

Chapter 21

Dispute Settlement

Article 21.1: Scope and Coverage

1. 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 implementation, interpretation, application or operation of this Agreement, which includes 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 Chapters 3 (National Treatment and Market Access for Goods), 4 (Rules of Origin), 5 (Customs Administration), 7 (Technical Regulations, Standards and Conformity Assessment Procedures), 9 (Cross-Border Trade in Services), 15 (Government Procurement) or 17 (Intellectual Property) is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.

2. In cases where there is an infringement of the obligations under this Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment.

Article 21.2: Choice of Dispute Settlement Procedure

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

2. Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.

Article 21.3: Consultations

1. Either Party may request in writing consultations with the other Party concerning any matter on the implementation, interpretation, application or operation of this Agreement, including a matter relating to a measure that the other Party proposes to take (hereinafter referred to in this Chapter as “proposed measure”).

2. The requesting Party shall deliver the request to the other Party, setting out the reasons for the request, including identification of the measure at issue and an indication of the legal basis for the complaint, and providing sufficient information to enable an examination of the matter.
3. The Parties shall make every effort to arrive at a mutually satisfactory resolution of the matter through consultations under this Article.
4. In consultations under this Article, 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.
5. The consultations under this Article shall be confidential and without prejudice to the rights of either Party in any further proceedings.

Article 21.4: Referral of Matters to the Joint FTA Committee

1. If the consultations fail to resolve the matter within 40 days of the delivery of a Party's request for consultations under Article 21.3.2, or 20 days in cases of urgency including those which concern perishable goods, the complaining Party may refer the matter to the Joint FTA Committee by delivering written notification to the other Party. The Joint FTA Committee shall endeavour to resolve the matter.
2. The Joint FTA Committee may:
 - (a) call on such technical advisers or create such working groups or expert groups as it deems necessary;
 - (b) have recourse to good offices, conciliation, mediation or such other dispute resolution procedures; or
 - (c) make recommendations;as may assist the Parties to reach a mutually satisfactory resolution of the dispute.

Article 21.5: Establishment of Arbitral Panels

1. The complaining Party that requested consultations under Article 21.3 may request in writing the establishment of an arbitral panel, if the Parties fail to resolve the matter within:
 - (a) 45 days after the date of receipt of the request for consultation if there is no referral to the Joint FTA Committee under Article 21.4;
 - (b) 30 days of the Joint FTA Committee convening pursuant to Article 21.4, or 15 days in cases of urgency including those which concern perishable goods; or

- (c) 60 days after a Party has delivered a request for consultation under Article 21.3, or 30 days in cases of urgency including those which concern perishable goods, if the Joint FTA Committee has not convened after a referral under Article 21.4.
- 2. The establishment of an arbitral panel shall not be requested on any matter relating to a proposed measure.
- 3. Any request to establish an arbitral panel pursuant to this Article shall identify:
 - (a) the specific measure at issue;
 - (b) the legal basis of the complaint including any provision of this Agreement alleged to have been breached and any other relevant provisions; and
 - (c) the factual basis for the complaint.
- 4. The panel shall be established and perform its functions in a manner consistent with the provisions of this Chapter.
- 5. The date of the establishment of an arbitral panel shall be the date on which the chair is appointed.

Article 21.6: Terms of Reference of Arbitral Panels

Unless the Parties otherwise agree within 20 days from the date of receipt of the request for the establishment of the arbitral panel, the terms of reference of the arbitral 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 arbitral panel pursuant to Article 21.5, to make findings of law and fact and determinations on whether the measure is not in conformity with the Agreement or is causing nullification or impairment in the sense of Article 21.1(c) together with the reasons therefore, and to issue a written report for the resolution of the dispute. If the Parties agree, the arbitral panel may make recommendations for resolution of the dispute.”

Article 21.7: Composition of Arbitral Panels

- 1. An arbitral panel shall comprise three panelists.
- 2. Each Party shall, within 30 days after the date of receipt of the request for the establishment of an arbitral panel, appoint one panelist who may be its national and propose up to three candidates to serve as the third panelist who shall be the chair of the arbitral panel. The third panelist shall not be a national of either Party, nor have

his or her usual place of residence in either Party, nor be employed by either Party, nor have dealt with the dispute in any capacity.

3. The Parties shall agree on and appoint the third panelist within 45 days after the date of receipt of the request for the establishment of an arbitral panel, taking into account the candidates proposed pursuant to paragraph 2.

4. If a Party has not appointed a panelist pursuant to paragraph 2 or if the Parties fail to agree on and appoint the third panelist pursuant to paragraph 3, the panelist or panelists not yet appointed shall be chosen within seven days by lot from the candidates proposed pursuant to paragraph 2.

5. All panelists shall:

- (a) have expertise or experience in law, international trade or other matters covered by this Agreement;
- (b) be chosen strictly on the basis of objectivity, reliability and sound judgment;
- (c) be independent of, and not be affiliated with or receive instructions from, the government of either Party; and
- (d) comply with a code of conduct, to be provided in the Rules of Procedure referred to in Article 21.13.

6. If a panelist appointed under this Article dies, becomes unable to act or resigns, a successor shall be appointed within 15 days in accordance with the appointment procedure provided for in paragraphs 2, 3 and 4, which shall be applied, respectively, *mutatis mutandis*. The successor shall have all the powers and duties of the original panelist. The work of the arbitral panel shall be suspended for a period beginning on the date the original panelist dies, becomes unable to act or resigns. The work of the arbitral panel shall resume on the date the successor is appointed.

Article 21.8: Proceedings of Arbitral Panels

1. The arbitral panel shall meet in closed session except when meeting with the Parties. Panel meetings with the Parties shall be open to the public except where information designated as confidential by a Party is being discussed.

2. The Parties shall be given the opportunity to provide at least one written submission and to attend any of the presentations, statements or rebuttals in the proceedings. All information or written submissions submitted by a Party to the arbitral panel, including any comments on the draft report and responses to questions put by the arbitral panel, shall be made available to the other Party.

3. The arbitral panel should consult with the Parties as appropriate and provide adequate opportunities for the development of a mutually satisfactory resolution.

4. The arbitral panel shall aim to make its decisions, including its report, by consensus but may also make its decisions, including its report, by majority vote.
5. After notifying the Parties, and subject to such terms and conditions as the Parties may agree if any within 10 days, the arbitral panel may seek information from any relevant source and may consult experts to obtain their opinion or advice on certain aspects of the matter. The panel shall provide the Parties with a copy of any advice or opinion obtained and an opportunity to provide comments.
6. The deliberations of the arbitral panel and the documents submitted to it shall be kept confidential.
7. Notwithstanding paragraph 6, either Party may make public statements as to its views regarding the dispute, but shall treat as confidential, information and written submissions submitted by the other Party to the arbitral panel which that other Party has designated as confidential. Where a Party has provided information or written submissions designated to be confidential, that Party shall, within 28 days of a request of the other Party, provide a non-confidential summary of the information or written submissions which may be disclosed publicly.
8. Each Party shall bear the cost of its appointed panelist and its own expenses. The cost of the chair of an arbitral panel and other expenses associated with the conduct of the proceedings shall be borne by the Parties in equal shares.

Article 21.9: Suspension or Termination of Proceedings

1. The Parties may agree that the arbitral panel suspend 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 set out in paragraphs 2, 5 and 7 of Article 21.10 and paragraph 7 of Article 21.12 shall be extended by the amount of time that the work was suspended. If the work of the arbitral panel has been suspended for more than 12 months, the authority for establishment of the arbitral panel shall lapse unless the Parties agree otherwise.
2. The Parties may agree to terminate the proceedings of the arbitral panel by jointly so notifying the chair of the arbitral panel at any time before the issuance of the report to the Parties.

Article 21.10: Report

1. The report of the arbitral panel shall be drafted without the presence of the Parties. The 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 panel.
2. The arbitral panel shall, within 180 days, or within 60 days in cases of urgency, including those which concern perishable goods, after the date of its establishment, submit to the Parties its draft report.

3. The draft report shall contain both the descriptive part summarising the submissions and arguments of the Parties and the findings and determinations of the arbitral panel. If the Parties agree, the arbitral panel may make recommendations for resolution of the dispute in its report. The findings and determinations of the panel and, if applicable, any recommendations cannot add to or diminish the rights and obligations of the Parties provided in this Agreement.
4. When the arbitral panel considers that it cannot submit its draft report within the aforementioned 180 or 60 day period, it may extend that period with the consent of the Parties.
5. A Party may provide written comments to the arbitral panel on its draft report within 15 days after the date of submission of the draft report.
6. After considering any written comments on the draft report, the arbitral panel may reconsider its draft report and make any further examination it considers appropriate.
7. The arbitral panel shall issue its final report, within 30 days after the date of submission of the draft report. The report shall include any separate opinions on matters not unanimously agreed, not disclosing which panelists are associated with majority or minority opinions.
8. The final report of the arbitral panel shall be available to the public within 15 days after the date of issuance, subject to the requirement to protect confidential information.
9. The report of the arbitral panel shall be final and binding on the Parties.

Article 21.11: Implementation of the Report

1. Unless the Parties agree otherwise, the Party complained against shall eliminate the non-conformity or the nullification or impairment in the sense of Article 21.1(c) as determined in the report of the arbitral panel, immediately, or if this is not practicable, within a reasonable period of time.
2. The Parties shall continue to consult at all times on the possible development of a mutually satisfactory resolution.
3. The reasonable period of time referred to in paragraph 1 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 report of the arbitral panel referred to in Article 21.10, either Party may refer the matter to an arbitral panel as provided for in Article 21.12.7, which shall determine the reasonable period of time.
4. Where there is disagreement between the Parties as to whether the Party complained against eliminated the non-conformity or the nullification or impairment in the sense of Article 21.1(c) as determined in the report of the arbitral panel within

the reasonable period of time as determined pursuant to paragraph 3, either Party may refer the matter to an arbitral panel as provided for in Article 21.12.7.

Article 21.12: Non-Implementation – Compensation and Suspension of Concessions or other Obligations

1. If the Party complained against notifies the complaining Party that it is impracticable, or the arbitral panel to which the matter is referred pursuant to Article 21.11.4 confirms that the Party complained against has failed to eliminate the non-conformity or the nullification or impairment in the sense of Article 21.1(c) as determined in the report of the arbitral panel within the reasonable period of time as determined pursuant to Article 21.11.3, the Party complained against shall, if so requested, enter into negotiations with the complaining Party with a view to reaching mutually satisfactory compensation.
2. If there is no agreement on satisfactory compensation within 20 days after the date of receipt of the request mentioned in paragraph 1, the complaining Party may suspend the application to the Party complained against of concessions or other obligations under this Agreement, after giving notification of such suspension 30 days in advance. Such notification may only be given 20 days after the date of receipt of the request mentioned in paragraph 1.
3. The compensation referred to in paragraph 1 and the suspension referred to in paragraph 2 shall be temporary measures. Neither compensation nor suspension is preferred to full elimination of the non-conformity or the nullification or impairment in the sense of Article 21.1(c) as determined in the report of the arbitral panel. The suspension shall only be applied until such time as the non-conformity or the nullification or impairment in the sense of Article 21.1(c) is fully eliminated, or a mutually satisfactory solution is reached.
4. In considering what concessions or other obligations to suspend pursuant to paragraph 2:
 - (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 report of the arbitral panel referred to in Article 21.10 has found a failure to comply with the obligations under this Agreement, or nullification or impairment of benefits in the sense of Article 21.1(c); and
 - (b) if the complaining Party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may suspend concessions or other obligations with respect to other sectors. The notification of such suspension pursuant to paragraph 2 shall indicate the reasons on which it is based.
5. The level of suspension referred to in paragraph 2 shall be equivalent to the level of the nullification or impairment.

6. If the Party complained against considers that the requirements for the suspension of concessions or other obligations by the complaining Party set out in paragraph 2, 3, 4 or 5 have not been met, it may refer the matter to an arbitral panel.

7. The arbitral panel that is established for the purposes of this Article or Article 21.11 shall have, wherever possible, as its panelists, the panelists of the original arbitral panel. If this is not possible, then the panelists to the arbitral panel that is established for the purposes of this Article or Article 21.11 shall be appointed pursuant to Article 21.7. The arbitral panel established under this Article or Article 21.11 shall issue its report within 60 days after the date when the matter is referred to it. When the arbitral panel considers that it cannot issue its report within the aforementioned 60 day period, it may extend that period for a maximum of 30 days with the consent of the Parties. The report shall be available to the public within 15 days after the date of issuance, subject to the requirement to protect confidential information. The report shall be final and binding on the Parties.

Article 21.13: Rules of Procedure

The Joint FTA Committee shall adopt the Rules of Procedure which provide for the details of the rules and procedures of arbitral panels established under this Chapter, upon the entry into force of this Agreement. Unless the Parties otherwise agree, the arbitral panel shall follow the rules of procedure adopted by the Joint FTA Committee and may, after consulting the Parties, adopt additional rules of procedure not inconsistent with the rules adopted by the Joint FTA Committee.

Article 21.14: Application and Modification of Rules and Procedures

Any time period or other rules and procedures for arbitral panels provided for in this Chapter, including the Rules of Procedure referred to in Article 21.13, may be modified by mutual consent of the Parties. The Parties may also agree at any time not to apply any provision of this Chapter.