1. The Parties shall apply the following procedures in selecting a panel:

- (a) The panel shall comprise three members.
- (b) Within 15 days following the date of the receipt of the request for the establishment of the panel, each Party shall nominate a panelist. If a Party fails to appoint a panelist within this period, the panelist shall be selected by the other Party, unless the Parties otherwise agree.
- (c) The Parties shall endeavor to agree on a third panelist who shall serve as chair within 15 days following the date the second panelist has been selected. If the Parties are unable to agree on the chair of the panel within this period, the Parties shall within the next 10 days exchange their respective list comprising four nominees who are not nationals of either Party. The chair shall then be appointed in the presence of the Parties, in person or by any technological means available to the Parties, by lot from among the nominees on the lists within 10 days following the date of exchange of the lists. If a Party fails to submit its list of four nominees, the chair shall be appointed by lot from among the nominees on the list already submitted by the other Party.
- (d) The chair of the panel shall not be a national of either Party, nor have his or her usual place of residence in the territory of either Party, nor be or have been employed by either Party, nor have dealt in any capacity with the subject matter of the dispute, unless the Parties otherwise agree.
- (e) The Parties shall endeavor to appoint panelists who have expertise or experience relevant to the subject matter of the dispute.

2. If a Party considers 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 replaced with a new panelist in accordance with this Article.

ARTICLE 23.9: ROLE OF THE PANEL

The role of the panel shall be to make an objective assessment of the dispute under its consideration and formulate the necessary findings for settling the dispute in accordance with the terms of reference referred to in Article 23.10.3.

ARTICLE 23.10: MODEL RULES OF PROCEDURE

1. Unless the Parties otherwise agree, the panel shall conduct its proceedings in accordance with the model rules of procedure set out in Annex 23A, which shall ensure:

- (a) a right to at least one hearing before the panel;
- (b) an opportunity for each Party to provide initial and rebuttal written submissions; and
- (c) that hearings before the panel, deliberations, as well as all submissions and communications exchanged during the hearings, are confidential.

2. The Joint Commission may amend or modify, when it considers necessary, the model rules of procedure set out in Annex 23A.

3. Unless otherwise agreed by the Parties within 10 days of the establishment of the panel, the terms of reference shall be:

“To examine, in light of the relevant provisions of this Agreement, the matter referred to in the panel request and issue the report.”

4. Panelists fees and other expenses related to the procedure shall be borne by the Parties to the dispute in equal shares.

5. The location of hearings shall alternate between the territories of the Parties. The first hearing will take place in the territory of the Party complained against.

6. Written submissions, oral arguments or presentations at the hearing, panel report, as well as all other written or oral communications between the Parties and the panel, related to panel proceedings, shall be conducted in English.

ARTICLE 23.11: ROLE OF EXPERTS

1. 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.

2. Before the panel seeks information or technical advice, appropriate procedures shall be established in consultation with the Parties. The panel shall:

- (a) notify the Parties of its intention to seek information or technical advice in accordance with paragraph 1 and provide the Parties with an adequate period of time to submit their comments or observations; and
- (b) provide the Parties with a copy of any information or technical advice received in accordance with paragraph 1, and with a period of time for the Parties to submit their comments or observations.

3. Where the panel takes into consideration the information or technical advice sought in accordance with paragraph 1, the panel shall also take into account any comment or observation submitted by the Parties with respect to such information or technical advice.

ARTICLE 23.12: CONSOLIDATION OF PROCEEDINGS

The panel may consolidate two or more proceedings where such proceedings are related to the same measure or matter.

ARTICLE 23.13: REPORT OF THE PANEL

1. Unless the Parties otherwise agree, the panel shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the Parties, and any information provided by the Parties in accordance with Annex 23A.

2. Unless the Parties otherwise agree, the panel shall present its report to the Parties, within 120 days, or 80 days in the case of urgent matters, following the selection of the third panelist.

3. The report shall contain:

- (a) the findings along with its factual and legal basis;
- (b) the determination as to whether a Party has not conformed with its obligations under this Agreement or any other matter that the Parties have requested that the panel address in the terms of reference; and
- (c) the recommendations for resolution of the dispute, including the reasonable period of time to implement them, if either Party has requested it.

4. The panel report shall be adopted by the majority of its panelists. The panelists may furnish separate opinions on matters not unanimously agreed.

5. The panel may not disclose which panelists are associated with majority or minority opinions.

ARTICLE 23.14: REQUEST FOR CLARIFICATION OF THE REPORT

1. Within 10 days following the presentation of the report, either Party may submit a written request to the panel for clarification of any item that the Party considers requires further explanation or definition. The panel shall respond to the request within 10 days following the submission of such request.
2. The submission of the request for clarification will not postpone the deadline for compliance with the panel report, unless the panel otherwise decides.

ARTICLE 23.15: SUSPENSION AND TERMINATION OF PROCEDURE

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 otherwise agree. If the authority of the panel lapses, and the Parties have not reached an agreement on the settlement of the dispute, nothing in this Chapter shall prevent a Party from requesting a new proceeding regarding the same matter.
2. The Parties may agree to terminate the panel procedures at any time by jointly notifying the chair of the panel on this respect.

ARTICLE 23.16: IMPLEMENTATION OF THE REPORT

1. The panel report shall be final and binding unless the Parties otherwise agree.
2. If the report determines that the measure is not conforming to the obligations under this Agreement, the Party complained against shall eliminate the non-conformity.
3. The Parties shall agree on the means to resolve the dispute and on a reasonable period of time to implement them, which normally shall conform to the recommendations of the panel, within 15 days following the receipt of the report of the panel. If the Parties fail to agree on the means to resolve the dispute, the Party complained against shall comply with the recommendations of the panel. If the Parties fail to agree on the reasonable period of time to implement the means, the Party complained against shall comply with the period established in the report.

ARTICLE 23.17: NON-IMPLEMENTATION AND COMPENSATION

1. If the Party complained against fails to implement the means to resolve the dispute or does not comply with the recommendations of the panel within the reasonable period of time agreed by the Parties or established in the panel report, the Party complained against shall enter into negotiations with the complaining Party with a view to establishing a mutually acceptable compensation. The Parties shall initiate negotiations within 10 days following the date of the receipt of the written request for negotiations.
2. The compensation referred to in paragraph 1 shall be effective as of the moment the Parties agree to it and until the Party complained against complies with the panel report.

ARTICLE 23.18: EXAMINATION OF IMPLEMENTATION

1. Without prejudice to the procedures set out in Article 23.17, once the reasonable period of time agreed by the Parties or established in the panel report has expired, and there is disagreement between the Parties as to the existence or consistency of the measures taken to comply with the determinations and recommendations of the panel, either Party may request the Agreement Coordinators referred to in Article 22.2 (Agreement Coordinators – Contact Points) to convene the original panel to refer the matter to it.
2. The panel shall convene no later than 15 days following the date of the receipt of the request and shall issue its report on the matter within 30 days following its first meeting.
3. Where possible, the panel shall comprise the same panelists as in the original panel. If not possible, the procedure established in Article 23.8 shall be applied, in which event the respective periods set out therein shall be reduced by half.

ARTICLE 23.19: SUSPENSION OF BENEFITS

1. 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 and the complaining Party considers that the Party complained against has failed to observe the terms of the agreement within 20 days following such agreement,the complaining Party may, at any time thereafter, communicate in writing to the Party complained against its intention to suspend the application of benefits. The communication shall specify the level of benefits that the complaining Party proposes to suspend.
2. The complaining Party may initiate the suspension of benefits 30 days following the later date between the date of the communication in accordance with paragraph 1 and the date when the panel issued its report in accordance with Article 23.18.
3. The level of benefits to be suspended shall have an equivalent effect to the adverse trade effect caused by the Party complained against.
4. In considering what benefits to suspend in accordance with paragraph 1:
 - (a) the complaining Party should first seek to suspend benefits in the same sector or sectors as that or those affected by the measure; and
 - (b) if the complaining Party considers that it is not practicable or effective to suspend benefits in the same sector or sectors, it may suspend benefits in other sectors.

5. Any suspension of benefits shall be restricted to benefits granted to the Party complained against under this Agreement.

6. The suspension of benefits shall be temporary and may only be applied until such time as the measure found to be inconsistent with this Agreement has been removed, or a mutually satisfactory solution is reached. If the panel established under Article 23.18 decides that the Party complained against has eliminated the non-conformity, the complaining Party shall promptly reinstate any benefits that it had suspended in accordance with this Article.

ARTICLE 23.20: EXAMINATION OF THE LEVEL OF SUSPENSION OF BENEFITS

1. If the Party complained against considers that the level of benefits suspended or proposed to be suspended is excessive, it may request the Agreement Coordinators to convene the original panel to examine the level of suspension of benefits.

2. In order to examine the level of suspension of benefits, where possible, the panel shall comprise the same panelists as in the original panel. If not possible, the procedure established in Article 23.8 shall be applied, in which event the respective periods set out therein shall be reduced by half.

3. In any event, this panel shall convene no later than 15 days following the date of the receipt of the request and shall issue its decision within 30 days after it convenes.

4. If the panel finds that the level of benefits which the complaining Party has suspended or proposed to suspend is excessive, it shall determine the level of benefits that it considers to be of equivalent effect.

ANNEX 23A
MODEL RULES OF PROCEDURE

Application

1. The following rules of procedure are established in accordance with Article 23.10 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 in connection with the panel proceeding;

court reporter means a designated note-taker;

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

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

Written Submissions and Other Documents

3. 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, the Party shall deliver at the same time an electronic version of such submissions or other document.

4. Submissions and other documents shall be considered delivered when effectively received by the panel. The deadlines are counted from the next day following the date of the receipt of such submission or documents. The complaining Party shall deliver a complete initial written submission to the panel and the Party complained against no later than 10 days after the date on which the third panelist is appointed. The Party complained against shall, in turn, deliver a written rebuttal submission no later than 20 days following the date of the receipt of the initial written submission of the complaining Party.

5. 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.

6. 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.

7. 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 the Party are closed by order of the government or by *force majeure*, the document may be delivered on the next working day.

Burden of Proof

8. A Party asserting that a measure of the other Party is inconsistent with this Agreement shall have the burden of establishing such inconsistency.

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

Operation of Panels

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

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

12. 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.

13. 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.

14. The time-period applicable to the panel proceedings 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.

15. 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.

16. If the complaining Party requests the panel to make findings in its panel request as to the level of adverse trade effects caused by a Party's failure to conform with the obligations under this Agreement, the terms of reference of the panel shall so indicate. If requested, the panel report shall contain its findings as to the level of adverse trade effects caused to a Party by the other Party's failure to conform with the obligations under this Agreement.

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 other panelists, and then notify the Parties in writing of those dates and times.

18. 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.

19. 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.

20. 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

21. The panel shall not communicate with a Party in the absence of, or without notifying, the other Party.

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

Availability of Information

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

- (a) A Party may make publicly available 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 in accordance with subparagraph (b).
- (d) Each Party shall take such reasonable steps as are necessary to ensure that its experts, interpreters, translators, court reporters, and other individuals involved in the panel proceedings maintain the confidentiality of the panel proceedings.

Remuneration and Payment of Expenses

24. 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 other expenses shall be born in equal shares between the Parties.

25. 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.