

## CHAPTER IX DISPUTE SETTLEMENT

### *Article 9.1 Scope and Coverage<sup>56</sup>*

Unless otherwise provided for in this Agreement, this Chapter shall apply with respect to the avoidance or settlement of disputes between the Parties concerning the interpretation, application and implementation of this Agreement, when 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 9.2 Cooperation*

The Parties shall at all times endeavor to agree on the interpretation, application and implementation 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, so as to avoid and settle disputes between the Parties.

### *Article 9.3 Choice of Forum*

1. Where a dispute arises under this Agreement and under any other agreement to which both Parties are party, the complaining Party may recourse to dispute settlement procedures available under any of such agreements to settle the dispute.
2. Once the complaining Party has requested establishment of, or otherwise referred a matter to, a panel or tribunal under an agreement referred to in paragraph 1 of this Article, the forum selected shall be used to the exclusion of other fora.

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<sup>56</sup> For greater certainty, this Chapter does not apply to proposed measures and/or non-violation complaints (nullification or impairment of a benefit in cases where there is no violation of the Agreement's provisions).

#### *Article 9.4 Consultations*

1. Each Party may request consultations with the other party through the Joint Committee with respect to an existing measure or any matter described in Article 9.1 (Scope and Coverage).
2. The requesting Party shall deliver written notification to the Joint Committee, stating the reasons for the request, including the identification of the measure at issue and an indication of the legal basis for the complaint so as to provide sufficient information to enable an examination of the matter.
3. The Joint Committee shall convene within 30 days after the date of receipt of the request. In conducting the consultations, the Parties shall provide information to enable the examination of how the measure or any other matter might affect the interpretation, application and implementation of this Agreement, and give confidential treatment to the information exchanged during consultations.
4. The Joint Committee shall endeavor to resolve the dispute promptly by means of a decision and may make recommendations regarding the implementing measures to be taken by the Party concerned, and the timeframe for doing so.
5. Consultations under this Article shall be confidential and without prejudice to the rights of either Party in any further proceedings.

#### *Article 9.5 Good Offices, Conciliation and Mediation*

1. The Parties may at any time voluntarily agree to good offices, conciliation and mediation. These procedures may begin at any time and be terminated at any time.
2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the Parties during those proceedings, shall be confidential and without prejudice to the rights of either Party in any further or other proceedings.

3. If the Parties agree, procedures for good offices, conciliation, or mediation may continue while the dispute proceeds for resolution before an arbitration panel established under Article 9.6 (Establishment of Arbitration Panels).

#### *Article 9.6 Establishment of Arbitration Panels*

1. Unless otherwise agreed, if a matter has not been resolved within 30 days after the Joint Committee has convened pursuant to paragraph 4 of Article 9.4 (Consultations), or 60 days after the date of receipt of the request for consultations by the Party complained against through the Joint Committee, whichever is earlier, the complaining Party may request in writing the establishment of an arbitration panel.

2. Pursuant to this Article, the complaining Party shall identify in the request for the establishment of an arbitration panel, the specific measure at issue, the legal basis of the complaint including any provision of this Agreement and any other relevant provisions it considers relevant, the factual basis for the complaint.

3. The complaining Party shall deliver the request to the other Party. An arbitration panel is established upon receipt of the request by the Party complained against.

#### *Article 9.7 Functions of Arbitration Panels*

1. An arbitration panel shall make an objective assessment of the matter before it, including an examination of the facts of the case and the applicability of an conformity with this Agreement.

2. Unless the Parties otherwise agree, within 20 days from the date of the establishment of the arbitration panel, the terms of reference of the arbitration panel shall be:

“To examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of an arbitration panel pursuant to Article 9.6 (Establishment of Arbitration Panels), to make findings of law and fact together with

the reasons on whether a concerned measure is in conformity with the Agreement or not and to issue a written report for the resolution of the dispute. The arbitration panel shall make recommendations for the resolution of the dispute, if it concludes a concerned measure is inconsistent with this Agreement.”

3. Arbitration panels shall interpret the provisions of this Agreement in accordance with customary rules of interpretation of public international law.

4. The findings and recommendations of an arbitration panel cannot add to or diminish the rights and obligations of the Parties provided in this Agreement.

#### *Article 9.8 Composition of Arbitration Panels*

1. Arbitration panels shall consist of three arbitrators.

2. Each Party shall appoint one arbitrator, within 15 days after the establishment of the arbitration panel. The Parties shall endeavor to agree on and appoint the third arbitrator, who shall be the chair of the arbitration panel, within 30 days after the establishment of the arbitration panel.

3. If any arbitrator has not been appointed, either Party may request the President of the International Court of Justice to designate the arbitrator within 30 days from the receipt of such request. If one or more arbitrators are designated pursuant to this paragraph, the President of the International Court of Justice shall be authorised to designate the chair of the arbitration panel.

The chair of arbitration panel shall:

- (a) not be a national of either Party;
- (b) not have his or her usual place of residence in the territory of either Party;
- (c) not be employed by either Party; and

(d) not have dealt with the dispute in any capacity.

4. All arbitrators shall:

- (a) have specialized knowledge or experience in law, international trade, other matters relating to this Agreement, or the resolution of disputes deriving from international trade agreements;
- (b) be chosen strictly on the basis of objectivity, reliability and sound judgment;
- (c) be independent, serve in their individual capacities and not be employed by, affiliated with or take instructions from any Party; and
- (d) comply with the Code of Conduct set out in the document WT/DSB/RC/1 of the WTO.

5. Where a Party considers that an arbitrator does not comply with the requirements of the Code of Conduct, the Parties shall consult with each other and, if so agreed, they shall replace that arbitrator in accordance with paragraph 2 of this Article.

6. If an arbitrator appointed under this Article becomes unable to participate in the proceeding or resigns, or is to be replaced according to paragraph 5 of this Article, a successor shall be appointed in the same manner and timeframe prescribed for the appointment of the original arbitrator. The successor shall have all the powers and duties of the original arbitrator. In such case, any time period applicable to the panel proceedings shall be suspended during the appointment of the successor.

#### *Article 9.9 Proceedings of Arbitration Panels*

1. A Party asserting that a measure of the other Party is inconsistent with the provisions of this Agreement shall bear the burden of establishing such inconsistency unless this Agreement provides otherwise. A Party asserting that a measure is subject to an exception

under this Agreement shall bear the burden of establishing that the exception applies unless this Agreement provides otherwise.

2. The arbitration panel should consult with the Parties as appropriate and provide adequate opportunities for the development of a mutually satisfactory resolution.
3. The arbitration panel shall make every effort to make its decisions, including its report, by consensus but may also make its decisions, including its report, by majority vote if the arbitration panel is unable to reach consensus. Arbitrators may furnish separate opinions on matters not unanimously agreed. All opinions expressed in an arbitration panel's report by individual arbitrators shall be anonymous.
4. Each Party shall bear the cost of its appointed arbitrator and its own expenses. The cost of the chair of an arbitration panel and other expenses associated with the conduct of the proceedings shall be borne by the Parties in equal shares.

#### *Article 9.10 Suspension or Termination of Proceedings*

1. The Parties may agree that the arbitration panel suspends its work at any time for a period not exceeding 12 months from the date of such agreement. In the event of such a suspension, the time-frames regarding the work of the arbitration panel shall be extended by the amount of time that the work was suspended. If in any case, the continuous suspension of the work of the arbitration panel exceeds 12 months, the authority for the establishment of the arbitration panel shall lapse unless the Parties agree otherwise<sup>57</sup>.
2. The Parties may agree to terminate the proceedings of the arbitration panel by jointly notifying the chair of the arbitration panel at any time before the issuance of the final report to the Parties.

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<sup>57</sup> For greater certainty, the lapse of authority for the establishment of an arbitration panel does not preclude the complaining party to request at a later stage the establishment of another arbitration panel to examine the same subject matter.

### *Article 9.11 Arbitration Panel Report*

1. The arbitration panel shall base its report on the relevant provisions of this Agreement and the submissions and arguments of the Parties, and may take into account any other relevant information provided to the arbitration panel in accordance with this Agreement.
2. Unless the Parties otherwise agree, the arbitration panel shall issue the initial report to the Parties no later than 120 days after the date of its composition. If the arbitration panel considers that it cannot issue its initial report within this period, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its initial report. Any delay shall not exceed a further period of 30 days unless the Parties otherwise agree.
3. Each Party may submit written comments to the arbitration panel within 15 days of the issuance of the initial report. After considering these written comments by the Parties and making any further examination it considers appropriate, the arbitration panel shall present Parties its final report within 30 days of issuance of the initial report, unless the Parties otherwise agree.

The final report of the arbitration panel shall be final and has no binding force except between the Parties and in respect of the matter to which the report refers.

4. The final report shall be made available to the public no later than 15 days after its issuance to the Parties, subject to the protection of confidential information, unless either Party decides not to do so.

### *Article 9.12 Implementation of the Final Report*

1. Unless the Parties agree otherwise, the Party complained against shall eliminate the non-conformity as determined in the final report of the arbitration panel, immediately, or if this is not practicable, within a reasonable period of time.
2. Unless the Parties reach agreement on compensation or other mutually satisfactory solution, the Party complained against shall

implement the recommendations and rulings in the final report of the arbitration panel.

3. The reasonable period of time referred to in paragraph 1 of this Article shall be mutually determined by the Parties. Where the Parties fail to agree on the reasonable period of time within 45 days after the date of issuance of the final report of the arbitration panel, either Party may refer the matter wherever possible to the original arbitration panel, which shall determine the reasonable period of time.

4. The arbitration panel shall provide its determination to the Parties within 60 days after the date of the referral of the matter to it. When the arbitration panel considers that it cannot provide its determination within this time frame, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will provide its determination. Any delay shall not exceed a further period of 30 days unless the Parties otherwise agree.

5. The reasonable period of time normally should not exceed 15 months from the date of issuance of the final report.

6. The Party complained against shall notify in writing to the complaining Party the implementing measures adopted in order to put an end to the violation of its obligations under this Agreement, before the expiry of the reasonable period of time agreed by the Parties or determined in accordance with paragraph 2 of this Article.

#### *Article 9.13 Compliance Review*

1. Where the Parties disagree on the existence or consistency with this Agreement of measures taken to comply with the recommendations and rulings of the arbitration panel, such dispute shall be decided through recourse to the dispute settlement procedures under this Chapter, including wherever possible by resort to the original arbitration panel.

2. The arbitration panel shall convene as soon as possible after the delivery of the request and shall issue its report on the matter within 60 days of the date of delivery of the written notification. When the arbitration panel considers that it cannot issue its report within this time frame, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. Any delay shall not exceed a further period of 30 days unless Parties agree otherwise.
3. Articles concerning the procedure of arbitration panel in this Chapter shall apply *mutatis mutandis* to the procedure under this Article.

*Article 9.14 Non-Implementation, Compensation and Suspension of Concessions or other Obligations*

1. If the Party complained against:
  - (a) fails to comply with the recommendations and rulings of the arbitration panel within the reasonable period of time;
  - (b) notifies the complaining Party in writing that it will not comply with the recommendations and rulings of the arbitration panel; or
  - (c) has been found through the compliance review process set out in Article 9.13 (Compliance Review) to have not complied with the obligations under paragraph 1 of Article 9.12 (Implementation of the Final Report),

the Party complained against shall, if so requested, enter into negotiations with the complaining Party with a view to reaching a mutually satisfactory agreement on compensation.

2. If the Parties do not reach agreement on compensation in accordance with paragraph 1 of this Article within 20 days from the receipt of the request pursuant to paragraph 1 of this Article, or Parties agreed on compensation but the Party complained against has failed to observe the

terms and conditions of that agreement, the complaining Party may notify the Party complained against in writing that it intends to suspend the application to the Party complained against of concessions and obligations under this Agreement of equivalent effect to the level of non-conformity that the arbitration panel has found. The notification shall specify the level of concessions or other obligations that the complaining Party proposes to suspend.

3. The compensation referred to in paragraph 1 of this Article and the suspension referred to in paragraph 2 of this Article shall be temporary measures in the event that the Party complained against does not comply with the obligation under Article 9.12 (Implementation of the Final Report). Neither compensation nor suspension is preferred to full elimination of the non-conformity as determined in the report of the arbitration panel. The complaining Party may begin suspending concessions and obligations 30 days after it provides notification of its intention to suspend, or after an arbitration panel issues its determination under paragraph 6.

4. In considering what concessions or other obligations to suspend pursuant to paragraph 2 of this Article the complaining Party shall apply the following principles and procedures:

- (a) the complaining Party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the Arbitration Panel has found a violation or other nullification or impairment;
- (b) the complaining Party should first seek to suspend concessions or other obligations with respect to the same sector(s) in which the report of the arbitration panel has found a failure to comply with the obligations under this Agreement. The notification of such suspension shall indicate the reasons on which it is based;
- (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the

same sector(s), it may seek to suspend concessions or other obligations in other sectors under this agreement;

(d) in the selection of the benefits to suspend, the complaining Party shall endeavor to take into consideration those which least disturb the implementation of this Agreement.

5. The level of suspension of concessions and obligations referred to in paragraph 2 of this Article shall be equivalent to the level of the nullification or impairment.

6. If the Party complained against objects to the level of suspension proposed, or considers that the principles set out in paragraph 4 of this Article have not been applied, it may make a written request to reconvene the original arbitration panel to examine the matter. The arbitration panel shall determine whether the level of concessions and obligations to be suspended by the complaining Party in accordance with paragraph 2 of this Article is equivalent to the level of non-conformity. If the arbitration panel cannot be established with its original arbitrators, the proceeding set out in Article 9.8 (Composition of Arbitration Panels) shall be applied.

The arbitration panel shall present its determination within 60 days of the request made in accordance with paragraph 6 of this Article or, if an arbitration panel cannot be established with its original arbitrators, from the date on which the last arbitrator is appointed. The determination of the arbitration panel shall be final and binding and shall be made publicly available.

7. The complaining Party may not suspend the application of concessions or other obligations before the issuance of the arbitration panel's determination pursuant to this Article.

#### *Article 9.15 Post Suspension*

1. Without prejudice to the procedures in Article 9.14 (Non-Implementation, Compensation and Suspension of Concessions or Other Obligations), if the Party complained against considers that it

has eliminated the non-conformity that the arbitration panel has found, it may provide written notice to the complaining Party with a description of how non-conformity has been removed. If the complaining Party disagrees, it may refer the matter to the original arbitration panel within 60 days after receipt of such written notice. Otherwise, the complaining Party shall promptly stop the suspension of concessions or other obligations.

2. The arbitration panel shall issue its report within 60 days after the referral of the matter by the complaining Party pursuant to paragraph 1 of this Article. If the arbitration panel concludes that the Party complained against has eliminated the non-conformity, the complaining Party shall promptly stop the suspension of concessions or other obligations.

#### *Article 9.16 Rules of Procedure*

Unless the Parties agree otherwise, the arbitration panel shall follow the rules of procedure set out in Annex 9-1 (Rules of Procedure of Arbitration Panel) and may, after consulting with the Parties, adopt additional rules of procedure not inconsistent with Annex 9-1 (Rules of Procedure of Arbitration Panel).

#### *Article 9.17 Application and Modification of Rules and Procedures*

Any time period or other rules and procedures for arbitration panels provided for in this Chapter, including the Rules of Procedure referred to in Article 9.16 (Rules of Procedure), may be modified by mutual consent of the Parties.

#### *Article 9.18 Private Rights<sup>58</sup>*

Neither 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.

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<sup>58</sup> For greater certainty, disputes regarding the interpretation and application of this Agreement arising between the Parties shall be resolved in accordance with the provision of this Chapter.

## **ANNEX 9-1 RULES OF PROCEDURE OF ARBITRATION PANEL**

### **First Written Submissions**

1. The complaining Party shall deliver its first written submission no later than 20 days after the appointment of the last arbitrator. The Party complained against shall deliver its first written submission no later than 30 days after the date of delivery of the complaining Party's first written submission, unless the arbitration panel otherwise decides.
2. A Party shall provide a copy of its first written submission to each of the arbitrators and to the other Party. A copy of the documents shall also be provided in electronic format.

### **Hearings**

3. The chair of the arbitration panel shall fix the date and time of the hearing after consultation with the Parties and other members of the arbitration panel. The venue of the hearings shall be agreed by the Parties. If there is no agreement, the venue shall alternate between the territories of the Parties with the first hearing to be held in the territory of the Party complained against. The chair of the arbitration panel shall notify in writing to the Parties of the date, time and venue of the hearing. Unless either Party disagrees, the arbitration panel may decide not to convene a hearing.
4. The arbitration panel may convene additional hearings.
5. All arbitrators shall be present at hearings.
6. The hearings of the arbitration panel shall be held in closed session.

### **Supplementary Written Submissions**

7. Where the arbitration panel so agrees, each Party may, within 20 days after the date of the hearing, deliver a supplementary written submission responding to any matter that arose during the hearing.

The supplementary written submission shall be delivered in accordance with paragraph 2 of this Annex.

### **Questions in Writing**

8. The arbitration panel may at any time during the proceedings put questions in writing to the Parties. A Party shall deliver the written reply to the arbitration panel and the other Party in accordance with the timetable established by the arbitration panel. Each Party shall be given the opportunity to provide written comments on the reply of the other Party.

### **Confidentiality**

9. The arbitration panel's hearings and the documents submitted to it shall be kept confidential. Nothing in these rules shall preclude a Party from disclosing statements of its own positions to the public. The information submitted by a Party to the arbitration panel which that Party has designated as confidential shall be treated as confidential.

### ***Ex parte* Contacts**

10. The arbitration panel shall not meet or contact a Party in the absence of the other Party.

11. No Party may contact any arbitrator in relation to the dispute in the absence of the other Party and the other arbitrators.

12. No arbitrator may discuss any aspect of the subject matter of the proceeding with a Party or the Parties in the absence of the other arbitrators.

13. The initial and final reports of the arbitration panel shall be drafted without the presence of the Parties.

### **Role of Experts**

14. Upon request of a Party or on its own initiative, the arbitration panel may seek information and technical advice from any

individual or body that it deems appropriate. Any information so obtained shall be provided to the Parties for comments.

### **Working Language**

15. Unless otherwise agreed by the Parties, English shall be the working language of the dispute settlement proceedings.