

## ANNEX 7

### **CONSULTATIONS AND DISPUTE SETTLEMENT**

#### **ARTICLE 1**

##### **Scope**

1. This Annex shall apply to the avoidance and settlement of disputes between the Parties concerning the interpretation, implementation or application of this Protocol and its Annexes.
2. Notwithstanding paragraph 1, any dispute arising from this Protocol and its Annexes and the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as the “WTO Agreement”) may be settled in one forum or the other, at the discretion of the complaining Party.
3. Once a dispute settlement procedure has been initiated between the Parties with respect to a particular dispute under this Protocol and its Annexes or under the WTO Agreement, the forum selected shall be used to the exclusion of the other.
4. For the purposes of this Article, a dispute settlement procedure under the WTO Agreement shall be regarded as initiated by a Party’s request for a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
5. The procedure for dispute settlement shall be deemed to have been initiated pursuant to this Protocol and its Annexes upon request for the participation of the Joint Commission as provided under Article 4 of this Annex.

#### **ARTICLE 2**

##### **Consultations**

1. A Party shall accord adequate opportunity for consultations requested by the other Party with respect to any matter related the interpretation, implementation or application of this Protocol and its Annexes.
2. If a request for consultations is made, the Party to which the request is made shall reply to the request within seven (7) days of the date of its receipt and shall enter into consultations within twenty (20) days of

## ANNEX 7

the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

3. The Parties shall make every effort to reach a mutually satisfactory resolution through consultations of any matter raised in accordance with this Article.

### **ARTICLE 3**

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

1. The Parties may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time.
2. Good offices, conciliation or mediation may continue while procedures of an arbitral tribunal established in accordance with this Annex are in progress.

### **ARTICLE 4**

#### **Participation of the Joint Commission**

1. If, within the term indicated in Article 2, no solution is mutually reached, or if the dispute is only settled partially, any of the Parties may request in writing that the Joint Commission established under Article 10 of this Protocol (hereinafter referred to as the "Commission") hold a meeting to discuss this issue.

The request must contain any factual and legal matter related to the dispute and indicate the provisions of the Protocol and its Annexes allegedly violated.

2. The Commission shall hold a meeting within fifteen (15) days from the date of receipt by the Party of the request referred to in paragraph 1 of this Article.
3. The Commission shall consider the dispute and shall give the Parties the opportunity to present their arguments, and, if necessary, to contribute with additional information, in order to reach a mutual settlement.

The Commission shall make the recommendations that it may deem

## ANNEX 7

appropriate within fifteen (15) days, as from the date of its first meeting.

### **ARTICLE 5**

#### **Request to Establish an Arbitral Tribunal**

1. If any Party, or both, decides not to adopt the recommendations made by the Joint Commission, the Party which made the request for consultations may make a written request to the other Party to establish an arbitral tribunal.
2. The request to establish an arbitral tribunal shall identify:
  - (a) the specific measures at issue;
  - (b) the legal basis of the complaint including the provisions of this Protocol alleged to have been breached and any other relevant provisions; and
  - (c) the factual basis for the complaint.

### **ARTICLE 6**

#### **Establishment of an Arbitral Tribunal**

1. An arbitral tribunal shall consist of three members. Each Party shall appoint a member within thirty (30) days after the date of receipt of the request under Article 4. The two members appointed shall, within thirty (30) days of the appointment of the second of them, designate by common agreement the third member.
2. The Parties shall, within seven (7) days of the designation of the third member, approve or disapprove the appointment of that member, who shall, if approved, chair the tribunal.
3. If the third member has not been designated within thirty (30) days of the appointment of the second member, or if one or both of the Parties disapproves the appointment of the third member, the Parties shall consult each other in order to jointly appoint within a further period of thirty (30) days the chair of the arbitral tribunal.
4. The arbitral tribunal shall be regarded as established on the day on which the appointment of the third member of the tribunal has been

## ANNEX 7

approved or agreed by the Parties in accordance with this Article.

5. If a member appointed under this Article resigns or becomes unable to act, a successor member shall be appointed in the same manner as prescribed for the appointment of the member being replaced and the successor shall have all the powers and duties of the member being replaced.
6. A person appointed as a member of the arbitral tribunal shall:
  - (a) have expertise or experience in law, international trade, other matters covered by this Protocol and its Annexes or the settlement of disputes arising under international trade agreements;
  - (b) be chosen strictly on the basis of objectivity, reliability, sound judgement and independence; and
  - (c) be independent of, and not be affiliated with or take instructions from, either Party.
7. A person appointed as chair of the arbitral tribunal shall not be a national of, nor have his or her usual place of residence in the territory of, nor be employed by, either Party nor have dealt with the dispute in any capacity.

## **ARTICLE 7**

### **Functions of Arbitral Tribunals**

1. An arbitral tribunal established under Article 6:
  - (a) shall consult the Parties as appropriate and provide adequate opportunities for the development of a mutually satisfactory settlement of the dispute;
  - (b) shall make its award in accordance with this Protocol and its Annexes and applicable rules of international law;
  - (c) shall set out, in its award, its findings of law and fact, together with its reasons; and
  - (d) may, in addition to its findings of law and fact, include in its award options for the Parties to consider in implementing the award.
2. The award of the arbitral tribunal shall be final and binding on the Parties.

## ANNEX 7

3. The arbitral tribunal shall attempt to make its decision, including its award, by consensus but may also make such decisions by majority vote.

### **ARTICLE 8** **Proceedings of Arbitral Tribunals**

1. An arbitral tribunal shall meet in closed session. The Parties shall be present at the meetings only when invited by the arbitral tribunal to appear before it.
2. The deliberations of the arbitral tribunal and the documents submitted to it shall be kept confidential. Nothing in this Article shall preclude a Party from disclosing to the public statements of its own positions or its submissions, but a Party shall not disclose information submitted by the other Party to the arbitral tribunal which the latter Party has designated as confidential.
3. The Parties shall transmit to the tribunal written submissions in which they present the facts of their cases and their arguments and shall do so within the following time limits:
  - (a) for the Party which requested the establishment of the arbitral tribunal, within thirty (30) days of the establishment of that tribunal; and
  - (b) for the other Party, within thirty (30) days of the transmission of the written submission of the Party which requested the establishment of the arbitral tribunal.
4. The proceedings shall guarantee the rights of the Parties to be heard in at least one hearing before the arbitral tribunal, as well as the opportunity to present their allegations and rebuttals or answers in writing.
5. The arbitral tribunal may at any time put questions to the Parties and ask them for explanations either in the course of a meeting or in writing.
6. The Parties shall make available to the arbitral tribunal a written version of their oral statements.

## ANNEX 7

7. The submissions, rebuttals and statements referred to in paragraphs 4 to 6 shall be made in the presence of the Parties. Each Party's written submissions, including any comments on the draft award made in accordance with paragraph 2 of Article 10, written versions of oral statements and responses to questions put by the arbitral tribunal shall be made available to the other Party.
8. The arbitral tribunal shall have no *ex parte* communications concerning a dispute it is considering.
9. At the request of a Party, or on its own initiative, the arbitral tribunal 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 set. This paragraph does not apply to information and technical advice provided by any person or body as part of the submissions referred to in paragraphs 4 to 5.
10. The arbitral tribunal shall, in consultation with the Parties, regulate its own procedures governing the rights of Parties to be heard and its own deliberations where such procedures are not otherwise set out in this Annex.

## **ARTICLE 9**

### **Suspension or Termination of Proceedings**

1. Where the Parties agree, an arbitral tribunal may suspend its work at any time for a period not exceeding twelve (12) months. If the work of the arbitral tribunal has been suspended for more than twelve (12) months, the tribunal's authority for considering the dispute shall lapse unless the Parties agree otherwise.
2. The Parties may agree at any time to terminate the proceedings of the arbitral tribunal established under this Annex by jointly notifying the chair of that arbitral tribunal.
3. The arbitral tribunal may, at any stage of the proceedings prior to release of its final award, propose that the Parties seek to settle the dispute amicably.

## ANNEX 7

### **ARTICLE 10 Awards of Arbitral Tribunals**

1. Unless the Parties otherwise agree, an arbitral tribunal shall base its award on the submissions and arguments of the Parties and on any information it has obtained in accordance with paragraph 9 of Article 8.
2. The arbitral tribunal shall prepare a draft award and accord adequate opportunity for the Parties to review this draft. The Parties may submit to the tribunal written comments on the draft award within fourteen (14) days of its receipt. The tribunal shall consider any comments received from the Parties in finalising its award.
3. The arbitral tribunal shall release to the Parties its final award on a dispute within one hundred and twenty (120) days of its establishment. If the tribunal considers it cannot release its final award within the aforesaid 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 award.
4. The final award of an arbitral tribunal shall become a public document within ten (10) days of its release to the Parties.

### **ARTICLE 11 Implementation**

1. The Parties shall promptly comply with the final award of an arbitral tribunal.
2. A Party shall notify the other Party in writing of any action it proposes to take to implement the award of the arbitral tribunal within thirty (30) days of the date of receipt of the final award by the Parties.
3. If a Party considers that prompt compliance with the award of the arbitral tribunal is impracticable, or if a Party which requested the establishment of the arbitral tribunal considers that an action proposed or subsequently taken by the other Party does not implement the award of the tribunal, the Parties shall immediately enter into consultations with a view to developing a mutually acceptable resolution, such as compensation or any alternative arrangement and to agreeing on a

## ANNEX 7

reasonable period of time to implement any such resolution. Compensation and any alternative arrangement are only temporary measures, neither of which is preferred to full implementation of the final award.

### **ARTICLE 12** **Compensation and Suspension of Benefits**

1. If:
  - (a) the Party which requested the establishment of an arbitral tribunal has not received any notice from the other Party under paragraph 2 of Article 11; or
  - (b) the Parties are unable to agree on a mutually acceptable resolution under paragraph 3 of Article 11 within thirty (30) days of the commencement of consultations under such paragraph; or
  - (c) the Parties have agreed on a mutually acceptable resolution under paragraph 3 of Article 11 and the Party which requested the establishment of the arbitral tribunal considers that the other Party has failed to observe the terms of such agreement,

the Party which requested the establishment of the arbitral tribunal may at any time thereafter provide a written notice to the other Party that it intends to suspend the application of benefits of equivalent effect to the non-conformity found by the tribunal. The notice shall specify the level of benefits that the Party proposes to suspend. The Party which requested the establishment of the arbitral tribunal may begin suspending benefits thirty (30) days after the date on which it provides notice to the other Party.

2. In considering what benefits to suspend under this Article:
  - (a) the Party which requested the establishment of an arbitral tribunal shall first seek to suspend the application of benefits in the same sector or sectors as affected by the matter that the tribunal has found to be inconsistent with this Protocol and its Annexes;
  - (b) the Party which requested the establishment of the arbitral tribunal may suspend the application of benefits in other sectors if it considers that it is not practicable or effective to suspend the application of benefits in the same sector; and
  - (c) the Party which requested the establishment of the arbitral tribunal shall aim to ensure that the level of suspension of

## ANNEX 7

benefits is of equivalent effect to the non-conformity found by the tribunal.

Any suspension of benefits under this Article shall be temporary and shall only be applied until such time as the Party that must implement the arbitral tribunal's award has done so, or until a mutually satisfactory solution is reached.

3. If the other Party considers that:
  - (a) the level of benefits that the Party which requested the establishment of the arbitral tribunal has proposed to suspend under paragraph 2 is excessive; or
  - (b) it has eliminated the non-conformity found by the tribunal,

it may, within thirty (30) days after the Party which requested the establishment of the arbitral tribunal provides notice under paragraph 1, request that the tribunal be reconvened to consider this matter. The other Party shall deliver its request in writing to the Party which requested the establishment of the arbitral tribunal. The tribunal shall reconvene within thirty (30) days after the date of receipt of the request by the Party which requested the establishment of the arbitral tribunal and shall present its determination to the Parties within ninety (90) days after it reconvenes. If the tribunal determines that the level of benefits proposed to be or actually suspended is excessive, it shall determine the level of benefits it considers to be of equivalent effect to the non-conformity found, with an adjustment to reflect any loss sustained by a Party as a result of excessive suspension.

4. The compliance tribunal's award shall be final and binding on the Parties.

## **ARTICLE 13**

### **Expenses**

Each Party shall bear the costs of its appointed member and its own expenses. The costs of the chair of an arbitral tribunal and other expenses associated with the conduct of its proceedings shall be borne in equal parts by the Parties.