TESE DE MESTRADO EM DIREITO E GESTÃO

DA RESOLUÇÃO DE CONFLITOS NO ÂMBITO DE ACORDOS TRANSNACIONAIS DE COMÉRCIO

Universidade Católica Portuguesa

Faculdade de Direito – Escola de Lisboa

Faculdade de Ciências Económicas e Empresariais

Orientador - Nuno Moreira da Cruz

Candidato - José Maria Luís-Lopes de Almeida Sande

Concluído a 24 de Maio de 2016

TESE DE MESTRADO EM DIREITO E GESTÃO

DA RESOLUÇÃO DE CONFLITOS NO ÂMBITO DE ACORDOS TRANSNACIONAIS DE COMÉRCIO

ÍNDICE

BIBLIOGRAFIA 3

LISTA DE SIGLAS 8

INTRODUÇÃO 9

GATT E OMC 10

GATT 10

DO GATT À OMC 15

OMC 17

NAFTA 22

ASEAN 29

UE 34

TPP E TTIP 37

TPP 37

TTIP 41

CONCLUSÕES 44

QUADRO COMPARATIVO 47

ANEXOS 48

BIBLIOGRAFIA

THE LAW OF THE WORLD TRADE ORGANIZATION (WTO): DOCUMENTS, CASES & ANALYSIS/ by PETROS C. MAVROIDIS, GEORGE A. BERMAN, MARK WU

DIREITO COMERCIAL INTERNACIONAL: CONTRATOS COMERCIAIS INTERNACIONAIS, CONVENÇÃO DE VIENA SOBRE A VENDA INTERNACIONAL DE MERCADORIAS, ARBITRAGEM TRANSNACIONAL/ LIMA PINHEIRO

O DIREITO COMERCIAL INTERNACIONAL, A ARBITRAGEM E A LEX MERCATORIA/ IÑAKI PAIVA DE SOUSA, orientado por ARMINDO RIBEIRO MENDES

THE IMPACT OF INVESTOR-STATE-DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP/ Study Prepared For: Minister for Foreign Trade and Development Cooperation; Ministry of Foreign Affairs, The Netherlands/ CHRISTIAN TIETJE, TRENT BUATTE

Sites consultados:

https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf

http://www.fd.unl.pt/docentes_docs/ma/LTF_MA_26142.pdf

https://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm#txt2

https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm

https://www.wto.org/english/docs_e/legal_e/final_e.htm

http://www.gddc.pt/siii/docs/rar75B-1994.pdf

http://internationalecon.com/wto/WTO-archive/ch1.html#N_1_

https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm

https://eh.net/encyclopedia/from-gatt-to-wto-the-evolution-of-an-obscure-agency-to-one-perceived-as-obstructing-democracy-2/

https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf

https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions

http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/settle.aspx?lang=en

http://www.naftanow.org/dispute/default_en.asp

https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement

http://useconomy.about.com/od/nafta/fl/NAFTA-Definition.htm

http://www.dgpj.mj.pt/sections/noticias/dgpj-disponibiliza/downloadFile/attachedFile_f0/UNCITRAL_Texto_Unificado.pdf?nocache=1298368366.42

http://www.gddc.pt/siii/docs/dec15-1984.pdf

https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf

http://www.oa.pt/upl/%7B59b6cc48-cdbc-4836-9bab-d61fe72e9215%7D.pdf

http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration

http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf

https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds

http://cil.nus.edu.sg/dispute-settlement-in-asean/

http://cil.nus.edu.sg/wp/wp-content/uploads/2010/01/WalterWoon-Dispute-Settlement-the-ASEAN-Way-2012.pdf

http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism

http://jids.oxfordjournals.org/content/early/2014/01/31/jnlids.idt031.full.pdf+HTML

http://www.asean.org/storage/images/ASEAN_RTK_2014/ASEAN_Charter.pdf

http://agreement.asean.org/media/download/20141217102933.pdf

http://www.asean.org/?static_post=asean-protocol-on-enhanced-dispute-settlement-mechanism

http://news.ntu.edu.sg/SAFNTU/Documents/Panel%201%20-%20Prof%20Kriengsak%20Chareonwongsak.pdf

http://www.freshfields.com/en/knowledge/Investment_protection_and_investor-State_dispute_settlement_under_the_Trans-Pacific_Partnership_Agreement/?LangId=2057

http://www.cfr.org/trade/trans-pacific-partnership/p37113

https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text

http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf

http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153021.8%20Dispute%20settlement.pdf

http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.5%20Investment.pdf

http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm

http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf

http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154391.pdf

http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230

http://ec.europa.eu/geninfo/query/index.do?queryText=dispute+settlement&query_source=TRADE&summary=summary&more_options_source=global&more_options_date=*&more_options_date_from=&more_options_date_to=&more_options_language=en&more_options_f_for

mats=*&swlang=en

http://europa.eu/about-eu/institutions-bodies/court-justice/index_pt.htm

http://curia.europa.eu/jcms/jcms/Jo2_7033/

http://ec.europa.eu/atwork/applying-eu-law/index_en.htm

https://europeplanetearth.wordpress.com/what-is-the-eu/4-how-are-eu-laws-created-and-enforced/

http://www.clientearth.org/reports/131210-enforcement-of-eu-environmental-law-and-citizens.pdf

http://www.europedia.moussis.eu/books/Book_2/2/3/3/index.tkl

https://e-justice.europa.eu/content_judicial_systems-14-en.do

http://www.hartpub.co.uk/pdf/samples/9781849468916sample.pdf

https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-en.do?clang=pt

https://e-justice.europa.eu/content_eu_courts-15-en.do?clang=pt

https://e-justice.europa.eu/content_mediation-62-en.do?clang=pt

https://e-justice.europa.eu/content_eu_law-3-en.do?clang=pt

http://ec.europa.eu/dgs/legal_service/arrets/listepartheme_en.htm#civillaw

http://ec.europa.eu/dgs/legal_service/arrets/07c420_en.pdf

www.eurocivil.civil

Lista de Siglas

ASEAN – Associação de nações do sudeste asiático

DSU – Memorando de Entendimento sobre Regras e Processos que Regem a Resolução de Litígios

EUA – Estados Unidos da América

GATT – Acordo Geral de Tarifas e Comércio

ISDS – Investor-to-State Dispute Settlement

NAFTA – Acordo Norte-Americano de Comércio Livre

OMC – Organização Mundial do Comércio

ORL – Órgão de Resolução de Litígios

SEOM – Senior Economic Officials Meeting

TPP – Acordo de Parceria Transpacífica

TTIP – Acordo de Parceria Transatlântica de Comércio e Investimento

UE – União Europeia

UNCITRAL – Comissão das Nações Unidas para o Direito Comercial Internacional

INTRODUÇÃO

O presente trabalho pretende olhar para os sistemas de resolução de conflitos consagrados nalguns Acordos Transnacionais de Comércio. Trata-se, na realidade, de acordos económicos multilaterais, constitutivos de zonas de comércio livre. Visa-se esclarecer quais os mecanismos criados para prover à resolução de diferendos no âmbito das relações comerciais por esses acordos reguladas. Adota-se, nesse âmbito, uma perspetiva evolutiva e comparativa, para que da decorrente análise possam ser retiradas conclusões no que respeita a parâmetros comparativos de eficácia. Quais são os sistemas? Haverá melhores sistemas?

Serve, igualmente, para determinar sobre a virtualidade da aplicação de modelos abstratos a realidades diferentes, e em que medida essas realidades impõem uma adaptação dos modelos. Percorre-se, aqui, um caminho de sequência temporal, de forma a ilustrar as alterações que foram sendo introduzidas. Observam-se acordos globais e regionais, com uma grande variedade de Estados envolvidos, de culturas e experiências Históricas muito distintas. De facto, apesar dessa diversidade, veremos como as soluções encontradas não diferem muito entre si, já que a realidade que se impõe é a de um mundo onde a evolução das relações económicas levou a uma complexidade e simbiose sem precedentes. De facto, as economias estão intimamente interligadas, partilhando da mesma natureza, e, como tal, as várias receitas de prevenção e resolução de conflitos não se revelam especialmente criativas.

Procura-se, mais do que descrever exaustivamente sistemas jurídicos, ilustrar uma amostra, e dessa ilustração retirar algumas ilações esclarecedoras da realidade dos tempos. De facto, o grande desafio em qualquer sistema de normas é, mais do que a sua aplicabilidade, a sua eficácia. Por isso, a resolução de conflitos é um tema fulcral para qualquer um destes acordos, já que só ela lhes poderá atribuir a referida eficácia, sem a qual qualquer um deles ficaria sem efeito. E sendo a eficácia um dos pontos-chave de qualquer sistema normativo, ela reveste-se de especial importância em matéria de relações económicas internacionais, já que, apesar do impacto que estas hoje têm nos mercados internos, o seu normal funcionamento estará sempre sujeito à boa vontade dos Estados, sempre ciosos da sua soberania, na ausência de normas que efetivamente garantam a sua aplicação.

DO ACORDO GERAL DE TARIFAS E COMÉRCIO

O GATT nasceu logo após a Segunda Guerra Mundial, assinado por 23 estados membros originários em Genebra, em Outubro de 1947. A sua consagração representa um mínimo de concertação entre os signatários no que respeita a matérias de redução tarifária e eliminação de barreiras comerciais, bem como o controlo de práticas discriminatórias no comércio entre Estados. De facto, o GATT deveria funcionar sob a égide da Organização Internacional do Comércio, instituição que nunca chegou a ser criada em virtude da sua não aprovação no Congresso americano. Surgiu, por isso, como um acordo provisório, cuja aplicação se estendeu por 46 anos, até à criação da OMC. Verdadeiramente, este acordo marcou a criação da primeira Zona de Comércio Livre multilateral.

No que concerne à resolução de conflitos propriamente dita, é premente referir que o sistema previsto se revelou algo insuficiente. A razão de ser desta característica provém daquela natureza provisória do Acordo, já que a resolução de conflitos fora intensamente negociada no âmbito do projeto da Organização Internacional do Comércio. O resultado final dos diferendos pautava-se frequentemente por alguma permeabilidade a relações diplomáticas e de influência entre Estados. De facto, esse tipo de considerações tendia a sobrepor-se à análise jurídica rigorosa das questões em apreço.

O procedimento está essencialmente previsto nos artigos XXII e XXIII do diploma, que aqui se transcrevem na íntegra:

"**Article XXII**

Consultation

> 1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
>
> 2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be

> free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him."

Em traços gerais, descrevia-se nestes dois artigos, respetivamente, um procedimento a duas fases.

Na primeira as partes recorriam a consultas, e havia um dever de os Estados Membros se mostrarem disponíveis relativamente a pedidos nesse sentido. De destacar que o artigo XXII, n.º 1, previa consultas sobre qualquer matéria englobada pelo GATT. Sobrepunham-se, assim, às consultas previstas no artigo que lhe sucede. O n.º 2 previa que as referidas consultas pudessem ser levadas a cabo, a pedido de uma das partes, pelo órgão cimeiro do GATT (o GATT CONTRACTING PARTIES, que aparece em maiúsculas no artigo, no qual estavam presentes todos os Estados participantes, reunindo-se em sessões anuais), com a contraparte. Não era, todavia, forçoso que se estivesse perante um verdadeiro conflito. Só em caso de conflito estaríamos dentro da previsão do n.º 1 do artigo XXIII (e, por isso, era menos abrangente que o artigo anterior). Previam-se, então, consultas no caso de um Estado Membro considerar violado algum dos seus direitos ao abrigo do GATT.

A segunda fase do procedimento de resolução de conflitos partia da não obtenção de solução em prazo razoável na fase das consultas. Nesse caso, a apreciação da questão era remetida ao GATT CONTRACTING PARTIES, que tomaria as diligências necessárias à sua análise, no sentido de uma decisão que dirimisse o conflito. Podia, para este efeito, consultar com qualquer Estado Membro, com o Conselho Económico e Social das Nações Unidas ou com qualquer organização intergovernamental relevante, consoante o caso. As suas decisões e recomendações deveriam ser respeitadas. Caso contrário, ao Estado cujo direito fora violado poderia ser permitida a suspensão de concessões ou outras obrigações para com o Estado faltoso ao abrigo do GATT.

A prática desenvolveu-se, no entanto, no sentido da criação de painéis de peritos que apreciavam e decidiam da questão em disputa, cujo relatório era depois submetido a decisão final por parte do GATT CONTRACTING PARTIES, sempre com base nesse relatório. Esses painéis, normalmente de 3 mas também de 5 pessoas independentes (de nacionalidade diferente das partes em conflito), nem sempre eram compostos por

juristas, mas também por economistas e diplomatas de renome, o que atesta a falta de rigor técnico muitas vezes evidenciada.

Esta prática dos painéis foi pela primeira vez oficialmente descrita em 1979, numa *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement*, documento anexo ao *Understanding on Notification, Consultation, Dispute Settlement and Surveillance*, que, ne sequência da *Tokyo Round* (um dos conjuntos de negociações através das quais o corpo normativo do GATT se densificou), importou novas regras para o sistema de resolução de conflitos. Descreveu-se então um procedimento de 2 ou 3 reuniões formais, nas quais os peritos ouviam as partes e qualquer outra fonte relevante. Muitas vezes também consultavam ou eram assistidos pelo Secretariado do GATT, o "guardião" do Acordo, órgão central que elaborava trabalhos de fundo e prestava serviços técnicos. Finalmente, apresentavam o seu relatório às CONTRACTING PARTIES. É importante referir a existência de um Conselho do GATT representado por todos os Estados signatários, que reunia mensalmente, autorizado a decidir sobre questões de rotina e assuntos urgentes, e que muitas vezes dirimia os conflitos no lugar das CONTRACTING PARTIES reunidas em sessão anual. A atuação daquele regia-se pelos mesmos procedimentos que aqui tenho explanado.

Apesar de tudo, a resolução de conflitos no âmbito do GATT pautou-se sempre por uma extrema falta de eficácia. De facto, não obstante um processo decisório normativamente consagrado (em que a regra era a da maioria simples), nesta matéria a prática era de uma decisão por unanimidade. Exigia-se portanto, um consenso positivo da totalidade dos membros reunidos na sessão das CONTRACTING PARTIES. Isto significa que em qualquer fase do processo de resolução de conflitos teria que haver o acordo da parte perpetradora da alegada violação. Quer na admissão de consultas, quer no pedido de intervenção das CONTRACTING PARTIES, na admissão do relatório do painel, na exigência de tomada de medidas corretivas ou na autorização de suspensão de concessões ou outras obrigações em benefício do requerente. É preciso referir que a maior parte das vezes a parte demandada aceitava relatórios adversos (cerca de 80%), mas isso não tem em conta o efeito dissuasor resultante da falta de coercibilidade (os Estados simplesmente não iniciavam o procedimento de resolução de litígios em razão da sua fraca vinculatividade, preferindo agir individualmente). Facilmente se chega à

conclusão de que se tratava de um sistema altamente ineficaz, totalmente desprovido de coercibilidade.[1]

México etc. V. EUA: *Tuna-Dolphin (1991)*

Estava em causa a exportação de atum para os EUA. Estes deixaram de comprar atum ao México (através de intermediários), considerando que aquele país não respeitava as suas normas de segurança quanto à proteção de golfinhos, que facilmente podiam ser apanhados nas redes. O México, após consultas, requereu a constituição de um painel, cujo relatório foi a seu favor, considerando que essas medidas não se enquadravam na órbita do GATT, e como tal não poderiam ser exigidas. No entanto, o relatório não foi adotado, por falta de acordo do próprio México. De facto, este acabou por resolver bilateralmente a questão com os EUA.

[1] THE LAW OF THE WORLD TRADE ORGANIZATION (WTO): DOCUMENTS, CASES & ANALYSIS/ by PETROS C. MAVROIDIS, GEORGE A. BERMAN, MARK WU, Págs 880 a 1091

DO GATT À OMC

O GATT foi um acordo que se caracterizou por uma progressiva densificação normativa e formalização institucional. Mesmo no que respeita ao procedimento de resolução de conflitos, houve uma evolução ao longo de 40 anos, que serviu de base ao sistema da Organização Mundial de Comércio. A prática dos painéis (que não começou logo no início), desenvolveu-se no sentido de um progressivo rigor técnico e da criação de uma certa "jurisprudência" assente, acompanhada de novas regras criadas em múltiplas rondas de negociações. Foi um processo moroso que permitiu a passagem de um acordo precário de natureza provisória para uma verdadeira organização ordenadora do comércio internacional, que tomou o lugar daquilo que esteve para ser a Organização Internacional do Comércio[2].

Ao todo, houve 8 destas rondas no âmbito do GATT. Até à ronda do Uruguai - aquela que mais alterações trouxe neste âmbito e na qual se gizaram os grandes eixos da OMC - tiveram lugar algumas decisões importantes, como a de 5 de Abril de 1966 sobre Procedimentos ao Abrigo do Artigo XXIII, a adoção do já referido *Understanding on Notification, Consultation, Dispute Settlement and Surveillance* em 1979 (no decurso da ronda de Tóquio), a Declaração Ministerial sobre Resolução de Conflitos de 1982, a Decisão sobre Procedimentos de Resolução de Conflitos de 1984. Nomeadamente, estas alterações permitiram um tratamento mais favorável aos países menos desenvolvidos, introduziram a possibilidade de recorrer a bons ofícios, a obrigação de notificar da implementação de medidas num período razoável e a proibição de que da decisão dos painéis se estendessem direitos ou obrigações para além do previsto no Acordo.

Mas, com efeito, foi a ronda do Uruguai, iniciada em 1984, que se revelou determinante e que materialmente operou a transição para a OMC. As negociações nela desenvolvidas prolongaram-se por 8 anos até se darem por concluídas. No dia 12 de

---

2 How the WTO Differs From the GATT, in **The WTO: An Historical, Legal, and Organizational Overview**: http://internationalecon.com/wto/WTO-archive/ch1.html#N_1_; **From GATT to WTO: The Evolution of an Obscure Agency to One Perceived as Obstructing Democracy**: https://eh.net/encyclopedia/from-gatt-to-wto-the-evolution-of-an-obscure-agency-to-one-perceived-as-obstructing-democracy-2/

Abril de 1989, os Estados signatários, no decorrer de uma conferência ministerial realizada em Montreal, com o intuito de implementar algumas regras preliminares já discutidas nessa ronda, decidiram-se pela adoção de um conjunto de regras no âmbito da resolução de conflitos, a ser aplicadas provisoriamente até ao fim da referida ronda. Figuravam já vários pontos do que viria a ser o sistema de resolução de conflitos da OMC, nomeadamente a criação de limites temporais para as consultas, e, quanto à decisão de constituição de um painel, a passagem de um sistema de consenso positivo para negativo (ou seja, para que se optasse pela sua não constituição, a decisão tomada em sessão das CONTRACTING PARTIES ou do Conselho do GATT tinha que ser unânime nesse sentido, caso contrário o painel seria constituído). Isto já não era assim relativamente à adoção do relatório do painel e à autorização de suspensão de concessões ou outras obrigações, exigindo-se, aí, uma decisão unânime de sentido positivo (passível de ser bloqueada pela contraparte). Prosseguiremos, no entanto, na análise do sistema consagrado sob a égide da OMC.

DA ORGANIZAÇÃO MUNDIAL DO COMÉRCIO

Esta organização, resultante do Acordo de Marraquexe, de 15 de Abril de 1994, por 123 Estados signatários, e que entrou em funcionamento a 1 de Janeiro de 1995, é uma verdadeira instituição de vocação universal para a regulação do comércio entre Estados.

A sua edificação, que resulta da conclusão da ronda do Uruguai, pôs fim à precariedade que envolvia o GATT, tendo-o no seu seio incorporado, e criou um sistema sólido para a resolução de conflitos na sua órbita.

O diploma relevante é o anexo 2 ao Acordo que estabelece a OMC, o *Undertanding on Rules and Procedures Governing the Settlement of Disputes* – ou *Dispute Settlement Understanding* – DSU (em português, Memorando de Entendimento Sobre as Regras e Processos que Regem a Resolução de Litígios).

O sistema sustenta-se numa figura especificamente criada para dirimir disputas no âmbito dos acordos da OMC, o Órgão de Resolução de Litígios, ou ORL. É composto por representantes de todos os Estados Membros, e a sua intervenção parte de uma iniciativa descentralizada. Significa isto que o início do procedimento está dependente de queixa de um Estado Membro, não podendo ser iniciado oficiosamente pelo ORL. Importa também referir que só os Estados têm legitimidade ativa perante a OMC. Para que as restantes pessoas possam defender os seus direitos perante estas instâncias, terão que recorrer aos instrumentos de representação diplomática criados em cada Estado.

Assim, a partir do momento em que um Estado decide iniciar um procedimento de resolução de conflitos, é aplicável o Memorando. Novamente, prevêem-se duas fases, uma bilateral e outra multilateral.

A primeira é uma fase de consultas entre dois Estados Membros. Trata-se de pedidos apresentados no âmbito de medidas que afetem o funcionamento de um acordo da OMC, adotadas no território do Estado ao qual a consulta é dirigida. O pedido deve ser notificado ao ORL e fundamentado, identificando-se as medidas em questão e a sua base jurídica. Pode tratar-se de um desacordo sobre determinada operação e sua conformidade com a Lei da OMC (ou seja, o conjunto de acordos por esta abrangidos), ou sobre a validade de normas jurídicas em face da mesma. À teleologia do artigo relevante (4.º do Memorando), está subjacente o fim de que as partes alcancem uma solução mutuamente satisfatória e que, dessa forma, seja logo resolvido o conflito. Qualquer outro Membro com interesse comercial substancial nas consultas em curso poderá nelas participar, desde que notifique devidamente as partes e o ORL, e que haja acordo do Membro a quem o pedido de consultas foi apresentado. Caso não se chegue a

um consenso, a parte queixosa poderá solicitar a criação de um painel para dirimir o conflito.

Inicia-se, então, a segunda fase do sistema de resolução de conflitos, uma fase multilateral. Esta poderá, por sua vez, desdobrar-se em duas subfases, já que se prevê a possibilidade de recurso. Esta é uma novidade relativamente ao processo que vigorava no âmbito do GATT.

A criação de um painel será, por regra, autorizada pelo ORL, a não ser que este se decida, por consenso, pela sua não criação. O painel é uma instituição que apresenta semelhanças com um tribunal de primeira instância. É composto por três pessoas, ou cinco se as partes assim acordarem. Os seus membros são propostos pelo Secretariado da OMC, mas as partes poderão opor-se à sua nomeação. Não se chegando a acordo, é o Diretor-Geral que determinará a composição do painel. Tratar-se-á de indivíduos altamente qualificados e independentes. Este órgão tem competência para analisar questões de facto e de direito. Também aqui se privilegia a obtenção de uma solução mutuamente satisfatória (um acordo entre as partes), pelo que os painéis devem consultar as partes regularmente de forma a criar oportunidades nesse sentido. Caso se chegue a uma tal solução, o relatório do painel limitar-se-á a uma breve descrição do caso e da solução dada ao mesmo. Não se obtendo tal solução, o painel elabora um relatório onde deve apresentar as conclusões sobre as questões de facto, sobre as disposições aplicáveis e os fundamentos essenciais de quaisquer conclusões e recomendações que adopte. Na sua função, o painel é assistido por membros do Secretariado, advogados e economistas que detêm a competência técnica necessária à boa decisão dos casos, e que o mais das vezes preparam os relatórios. Mais uma vez, Estados terceiros ao conflito podem requerer o seu comparecimento perante o painel. O referido relatório será, no prazo de 60 dias, adotado em reunião do ORL, a menos que este decida unanimemente não o adotar, ou que uma das partes em conflito o notifique formalmente de uma decisão de recurso. Nesse caso, entramos numa segunda subfase.

Existe, então, um Órgão de Recurso, composto por sete especialistas em direito, comércio internacional e em matérias reguladas nos acordos abrangidos pela OMC. Não se trata, portanto, de juízes. O seu mandato é de 4 anos, renovável por uma vez. Apenas analisam as questões de direito referidas no relatório do painel e as interpretações jurídicas dele constantes. O Órgão de Recurso elabora um relatório, adotado pelo ORL e aceite incondicionalmente pelas partes, a não ser que, novamente, o ORL se decida de forma unânime pela sua não adoção. Também aqui, as conclusões e recomendações do

painel e do Órgão de Recurso não podem aumentar ou diminuir os direitos e obrigações previstos nos acordos abrangidos.

Termos em que, se uma queixa é julgada procedente, adotado o relatório do painel ou do Órgão de Recurso, o demandado deve executar a decisão imediatamente, no sentido da conformação da medida incompatível por este tomada com o acordo abrangido em causa. Não sendo isto possível, é determinado um período de cumprimento, seja o proposto pelo Estado Membro em questão (sujeito a aprovação pelo ORL), mutuamente acordado pelas partes, ou determinado através de arbitragem vinculativa.

Normalmente, o organismo decisório não indica formas específicas para a execução de decisão. Quando o faz, no entanto, o procedimento indicado não é vinculativo. Poderá, por isso, haver desacordo sobre a existência de medidas de execução da decisão, ou sobre a sua compatibilidade com os acordos abrangidos. Poderá, então, ser criado um painel de *compliance* para aferir da questão, prevendo-se também a possibilidade de recurso. Em todo o caso o ORL fiscalizará sempre a execução das recomendações ou decisões adotadas. Concluindo-se pelo incumprimento, o Estado queixoso pode requerer compensação ou a suspensão de concessões. A compensação depende de negociações entre as partes, e consubstancia-se como resultado de uma solução mutuamente satisfatória. No caso de esta não ser possível, o requerente pode solicitar autorização do ORL para suspender a aplicação de concessões ou outras obrigações previstas nos acordos abrangidos, em relação ao Estado que incumpriu com as suas obrigações, de forma a neutralizar o desequilíbrio económico em que essa violação se traduziu. Esta finalidade é traduzida pela regra de que o nível de suspensão de concessões ou outras obrigações deve ser equivalente ao nível de anulação ou redução de vantagens (criadas pela atuação do infractor), mas nunca superior nem inferior. Traduzir-se-á, sobretudo, no aumento de taxas alfandegárias.

Releva, agora, olhar ao artigo 23.º do Memorando. Trata-se da regra geral de resolução de conflitos no âmbito de acordos abrangidos pela OMC. Estatui-se no n.º 1 que os Estados Membros deverão recorrer ao Memorando e respeitar as suas normas e procedimentos, querendo opor-se à violação de obrigações ou anulação de vantagens previstas nos Acordos. O n.º 2 elabora com o dever de que nestes casos não sejam tomadas decisões unilaterais, excepto aquelas que decorram do normal desenrolar do mecanismo de resolução de litígios em conformidade com as normas e procedimentos previstos no Memorando. Consagra-se, então, este diploma e o sistema por ele criado

como fórum exclusivo de resolução de conflitos no âmbito dos acordos abrangidos pela OMC. Isto é uma grande inovação em relação ao anterior sistema, onde se previa, nomeadamente, a possibilidade de submeter litígios perante o Tribunal Internacional de Justiça, embora isto nunca tenha acontecido.

De constatar que o procedimento acima descrito não é o único previsto no Memorando. Com efeito, prevê-se a hipótese de as partes recorrerem aos bons ofícios, à conciliação, e à mediação, procedimentos que podem correr paralelamente aos trâmites do processo dos painéis, solicitados em qualquer momento do diferendo. Como forma alternativa de resolução de conflitos, prevê-se a possibilidade de recorrer à arbitragem, cuja decisão final é vinculativa. Com efeito, será também objeto de fiscalização por parte do ORL e o seu incumprimento poderá levar à suspensão de concessões ou outras obrigações.

Nalguns raros casos, a resolução de conflitos operou através de um procedimento *ad hoc*, abrogando-se a regra do artigo 23.º. Defende-se que, apesar do desvio, se inseriram no espírito do sistema, já que a solução foi obtida através de decisão de terceiros. No entanto, não deixou de se traduzir numa violação da regra da exclusividade.

Resta dizer que há uma relação complexa entre este artigo 23.º e a aplicação de regras de outros acordos de comércio preferenciais, como a NAFTA ou a MERCOSUR, quando os Estados partes do conflito sejam simultaneamente membros da OMC e desses outros acordos. A regra tende a ser a da escolha de um ou outro fórum para a sua resolução, mas nem sempre é assim. O artigo 2005.º, n.º 3, do acordo NAFTA, impõe que, no caso de o conflito se enquadrar em matérias ambientais e de conservação, deve ser submetido às regras previstas nesse diploma, desde que a parte demandada assim o requeira.

Para concluir, o sistema criado com a OMC revelou uma grande solidez e eficácia relativamente ao anterior sistema que vigorava no âmbito do GATT. Foi, sobretudo, a alteração do processo decisório que se traduziram numa maior eficácia, já que a unanimidade para a não adoção de relatórios e autorizações passou a ser exigida em todas os momentos decisórios do ORL, pelo que o Estado demandado deixou de poder bloquear o processo.

<u>Venezuela v. EUA (1995)</u>

Em Janeiro de 1995, a Venezuela comunicou ao ORL que os EUA aplicavam regras discriminatórias relativamente à importação de gasolina – mais estritos na exigência de características químicas da gasolina importada do que da nacional, estando em causa a alegada violação do princípio do Tratamento Nacional – e requereu o início de consultas

com este país. Um ano mais tarde, o painel concluiu o seu relatório favorável à requerente, tendo o Brasil, entretanto, aderido à disputa (com uma reivindicação similar, o processo foi julgado pelo mesmo painel). Os EUA recorreram, e o Órgão de Recurso sustentou a decisão da primeira instância. O princípio foi, de facto, violado, não se justificando através das normas de proteção ambiental e da saúde. Decorreu, depois, um período de 6 meses para chegar a acordo sobre a medida a praticar pelos EUA, e determinou-se um prazo de 15 meses para a sua implementação. A 26 de Agosto de 1997, os EUA notificaram o ORL da assinatura de um novo regulamento para implementação do acordado.

NAFTA

DO ACORDO NORTE-AMERICANO DE COMÉRCIO LIVRE

A NAFTA – *North American Free Trade Agreement* – é um acordo celebrado entre os EUA, o Canadá e o México, que entrou em vigor em 1 de Janeiro de 1994. Partiu de um prévio acordo entre os dois primeiros países (em vigor desde 1989), e de um segundo entre os três, ao qual foram aditadas duas adendas em 1993.

Estabeleceu-se, então, uma grande zona de comércio livre entre aqueles Estados, numa altura especialmente fértil de celebração de acordos deste tipo. De facto, a transição para a OMC e a longa ronda de negociações do Uruguai, a par do desenvolvimento do projeto Europeu, parecem ter sido o ponto de partida para a multiplicação destas zonas de comércio livre.

O sistema de resolução de conflitos consagrado no acordo NAFTA apresenta alguma complexidade, e embora haja um processo geral, este está sujeito a desvios, previstos em diversos capítulos, em função da matéria objeto do diferendo. Relativamente ao sistema da OMC, há aspetos absolutamente novos, tais como a possibilidade de investidores demandarem Estados em processos de arbitragem. Veremos isto mais à frente. Neste ponto, importa apenas ter presentes os capítulos que regem a resolução de conflitos. São eles o capítulo XX, que trata do procedimento geral; XI, no que respeita a questões relacionadas com investimento; XIV, quanto a serviços financeiros; e XIX, em relação a questões de *antidumping* e direito de compensação.

Comecemos, portanto, pela análise do procedimento geral, previsto no capítulo XX do Acordo.

Os trâmites não diferem muito daqueles previstos no sistema OMC. A nível institucional, há uma figura importante, a Comissão de Livre Comércio (*Free Trade Comission*), daqui em diante designada por Comissão, que, no âmbito da resolução de conflitos, tem uma função análoga à do Órgão de Resolução de Conflitos do Memorando de Entendimento que antes vimos. De notar que não se prevê a possibilidade de recurso. Em traços gerais, surgindo uma qualquer questão sobre a interpretação ou aplicação do acordo NAFTA ou sobre a conformidade com o mesmo de uma medida existente ou proposta num determinado Estado Membro, aplicam-se as normas previstas neste capítulo. Trata-se de uma exigência de exclusividade que, no entanto, não é absoluta, dado que os conflitos poderão ser resolvidos noutros fóruns (como vimos atrás), reunidas as devidas condições. Partindo do pressuposto de que o

fim das partes deve ser sempre a obtenção de uma solução mutuamente satisfatória do conflito, o procedimento inicia-se através de consultas entre as partes sobre a questão fraturante. Não sendo possível a obtenção de uma tal solução dentro de prazo razoável (30, 45, ou 15 dias após a submissão do pedido para consultas), a parte demandante pode pedir por escrito que a Comissão reúna (na realidade tem que o pedir, se desejar que o procedimento prossiga). Esse pedido deve ser fundamentado, indicando-se a medida posta em causa e as normas relevantes do Acordo. A Comissão deve reunir dentro de 10 dias após a receção do pedido e procurar uma rápida solução do conflito. Nesse sentido, pode criar grupos de trabalho ou convocar técnicos e peritos que a assistam se necessário, proceder a bons ofícios, conciliação e a mediação, ou fazer recomendações. Novamente, procura-se através destes mecanismos a obtenção de uma solução mutuamente satisfatória, já que o fito de todos eles é assistir as partes a resolver a sua disputa. Se, apesar disto, esta se mantém, qualquer das partes envolvidas pode requerer o estabelecimento de um painel arbitral. Tanto nesta fase como na anterior, pode haver participação de partes terceiras com interesse demonstrado na questão. O painel é composto por cinco árbitros. A presidência do painel deve ser decidida por consenso, caso contrário uma das partes, selecionada à sorte, deverá escolher como presidente um cidadão de nacionalidade que não a sua. Cada parte selecionará depois dois árbitros, cidadãos da outra parte. Caso não o façam nos 15 dias subsequentes à seleção do presidente, os membros do painel serão escolhidos por sorteio, a partir de listas pré-existente de indivíduos altamente qualificados. Em princípio, os membros serão sempre normalmente escolhidos dessas listas. Ao painel caberá a análise do questão em apreço, tal como descrita no requerimento para a reunião da Comissão, e proceder ao apuramento da verdade material, decidindo, nessa base, pela violação ou não de obrigações decorrentes do Acordo, bem como da redução de vantagens para uma das partes, decorrente dessa mesma violação. Compete-lhe, ainda, fazer recomendações para a resolução da disputa. O relatório final é enviado à Comissão, que em princípio o publica. Ao receber o relatório final, as partes deverão concordar numa solução para o conflito, normalmente coincidente com as determinações e recomendações naquele contidas, que o mais das vezes se traduzirão simplesmente na não implementação ou remoção da medida ilegal. Quer-se, então, atingir sempre um acordo entre as partes, ainda que baseado no relatório. Se, uma vez publicado este, a parte demandada, verificada a violação, continua sem chegar a acordo (ainda que diferente da solução proposta pelo painel) com a demandante no prazo de 30 dias da receção do relatório,

não aceitando a solução nele propugnada, o demandante pode suspender a aplicação de benefícios de efeito equivalente ao dos danos patrimoniais por este sofridos (em virtude da atuação ilegal) até que se chegue a um acordo sobre a resolução do conflito.

Quando a questões relacionadas com a interpretação ou a aplicação do Acordo NAFTA surgirem em processos judiciais internos, a comissão pode ser solicitada a intervir, a título prejudicial, para dar uma resposta a essa questão. Em todo o caso, um Estado Membro nunca poderá permitir que ao abrigo da sua lei se atue contra outro Estado Membro com o fundamento de que este praticou uma medida desconforme ao Acordo. Finalmente, no que toca a disputas de direito internacional privado no espaço da zona de comércio livre, os Membros deverão sempre encorajar e facilitar a utilização da arbitragem.

Este é o procedimento geral, que deverá ser aplicado em qualquer conflito no âmbito da NAFTA para o qual não esteja previsto regime específico. Interessa-nos, agora, olhar para essas exceções, sobretudo àquela que concerne a disputas entre um Estado Membro e um investidor de outro Estado Membro.

O sistema, previsto na Seção B do capítulo XI do acordo NAFTA, dirige-se à resolução de conflitos entre um investidor de um Estado relativamente a um investimento seu noutro Estado, ou entre este e um investidor de um Estado membro em representação de uma empresa de outro Estado membro por si controlada direta ou indirectamente. Novamente, as partes devem primeiro tentar resolver a questão através de consultas e negociação. Exige-se, nesse sentido, um intervalo de 90 dias entre os factos que deram origem à disputa e a possibilidade de prosseguir para uma outra via de solução. Foi consagrado para tal um procedimento de arbitragem, cuja legitimidade ativa pertence ao investidor. Compreende-se que assim seja, já que este é a parte que mais carece de proteção, porque o Estado poderá sempre agir com base no seu ius imperii (devendo para tal cumprir com o princípio da legalidade, claro está). O investidor pode submeter a questão a arbitragem sob as regras da Convenção Internacional para a Resolução de Diferendos Relativos a Investimentos entre Estados e Nacionais de Outros Estados (de 1966), ou as Regras sobre Facilidades Adicionais (adotadas em 1978, prevêem que a Convenção possa ser aplicada a Estados Terceiros - e o Acordo permite a sua aplicação porque o México não é parte daquela), ou sob a égide da Lei Modelo da Comissão das Nações Unidas sobre Direito Comercial Internacional (UNCITRAL). Independentemente da opção escolhida, as normas neste âmbito previstas no Acordo Nafta prevalecem sobre aquelas. De salientar que o investidor (e a empresa de outro

Estado Membro por este representada, se for o caso) abdica do seu direito de recorrer a qualquer outro foro para a resolução do conflito (no que respeita à reparação dos danos imputados à atuação do Estado que motiva o processo de arbitragem). Também de notar que se declara expressamente que as partes consentem na submissão da questão à arbitragem. Temos, por isso, que aquela tem natureza obrigatória (na inexistência de acordo) e vinculativa.

Não nos interessa tanto explorar as normas processuais que regem cada um daqueles fóruns de arbitragem, relevando aqui, sobretudo, olhar a natureza do mecanismo aqui utilizado. Trata-se da utilização de sistemas de arbitragem para a resolução de conflitos internacionais de comércio entre investidores estrangeiros e Estados (*Investor-to-State Dispute Settlement*, comumente conhecido como ISDS). Este tipo de solução entrou em voga no princípio dos anos 60 do século passado, e teve como grande contributo para a resolução de conflitos deste tipo a criação de quadros orgânicos neutros nos quais um investidor (seja pessoa singular ou coletiva) pode demandar diretamente um Estado onde mantenha atividade empresarial, como alternativa à prossecução de uma ação judicial nesse Estado (o que, sobretudo em países menos desenvolvidos, colocava sérias questões ao nível da imparcialidade das decisões), ou da resolução do conflito através de meros meios de proteção diplomática, permeáveis às ingerências do poder político, e muitas vezes ineficazes.

Frequentemente, têm sido colocadas dúvidas quanto à bondade deste mecanismo, sobretudo no que respeita a um receio de perda de soberania para legislar sobre áreas de interesse público, e a uma certa falta de transparência que aquele pode importar. Quanto ao primeiro ponto, trata-se de um fenómeno a que tem sido dada a designação de *Regulatory Chill*. Este traduz-se numa alteração ou abstenção do impulso legislativo, em face da ameaça de decisões arbitrais desfavoráveis ao Estado recetor do investimento, e consequente pagamento de pesadas indemnizações (sobretudo, no que diz respeito a matérias de especial interesse público, como a saúde, o ambiente e a proteção de recursos naturais). Necessário será afirmar que esta teoria é de difícil prova, já que os interesses dos investidores são múltiplos e variados, pelo que será difícil ao legislador saber com que interesses específicos estará a contender ao legislar. Por essa razão, não se poderá defender que aquele recuou na criação de normas em função deste ou daquele interesse. Será sempre, em todo o caso, um factor entre muitos. Para além disto, esta preocupação é algo falaciosa, já que, em primeiro lugar, a grande maioria de processos arbitrais não contestam normas legislativas, mas regulamentos e atos

administrativos. É preciso, também, afirmar que também se poderia invocar esta teoria em relação a processos judiciais, já que as decisões dos tribunais desta natureza também poderiam influenciar o legislador na sua função legislativa. De resto, não se esqueça que em qualquer acordo deste cariz haverá sempre uma dose de perda de soberania, já que os Estados atribuem poder a entidades terceiras para decidir sobre estas questões, mas essa perda é consentida num acordo, e, como tal, é o Estado que dispõe livremente da sua soberania, deste modo salvaguardada. O que, de facto, é relevante, é que as medidas de regulação não sejam discriminatórias quanto aos investidores estrangeiros. Assente este ponto, há que prever exceções e procedimentos adequados para que a liberdade dos Estados para regular sobre determinadas matérias nunca seja ameaçada[3].

Depois, deve haver necessários requisitos processuais de transparência, e um código de conduta que garanta a independência e competência da composição da lista de árbitros.

No âmbito da NAFTA, houve mais de 70 casos de procedimentos arbitrais despoletados de acordo com o capítulo XI, aos quais se aplicou o mecanismo ISDS. É preciso referir, no entanto, que uma grande parte destes casos nunca chegou ao tribunal arbitral, por mera inércia processual (tornaram-se "inactivos") ou por terem sido rejeitados por incumprimento de requisitos procedimentais, e são raros os casos em que os Estados foram condenados ao pagamento de indemnizações, pelo que a prática coloca sérias dúvidas à tese do "Regulatory Chill" atrás analisada. Observemos dois exemplos.

Ethyl Corp. v. Canada

Em 1997, a Ethyl Corporation, uma empresa com sede na Virgínia (EUA) que detinha uma subsidiária no Canadá, desencadeou o procedimento previsto no capítulo XI, segundo o modelo UNICTRAL. Em causa estava uma medida do Parlamento Canadiano que bania a importação e transporte entre províncias de MMT, um aditivo utilizado para a gasolina sem chumbo. Essa medida pretendia minorar o risco para a saúde pública que as emissões dessa substância importam, dificultando a sua circulação. A Ethyl Corporation alegou, então, uma violação dos artigos 1102º, 1110º e 1106 do Acordo (respetivamente, o princípio do tratamento nacional, a proibição de expropriação, e a proibição de certos requisitos de *performance*), já que isto impedia a sua sucursal de importar MMT para utilizar na sua produção, e um consequente pedido

3 The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership, Págs 39 e ss.; Investor-to-State Dispute Settlement (ISDS) Some facts and figures, in: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf

de indemnização de 201 milhões de dólares americanos. Embora o Canadá tenha perdido a causa numa primeira decisão arbital (qua não era ainda final), a questão acabou por ser resolvida por acordo (indemnização de 20 milhões de dólares canadianos), dado que, contemporaneamente, três províncias canadianas puseram em causa o mesmo ato parlamentar, julgado inválido à luz da lei canadiana por um órgão de resolução de conflitos interno.

S.D. Meyers v. Canada

Tratava-se, novamente, de uma empresa americana, S.D. Meyers, Inc, que fazia tratamento de bifenilos policlorados (PCB), um componente usado na produção industrial, tendo para tal estabelecido um investimento no Canadá de forma a exportar resíduos para serem processados nos EUA. Embora os EUA tivessem as suas fronteiras fechadas ao comércio deste produto, a S.D. Meyers obtivera, no final de 1995, uma autorização governamental para a sua importação. Ora, logo após aquela, o Governo Canadiano proibiu temporariamente a exportação deste componente, invocando, para tal, conformidade com a Convenção de Basileia sobre Cotrolo de Movimentos Transfronteiriços de Resíduos Perigosos e sua Eliminação (1989), que assim o permite (embora não obrigue). A S.D. Meyers intentou, então, ação arbital com base nesta medida, invocando os artigos 1102º, 1105º (requisitos mínimo de tratamento), 1106º e 1110º do NAFTA. O tribunal arbitral considerou que havia discriminação por parte do Canadá, violando requisitos mínimos de tratamento de investidores estrangeiros (e, de facto, esta medida era direcionada a esta empresa, já que era única autorizada pelo Governo americano para importar PCB), e ordenou o Governo canadiano ao pagamento de uma indemnização de 5 milhões de dólares por danos (acrescidos de juros). O Canadá ainda reagiu, recorrendo ao Tribunal Federal para que revogasse a decisão, com base numa alegada falta de jurisdição do tribunal arbitral, e que a decisão conflituava com a política pública canadiana. O Tribunal, por seu turno, não lhe deu razão, invocando que qualquer questão de jurisdição teria que ter sido levantada diante do painel e que não havia desrazoabilidade ou denegação flagrante de justiça que pudesse sustentar a contrariedade com a política pública (em determinados casos, o Tribunal Federal pode revogar a decisão com base nesse argumento).

Em relação ao estabelecido quanto a resolução de conflitos nos capítulos XIV - Serviços Financeiros - e XIX - *AntiDumping* e Direito de Compensação – pouco há a referir.

Relativamente ao primeiro, apenas se determina que a lista de possíveis membros do painel deve ser composta por peritos em área financeira. De resto, aplica-se o capítulo

XX (regime geral). Quanto ao segundo, existe uma opção de estabelecer um painel de recurso binacional no lugar de recurso judicial nacional no caso de decisões nacionais relativas a esta matéria.

ASEAN

DA ZONA DE COMÉRCIO LIVRE DA ASSOCIAÇÃO DE NAÇÕES DO SUDESTE ASIÁTICO

A ASEAN (*Assotiation of Southeast Asian Nations*) é um caso interessante no que respeita a zonas de comércio livre, cujo escopo da sua criação e existência transcende a esfera económica. De facto, esta assume-se como uma entidade de cooperação política, económica, cultural e social.

Para percebermos os mecanismos através dos quais se regem as relações comerciais no seu âmbito estabelecidas (para o que nos interessa, o sistema de resolução de conflitos no seu âmbito criado), é necessário ter presentes as relações sensíveis entre os seus membros, pautadas por conflitos antigos e recentes, bem como a subsistência de ressentimentos relativos à ingerência de potências ocidentais em assuntos locais, vestígios da realidade colonial de outrora. A Associação foi oficialmente criada com a Declaração de Banguecoque de 8 de Agosto de 1967 (a Declaração ASEAN). De 5 membros originários (Indonésia, Malásia, Filipinas, Singapura e Tailândia), ao longo do tempo foi definitivamente alargada a um total de 10 membros (para além dos primeiros 5, em primeiro lugar o Bornéu, seguido pelo Vietname, o Laos, o Myanmar, e o Camboja). A adesão dos últimos quatro membros trouxe novos desafios à Associação, já que estes tinham atravessado (e atravessavam ainda) períodos conturbados da sua vida sociopolítica. O Vietname tinha mesmo invadido o Camboja e estabelecido um novo Governo neste país, pondo fim ao regime dos Khmers Rouges, impasse que só foi resolvido em 1991, com a retirada das tropas vietnamitas e a realização de eleições livres. O processo de adesão só foi concluído em 1999, depois de um golpe de Estado por parte do Vice Primeiro-Ministro Hun Sen, Primeiro-Ministro desde então. Temos portanto, uma certa fracção no seio da ASEAN, entre os primeiros 5 Membros e os últimos 4, sendo aqueles mais desenvolvidos e profundamente integrados que os últimos.

Tendo este contexto como pano de fundo, a Associação desenvolveu-se no sentido de acolher, sobretudo, três aspetos nucleares na abordagem de questões externas como internas: em primeiro lugar, uma clara preocupação com a reputação dos seus membros e que esta não seja publicamente posta em causa; em segundo, a preferência de consenso sobre confronto; em terceiro, o respeito pela soberania dos Estados, e a correspondente exigência de consentimento interno para interferências por parte de outros Estados em assuntos internos. A Associação, suas comunidades e políticas,

cresceu, assim, na base daquilo a que se correntemente se denomina por "ASEAN WAY" – um abordagem de trabalho informal e pessoal na processo de tomadas de decisão; a preferência de consensos na resolução de problemas e litígios; a adoção de políticas que satisfaçam o menor denominador comum[4].

Assim, o processo de criação de um quadro legal que pudesse efetivamente dirimir conflitos no âmbito económico revelou-se lento e progressivo. Atentemos agora ao regime de resolução de conflitos criado no âmbito da Comunidade Económica da ASEAN, um dos pilares que a constitui.

Desde 1992, como estabelecia o artigo 9º do *Framework Agreement on Enhancing ASEAN Economic Cooperation*, que se previa o estabelecimento de um sistema de resolução de conflitos. Este foi implementado pelo *Protocol on Dispute Settlement Mechanism*, de 1996 (o Protocolo de Manila), por sua vez substituído e consolidado pelo *Protocol on Enhanced Dispute Settlement Mechanism*, de 1994 (o Protocolo Vientiane). Finalmente, a Carta da ASEAN (diploma que estabelece o quadro legal e institucional da ASEAN), no n.º 3 do artigo 24º, estabelece a aplicação deste último diploma à resolução dos conflitos (entre membros) no âmbito de todos os acordos económicos da ASEAN.

Ao nível institucional, o órgão que dirime o procedimento é o *Senior Economic Officials Meeting (SEOM)*, à semelhança do ORL no sistema OMC.

Em primeiro lugar, na perspetiva de facilitar uma solução pacífica, prevê-se que a todo o momento se possa recorrer a bons ofícios, conciliação e mediação (o Secretário-Geral tem, aliás, a capacidade de se oferecer como árbitro). Existe, igualmente com o fim de obter uma solução pacífica célere, um ASEAN Compliance Monitoring Body que, a pedido de Estados-Membros não envolvidos no conflito, analisa a questão de fundo e concluirá, ou não, pela existência de uma infração. Em caso afirmativo, o Estado-infrator deve corrigir a situação, sob pena de se desenrolar o processo formal de resolução de conflitos.

Quanto a este último, assemelha-se ao sistema previsto quanto à OMC. Começa por um pedido de consultas por parte da Estado lesado ao Estado lesante. Este tem o prazo de 10 dias para responder, findo o qual a questão é reenviada ao SEOM. O mesmo sucede no caso de não se chegar a uma solução mutuamente satisfatória no prazo de 60 dias, ou se, apesar de ter havido resposta, não se encetem quaisquer negociações no prazo de 30

[4] DISPUTE SETTLEMENT THE ASEAN WAY, in: http://cil.nus.edu.sg/wp/wp-content/uploads/2010/01/WalterWoon-Dispute-Settlement-the-ASEAN-Way-2012.pdf

dias. A partir daí, o SEOM estabelecerá um painel (no necessário pressuposto de que a parte lesada o tenha requerido), a não ser que se decida por consenso negativo pelo seu não estabelecimento. Há um prazo de 45 dias (a contar da data do requerimento) para decidir sobre o estabelecimento de painel, que ocorrerá por defeito. Novamente, este elaborará, então, um relatório, depois de objectivamente considerar os factos e normas relevantes para a boa decisão da causa. Esse relatório (e respetivas recomendações), deve ser remetido ao SEOM no prazo de 60 dias, aplicando-se, uma vez mais, a regra do consenso negativo na sua adoção, que deverá ocorrer nos 30 dias subsequentes à receção. Aqui, pode também haver recurso das partes. Nesse caso, a questão é analisada por um órgão de recurso cuja composição será determinada em reunião dos ministros da economia dos Estados-Membros da ASEAN. Até à data, tal ainda não foi concretizado. Em todo o caso, o relatório do órgão de recurso será adotado pelo SEOM, a não ser que haja consenso em sentido contrário. Quanto às partes em conflito, terão que aceitar incondicionalmente o relatório por aquele adotado (provenha ou não de recurso) e cumprir com as suas recomendações no prazo de 60 dias. Inicia-se, então, uma fase de implementação da solução encontrada. Naturalmente, cabe ao SEOM a fiscalização desse cumprimento cuja violação importa sanções. Em primeiro lugar, caso se verifique um incumprimento, poderá haver lugar a uma obrigação de compensação financeira à parte lesada. Esta deverá ser negociada pelas partes. No caso de não se chegar a acordo dentro do prazo de 20 dias após a data limite para o cumprimento das recomendações, a parte lesada poderá requerer autorização ao SEOM para suspender concessões em relação à parte lesante. Mais uma vez, este terá que autorizar essa suspensão, a não ser que haja consenso em sentido contrário. Note-se que qualquer medida de compensação ou suspensão de concessões será sempre temporária. Se, findo todo este procedimento, a parte lesante continuar a incumprir com as suas obrigações, a questão pode ser discutida numa cimeira da ASEAN para que sobre ela se tome uma decisão, o que está expressamente previsto no artigo 27º, n.º 2, da Carta da ASEAN, relativamente ao insucesso de qualquer mecanismo de resolução de conflitos existente sob a sua égide. Como foi já referido, trata-se de um sistema muito parecido com aquele que existe no âmbito da OMC (e também da NAFTA, embora para esta seja, talvez, mais complexo). É, no entanto, prudente que assim seja, atendendo às relações difíceis e delicadas entre os membros da Associação.

Este mecanismo é vital para o bom funcionamento da Zona de Comércio Livre da ASEAN, enquanto Comunidade Económica. Na verdade, as suas aspirações vão ainda

mais longe, ambicionando-se a afirmação desta entidade como uma verdadeira União Aduaneira. Quanto a esta, embora tenham já sido feitas declarações no sentido da sua efetivação, não se pode afirmar que já exista, faltando ainda uma completa harmonização das fronteiras alfandegárias exteriores e a livre circulação de mercadorias, serviços, pessoas e capitais. Trata-se de um caminho longo com sucessivos avanços e recuos. E quanto ao sistema de resolução de conflitos descrito, é importante referir que nunca foi utilizado. Em seu lugar, recorreu-se ao sistema criado no âmbito da OMC. De facto, a ele se recorreu por quatro vezes: Singapura contra Malásia; Singapura contra Filipinas; Filipinas contra Tailândia; Vietnam contra Indonésia. No primeiro caso a queixa foi retirada após ter sido requerido o estabelecimento de um painel, tendo a causa de pedir sido resolvida (tratava-se de uma proibição de importação de polietileno e polipropileno, termoplásticos usados na indústria). No segundo, a questão foi amigavelmente resolvida após consultas, tendo sido acordado o pagamento de uma indemnização por parte das Filipinas (relevante foi a excelente relação entre os ministros do comércio e indústria de ambos os países). Já o terceiro caso foi objeto de maior litigância. Tratava-se de um conjunto de medidas fiscais e aduaneiras sobre a importação de tabaco. Após consultas, as Filipinas requereram a constituição de um painel, que deu razão ao seu pleito. A Tailândia recorreu da sua decisão ao Órgão de Recurso, que sustentou a decisão do painel. No final aquela aceitou implementar as suas recomendações de forma a cumprir com as obrigações a que estava adstrita em virtude dos acordos OMC (embora tenha continuado a haver divergência entre os dois países quanto à efectiva implementação daquelas). Por último, corre um litígio entre o Vietnam e a Indonésia, sobre uma medida preventiva da segunda no que respeita à importação de ferro e aço laminado. Parece existir receio por parte dos Estados-Membros em aplicar o mecanismo previsto, e ninguém parece querer ter a iniciativa de o testar, podendo recorrer em alternativa a um outro sistema, que já deu provou a sua eficácia. Relativamente a este ponto, talvez a solução passasse por atribuir exclusividade ao foro especificamente criado pelos membros da ASEAN para a resolução de conflitos no âmbito dos seus acordos económicos.

Como último ponto, vale a pena olhar a um caso muito mediático entre países da ASEAN, que, embora não do foro económico, ilustra de forma muito clara a delicadeza que certas questões assumem para a sensibilidade patriótica e regional dos membros, cuja política interna é frequentemente instável, e como por vezes o valor que mais importa não é a legitimidade jurídica da causa.

O caso de *Preah Vihear*

Tradicionais inimigos desde há séculos, o Camboja e a Tailândia sempre disputaram as respetivas fronteiras. Em 1907, um tratado entre o Reino de Sião (Tailândia) e as forças coloniais francesas que então ocupavam o Camboja demarcou a fronteira entre os dois países. Após uma curta guerra, e depois do fim da Guerra do Pacífico, a Tailândia ocupou alguns territórios no lado de lá daquela fronteira, entre os quais se incluía o templo de *Preah Vihear*. Em 1959, após recuperar a independência, o Camboja intentou uma ação (contra a Tailândia) junto do Tribunal Internacional de Justiça, reivindicando a propriedade do templo. O Tribunal decidiu (1962) a favor do Camboja, condenando a Tailândia à restituição de todos os objectos que tinham sido removidos do Templo. Na verdade, apesar desta decisão, a questão nunca ficou pacificamente resolvida. Em 2008, com a candidatura de Preah Vihear a património mundial da UNESCO reinstalou-se a polémica, e irromperam escaramuças na área circundante ao templo, que se intensificaram em 2011. Nesse ano, foi igualmente pedido ao Conselho de Segurança da ONU que enviasse um grupo de observação, negado em virtude da reduzida dimensão do conflito. O Camboja pediu, ainda, ao TIJ uma interpretação da decisão de 1962, sem que isso tenha tido repercussão alguma na discussão para além da recomendação para que as partes retirassem as tropas do local e se abstivessem de qualquer comportamento suscetível de agravar o conflito. Coube, então, à ASEAN fazer a mediação da querela, num tom sempre informal e com avanços e recuos constantes (muito em função da pessoa que ocupava o cargo de primeiro-ministro do país na presidência da ASEAN). Acordou-se, finalmente, no envio de observadores indonésios, cuja receção foi rejeitada pelos militares tailandeses. Continua, portanto, a ser uma questão actual, difícil de resolver em virtude das consequências que a derrota pode ter para qualquer um dos países, numa matéria tão simbólica da soberania de ambos os Estados. Nenhum deles quer abdicar da sua pretensão, já que isso significa um reconhecimento da razão do outro, e como tal a consequente transparência de fragilidade, favorável ao crescimento de forças nacionalistas. É, precisamente, a fragilidade dos Governos e a instabilidade interna que provoca uma desesperada necessidade de solidez e força nas relações externas que impede um efetivo sistema de Direito. Por essa razão, a abordagem dos membros às questões que entre eles se colocam tende a ser diplomática e na base de cooperação, para que não haja vencedores e derrotados. E, sobretudo, em situações de soberania especialmente delicadas.

DA UNIÃO EUROPEIA

Em primeiro lugar, é necessário referir que esta realidade difere radicalmente daquelas que temos vindo a analisar. De facto, trata-se de uma união aduaneira, onde circulam livremente pessoas, bens, serviços e capitais. A pauta aduaneira exterior homogénea encerra um espaço de integração política, económica e social sem precedentes, e, como tal, o sistema de resolução de conflitos no seu seio criado reveste-se de muito maior complexidade que os restantes. Embora não seja objeto do presente trabalho a análise cuidada desse sistema, ele merece aqui uma breve exposição, dada a sua importância como exemplo paradigmático de mecanismos de eficácia no que toca a fenómenos de integração económica.

Temos, pois, que mais do que em resolução de conflitos, se deve falar aqui em verdadeiro sistema judicial.

Como se sabe, as normas jurídicas de fonte (da união) europeia são aplicáveis pelos tribunais nacionais dos Estados Membros. Dada a quantidade de normas que dela provêm, que compõem a maior parte do tecido normativo nacional, não poderia ser de outra forma. Desta forma, os tribunais nacionais são a primeira linha (ou instância) do sistema judicial da EU. Isto depende, claro está, da sua aplicação direta ou não, em face da distinção entre Direito Originário e Derivado (regulamentos e directivas – estas últimas com efeito direto vertical). De resto, há um princípio de reconhecimento de sentenças estrangeiras (proferidas por tribunais de outros Estados-Membros) – nomeadamente, para o que nos interessa, regem as normas dos regulamentos *Bruxelas I* e *Bruxelas II*. Depois, num outro nível, há o Tribunal de Justiça da União Europeia, que se divide em Tribunal da Função Pública, Tribunal Geral, e Tribunal de Justiça.

Ao primeiro compete conhecer, em primeira instância, dos litígios entre a EU e os seus agentes, relativos a questões de relação laboral e ao regime de segurança social. No entanto, não conhece dos litígios entre as administrações nacionais e os respetivos agentes.

Ao segundo, compete julgar os recursos de anulação interpostos por pessoas singulares ou coletivas contra os atos das instituições, dos órgãos e organismos da EU de que sejam destinatárias, ou que lhes digam direta e individualmente respeito, ou atos regulamentares que lhes digam diretamente respeito e não necessitem de medidas de execução, ou ainda ações intentadas por aquelas pessoas que visem obter

reconhecimento de uma abstenção dessas instituições, órgãos e organismos. Entre outras competências, cabe-lhe igualmente a apreciação de ações e recursos interpostos pelos Estados Membros contra a comissão, contra o Conselho (quanto aos atos adotados no domínio de auxílios de Estado, medidas de *dumping*, e atos no domínio das suas competências de execução), ações que tenham por objeto a reparação de danos causados pelas instituições, órgãos ou organismos da UE e seus agentes; ações e recursos cuja causa de pedir radica em contratos celebrados pela EU, desde que prevejam expressamente a competência do Tribunal Geral; ações e recursos contra o Instituto de Harmonização do Mercado Interno e contra o Instituto Comunitário das Variedades Vegetais, no domínio da propriedade intelectual; recursos das decisões do Tribunal da Função Pública, sempre limitados a questões de Direito; recursos interpostos das decisões da Agência Europeia dos Produtos Químicos.

Das decisões desta instância, caberá sempre recurso para o Tribunal de Justiça

Quanto a este, a competência que mais o ocupa é, por excelência, a do reenvio prejudicial. Dada a exigência de aplicação uniforme do Direito da UE, os juízes dos tribunais nacionais podem (e, caso se trate de instância superior, devem), em caso de dúvida sobre o sentido de normas desta natureza, pedir esclarecimentos ao Tribunal para uma correta interpretação das mesmas. Isto, para uma justa decisão da causa. Igualmente, o reenvio prejudicial pode visar a fiscalização da legalidade de um ato jurídico da União. O Tribunal de Justiça pronuncia-se através de acórdão ou despacho fundamentado, e no primeiro caso a sua decisão quanto à matéria vincula quaisquer órgãos jurisdicionais a que seja submetida questão idêntica. Para além deste mecanismo, detém, ainda, outras competências. Nomeadamente, fiscaliza as obrigações dos Estados-Membros ao abrigo do Direito da EU, através de ações por incumprimento, intentadas pela Comissão ou por Estados-Membros. Isto pode resultar em sanções pecuniárias fixas e compulsórias. Também: recursos de anulação, através dos quais um Estado-Membro ou uma instituição pedem a anulação de um ato de uma instituição. O Tribunal Geral é competente para conhecer de todos os recursos deste tipo em primeira instância (designadamente, daqueles interpostos por particulares), excepto daqueles interpostos por um Estado-Membro contra o Parlamento Europeu e o Conselho (exceptuando em matéria de auxílios de Estado, *dumping* e de competências de execução) e por uma instituição contra outra instituição, para os quais é competente o Tribunal de Justiça; ações por omissão para fiscalizar a legalidade da inação das instituições, partilhada entre o Tribunal de Justiça e o Tribunal Geral segundo os critérios aplicáveis aos

recursos de anulação; recurso de decisão do Tribunal Geral, limitado a questões de Direito, como lhe compete na qualidade de instância superior; por último, reapreciação, a título excecional, das decisões do Tribunal Geral sobre os recursos interpostos das decisões do Tribunal da Função Pública da EU, como previsto no Protocolo relativo ao Estatuto do Tribunal de Justiça da EU[5].

C-420/07 Meletis Apostolides v David Charles Orams & Linda Elizabeth Orams, judgment of 28 April 2009

O presente caso, embora não se inscreva em litígios de matéria comercial, serve para ilustrar brevemente o sistema de reenvio prejudicial. Estava em causa o direito de propriedade sobre um terreno pertencente ao Sr. Apostolides, que fora expulso do Norte do Chipre. Aquando da Adesão deste país à EU, incluiu-se no respetivo Ato um Protocolo (n.º 10) no qual se suspendia a aplicação do acervo comunitário às zonas fora do controlo efetivo deste Estado-Membro. A sua propriedade foi, posteriormente à sua expulsão, adquirida de parte terceira por um casal inglês, para construção de casa de férias. Nessa sequência, o Sr. Apostolides intentou uma ação no tribunal de Nicosia (sul do Chipre) que, sendo-lhe favorável, condenou o casal a deixar a propriedade e pagar uma indemnização ao cipriota. Este intentou, depois, ação de execução no *Court of Appeal* (Inglaterra e País de Gales). Por sua vez, este tribunal formulou uma questão prejudicial ao Tribunal de Justiça sobre a interpretação do Regulamento CE no. 44/2001 (*Bruxelas I*) relativamente ao reconhecimento da decisão do Tribunal cipriota, já que esta tinha por objeto a propriedade de um terreno situado na zona Norte, sobre a qual o Governo do Chipre não tinha controlo. O Tribunal considerou que, limitando-se a suspensão do acervo à zona Norte, aquela não é violada pela decisão cipriota. Os tribunais do Estado-Membro onde a propriedade está situada (República do Chipre) têm jurisdição. O facto de a decisão não poder ser, na prática, aplicada (por questões internas) no Norte não é fundamento de recusa da aplicação de sentença estrangeira. De facto, essa dificuldade de aplicação não justifica a não aplicação por outros Estados-Membros. A questão, agora resolvida, foi então decidida a favor do cipriota, ficando o Tribunal inglês vinculado à resposta dada pelo Tribunal.

[5] http://curia.europa.eu/

DO ACORDO DE PARCERIA TRANSPACÍFICA

Este acordo, que importa a criação de uma verdadeira zonas de comércio livre, é um marco na História da integração económica regional, já que liberaliza grandes mercados potenciados por grandes economias, a uma escala sem precedentes (OMC à parte).

O Acordo de Parceria Transpacífica (TPP – *Trans-Pacific Partnership*) foi assinado a 4 de Fevereiro de 2016, por 12 países banhados pelo Pacífico - Bornéu, Chile, Nova Zelândia, Singapura, Austrália, Canadá, Japão, Malásia, México, Peru, Estados Unidos da América, e Vietnam - não tendo ainda (à data de escrita) entrado em vigor. Depois de vários anos em negociação, o resultado é, na verdade, o aprofundamento e alargamento de um acordo já existente entre os primeiros 4 países, assinado em 2005. Visa o crescimento económico, a criação de emprego, o incentivo à inovação, à produtividade e à competitividade, para a melhoria de condições de vida e da redução da pobreza. Para isto importa a promoção de transparência, boa governança (governance) e um quadro normativo laboral e ambiental mais densificado. No fundo, o grande objetivo é a abolição de barreiras ao comércio entre os membros e a instituição de uma zona livre de comércio.

Quanto ao sistema de resolução de conflitos, não se pode dizer que o quadro seja especialmente diferente daqueles que observámos acima. Há, novamente, um mecanismo de caráter geral, e outro especial, no que toca ao investimento.

O capítulo XXVIII do Acordo rege o sistema de resolução de conflitos, aplicável à generalidade das matérias abrangidas.

A regra é, no caso de as partes envolvidas serem ambas signatárias de outro acordo da mesma natureza (por exemplo, da OMC), a da liberdade de escolha de fórum. O que é interessante neste acordo é a forma bilateral como o procedimento se desenrola. De facto, não há uma entidade correspondente ao ORL que encontramos no sistema OMC. Aqui, mesmo os requerimentos de constituição do painel são dirigidos à contraparte, e a escolha dos seus membros é feita por ambas. Neste sentido, deve sempre ter-se em conta que o impulso criador na base da construção de qualquer sistema de resolução de conflitos não é o rigor legal ou a prossecução da justiça material, mas sim a obtenção de uma solução que termine esse conflito, de forma a viabilizar as relações económicas reguladas. De preferência, uma solução mutuamente satisfatória.

Havendo uma querela entre duas (ou mais) partes, sobre uma matéria abrangida pelo Acordo, o procedimento inicia-se com um requerimento escrito do lesado, dirigido ao lesante, para que se iniciem consultas. Este deve responder no prazo de 7 dias a contar da data de receção, iniciando-se as consultas num prazo de 30 dias a contar dessa receção. As partes poderão sempre acordar noutros prazos, se assim lhes aprouver. Poderá, ainda, haver participação, nas consultas, de terceiros com interesse substancial na questão. Aqui, rege um princípio de cooperação. De facto, o objetivo é a resolução do conflito, de preferência através de uma solução mutuamente satisfatória. Devem, por isso, ser prestadas todas as informações necessárias e requeridas, bem como postos à disposição os meios (comissões de peritos, agências governamentais) que se revelem oportunos ao adequado esclarecimento da questão. Impera, nesta fase, um dever de sigilo (confidencialidade). Prevê-se, mais uma vez, a possibilidade de recorrer a mediação, conciliação ou bons ofícios. Isto pode ser requerido a qualquer altura, suspendido ou terminado a todo o tempo, e pode mesmo correr paralelamente depois de estabelecido um painel. Quanto a este último, é requerido através de notificação escrita à contraparte (de facto, aqui o significado de "requerer" aproxima-se ao de "notificar"). Este requerimento deve ocorrer no prazo de 60 dias (ou 30, no caso de bens perecíveis) a contar da receção do requerimento para consultas, ou de outro prazo em que as partes acordem. O painel é estabelecido contra receção da notificação. Nesta devem constar a indicação da medida em questão e da base legal à qual aquela é contrária e, se for caso disso, a indicação da medida que, embora legal, reduza ou inviabilize (quanto à parte lesada) vantagens devidas por força do Acordo. O painel é composto por 3 membros, dois dos quais escolhidos por cada uma das partes, e o terceiro (presidente) co-selecionado. Na ausência de escolha, há regras supletivas previstas para determinar os membros (no limite, a outra parte escolhe em vez da primeira, ou a escolha cabe a um terceiro Estado). Regra geral, aos painéis caberá a análise objetiva da questão (em face das normas relevantes, para dela se pronunciar e, querendo, emitir recomendações. As decisões (sob a forma de relatório) são, se possível, tomadas por consenso. Durante o procedimento, devem ser ouvidas as partes e tomadas as diligências necessárias para o devido esclarecimento da questão (nomeadamente, ter em conta opiniões de peritos). Há um relatório inicial, sobre o qual as partes se podem pronunciar e, depois, um final. No caso de se verificar algum incumprimento, determinar-se-á um período razoável (salvo acordo das partes) dentro do qual a parte lesante deve alterar a medida desconforme. Não alterando o seu comportamento no momento devido, poderá haver lugar a

compensação (que tem, uma vez mais, de ser acordada pelas partes) e, no caso de quanto a esta não se acordar, ou de a parte mais tarde se recusar ao seu pagamento, ou se simplesmente não pagar, poderá, aqui também, haver suspensão de concessões (embora neste caso se fale em "benefícios"). A medida de suspensão de concessões não carece de autorização, bastando-se a mera notificação ao lesante da intenção de a ela se proceder. Este último pode, se considerar excessiva essa suspensão, ou que eliminou a medida desconforme revelada danosa para o lesado, requerer nova reunião do (mesmo) painel, que decidirá sobre esta questão.
Repare-se que neste sistema não há possibilidade de recurso.

Quanto ao capítulo que trata do Investimento, o capítulo IX, está previsto (à semelhança do acordo NAFTA) um sistema especial de resolução de conflitos, através do qual os investidores (empresas) podem recorrer a arbitragem vinculativa para demandar um Estado-Membro do TPP, desde que decorridos 6 meses de uma necessária fase de consultas e negociação com o Estado relevante. Este mecanismo é válido tanto para violações de obrigações previstas no âmbito daquele capítulo, como também para questões de autorizações de investimento (por parte dos Estados-parte a um investidor de outro Estado-Parte) e de acordos de investimento (mediante os quais um investidor estabelece ou adquire um investimento). Há, tal como no sistema previsto sob a égide do NAFTA, a possibilidade de recorrer a arbitragem institucional ou *ad hoc*, aplicando as regras da Convenção Internacional para a Resolução de Diferendos Relativos a Investimentos entre Estados e Nacionais de Outros Estados, das Regras sobre Facilidades Adicionais (aplicáveis no caso de o Estado e o investidor não serem ambos parte daquela convenção), ou da Lei Modelo da UNCITRAL, ou de qualquer outro sistema de regras de arbitragem acordado pelas partes. Independentemente do fórum escolhido, há vários aspetos comuns dignos de nota. Em primeiro lugar, prevê-se expressamente que a lei material aplicada pelos árbitros serão as regras do TPP, e demais normas aplicáveis de direito internacional. Serão também aplicadas as disposições relevantes de autorizações ou acordos de investimento específicos acordadas pelas partes. Em segundo lugar, o capítulo IX aborda a questão da litispendência. A arbitragem a que no seu âmbito se recorre deve ter exclusividade para decidir sobre a questão em apreço, pelo que se simultaneamente correr um outro processo sobre a mesma questão, ao abrigo de outros acordos de que os litigantes sejam parte, esse processo deve ser imediatamente suspenso. A partir do momento em que

recorrem à arbitragem, as partes renunciam por escrito ao direito de iniciar (ou continuar) novo processo perante qualquer outro tribunal (ou procedimento de resolução de conflitos) para julgar a mesma questão. Em terceiro lugar, note-se que está previsto um prazo de prescrição de 3 anos (e seis meses), contados da data em que o investidor tenha adquirido (ou devesse ter adquirido) conhecimento da alegada violação, ou dos danos que o comportamento da contraparte tenha provocado na sua esfera, para exercer o direito de iniciar o procedimento arbitral. Existe uma Comissão com a competência de emitir interpretações vinculativas das disposições do Acordo, com uma competência análoga à da Comissão de Livre Comércio acima indicada quanto ao NAFTA, cujos membros serão ministros e altos funcionários governamentais dos Estados-Membros. O Acordo prevê, ainda, um Código de Conduta para os árbitros, importante como garantia de independência e imparcialidade.

Há, de resto, diversas inovações no que respeita a normas de ISDS. Nomeadamente, prevê-se um procedimento expedito quanto a questões de competência, tendo estas prioridade sobre a questão substancial, caso sejam invocadas a título de exceção pela contraparte (nos primeiros 45 dias após a constituição do tribunal arbitral). Aquelas devem ser decididas num prazo de 150 dias a contar da sua invocação (e pedido de decisão prévia). Há uma regra de publicidade do procedimento (que existe também no mecanismo do capítulo XXVIII), sendo as audiências públicas e estando os documentos utilizados disponíveis para consulta. Interessante é também a proposta de decisão que o tribunal transmite às partes, para que estas sobre ela se pronunciem num prazo de 60 dias anteriores ao início do prazo para tomada da decisão final (45 dias), que tomará em conta as suas observações. Finalmente, pode também haver intervenção de terceiros com interesse atendível no processo, sempre precedida de consulta (ainda que não acordo) do Tribunal com as partes nesse sentido[6].

[6] http://www.cfr.org/trade/trans-pacific-partnership/p37113

DO ACORDO DE PARCERIA TRANSATLÂNTICA DE COMÉRCIO E INVESTIMENTO

O TTIP, a par do TPP, é um dos maiores acordos transnacionais de comércio alguma vez criados, com a diferença, relativamente àquele, de que ainda está em negociações pelas duas economias que o constituem: a dos Estados Unidos da América e a da União Europeia.

Dada a natureza provisória dos textos legislativos propostos, não é possível expor o sistema definitivo de resolução conflitos que virá a ser consagrado (se das negociações se chegar efetivamente a acordo), mas podemos olhar para o quadro geral visado, focando-nos num aspeto que surpreende pelo seu caráter inovador.

Pois bem, relativamente ao sistema geral de resolução de conflitos, baseia-se, tal como ou restantes acordos analisados, no modelo da OMC. Assim, há apenas algumas diferenças face a essa base em que assentam. Em primeiro lugar, a existência de listas predeterminadas de indivíduos suscetíveis de escolha para um painel (embora as partes possam escolher os árbitros que entenderem). Depois, a publicidade do sistema – audiências públicas, participação de outras entidades interessadas (como é o caso das organizações não-governamentais); publicação das várias posições assumidas perante o painel. Ainda, e de forma semelhante ao procedimento a que assistimos no TPP, não há, aqui, nenhum órgão de recurso, a o mesmo painel poderá ser chamado a nova intervenção perante desacordo quanto a compensações, efetiva aplicação de recomendações e suspensões de concessões (ou benefícios). Diferentemente, já se faz referência a um órgão institucional (ainda por definir) ao qual devem ser notificadas todas as decisões do painel e das partes e a que estão atribuídas algumas competências, tais como a publicação de decisões do painel, o estabelecimento de listas de putativos membros do painel, a modificação do capítulo sobre resolução de conflitos e respetivos anexos. Repare-se que não existe aqui qualquer relatório do painel, a ser aprovado por um órgão decisório. As decisões daquele são, portanto, incondicionalmente aceites pelas partes (estando isto estabelecido no artigo 21º, n.º 1). Em todo o caso, o sistema é muito semelhante àquele criado para o TPP. As negociações dos dois acordos foram sendo desenvolvidas a par, o que é não é anómalo, atendendo à idêntica natureza de ambos e à participação dos EUA nos dois procedimentos.

Importa, agora, olhar a uma proposta inovadora relativa à resolução de conflitos de investimento (entre investidor e Estado-Membro). Trata-se da criação de um Sistema de Tribunais de Investimento (*Investment Court System*), com um tribunal de primeira

instância e um tribunal de recurso para dirimir os conflitos daquela natureza[7]. É, naturalmente, uma nova alternativa ao sistema de ISDS até aqui utilizado, e apresenta inúmeras vantagens, à luz dos dois bens jurídicos que, nesta sede, fundamentalmente importam: direito de regular dos Estados; proteção dos investidores (como se de nacionais se tratasse). Mais uma vez se aplicam as regras de arbitragem da Convenção Internacional para a Resolução de Diferendos Relativos a Investimentos entre Estados e Nacionais de Outros Estados, das Regras sobre Facilidades Adicionais, da Lei Modelo da UNCITRAL, ou de quaisquer outras acordadas pelas partes, mas sempre de forma subordinada àquelas previstas neste sistema.

Semelhante estrutura permite a aplicação das regras por juízes (com mandatos de 6 anos, renováveis por uma vez), através de um processo transparente. Os litígios são julgados por coletivos compostos por 3 juízes (dois deles nacionais dos EUA e de um Estado-Membro da EU). Trata-se de um fórum neutro e independente quanto aos interesses em conflito. A delimitação de prazos está pensada de forma a que, no máximo, o processo não ultrapasse o limite de dois anos (sendo que na primeira instância a decisão deve ser tomada num prazo máximo de 18 meses, e na segunda num prazo de 6 meses). Os ordenados dos juízes do tribunal de recurso seriam integralmente pagos pela UE e pelos EUA, e haveria um limite diário para o pagamento dos restantes juízes, o que se revela menos oneroso para as partes (quando comparado com a prática em sistemas de ISDS, onde o pagamento de árbitros pode ser negociado). Está, também, especificamente previsto o direito de regular (legislativo e regulamentar) dos Estados. De facto, estabelece-se que as normas de resolução de conflitos "*shall not affect the right of the Parties to regulate within their territories* ***through measures necessary to achieve legitimate policy objectives,*** *such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity"*. Isto é também acautelado no TPP, e surge como resposta a críticas que sempre acompanharam os sistemas de ISDS. Há, depois, um especial cuidado no que respeita a Pequenas e Médias Empresas, reconhecendo-se a maior vulnerabilidade que estas apresentam. Nomeadamente, procura-se garantir o seu acesso a mecanismos alternativos de resolução com a criação de um sistema rápido e eficaz de mediação, há a possibilidade de o caso ser decidido por apenas um juíz (em

[7] http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm

função do valor da causa), prevê-se uma limitação dos custos a cargo destas empresas no caso de perderem a causa.

Trata-se, portanto, de um sistema que pugna por uma maior certeza na aplicação do Direito, transparência e judicialização do sistema, afirmando-se como um novo instrumento de resolução de conflitos de investimento.

Esta é a base que está a ser discutida, tendo a última ronda de negociações decorrido entre 22 e 26 de Fevereiro do presente ano. Há grande convergência relativamente ao sistema geral de resolução de conflitos, e quanto ao ponto da resolução das questões de investimento também tem havido bom progresso, tendo sobretudo sido discutidas definições e regras substantivas.

CONCLUSÕES

NATUREZA DIPLOMÁTICA V. NATUREZA JURÍDICA DA RESOLUÇÃO DE CONFLITOS

Do exposto, a primeira conclusão que retiro prende-se com a própria natureza das relações em análise. Na abordagem à resolução de conflitos económicos deve sempre ter-se presente que, primordialmente, se trata de disputas entre Estados soberanos que com algum pesar abdicam do seu poder para dirimir esses conflitos.

Vimos que, no despontar da base daquilo que viria a ser o sistema mais generalizado (o da OMC), a atividade dos painéis estava o mais das vezes subjugada às relações diplomáticas entre os membros do GATT. De facto, as regras edificadas não mais eram que meras linhas orientadoras cuja efetividade pouco devia ao sistema de resolução de conflitos efetivamente consagrado. Desde então, muitos progressos foram feitos, e assistimos, hoje, à consagração de sistemas de Direito que são, de facto, eficazes. Este é um problema transversal a todo o Direito Internacional, que tem sido progressivamente ultrapassado, sobretudo no ramo das relações económicas, onde parece mais fácil impor sanções, até porque aos Estados interessa manter a lógica de *win-win* que do seu regular funcionamento advém.

DESENVOLVIMENTO E PROGRESSIVO RIGOR TÉCNICO DOS MECANISMOS

Assistimos, desde os meados do século passado (mais concretamente, em 1947, onde a nossa análise começa), a um constante aperfeiçoamento dos instrumentos de resolução de conflitos. De facto, as soluções disponíveis para as partes diversificaram-se e aprofundaram-se. De um sistema meramente assente em consultas e painéis, novas soluções foram criadas. Primeiro, a consagração da mediação, da conciliação e dos bons ofícios. Depois, o nascimento de formas específicas de resolução de conflitos para determinadas matérias e em função de determinados atores. Institucionalizaram-se, então, procedimentos de Investor State Dispute Settlement, que deram um lugar primacial à arbitragem no campo da resolução de conflitos entre investidor e Estado. Isto serviu como garantia da não discriminação dos investidores, através da viabilização de fóruns neutros e transparentes para dirimir os conflitos, e permitiu que Estados sejam diretamente demandados por privados no que respeita aos negócios que estes desenvolvem no território dos primeiros. Podemos, brevemente, assistir ao dealbar de uma nova era neste campo, verificando-se a criação de um Tribunal permanente para julgar destes litígios no seio do TTIP.

EFICÁCIA DEPENDENTE DA REALIDADE SÓCIO-POLÍTICA INTERNA

Independentemente da existência de sistemas jurídicos funcionais com aptidão para competentemente resolver diferendos, eles formam um corpo normativo cuja efetividade depende do bom funcionamento de instituições internas. De facto, é necessário que os Estados que assinam estes acordos sejam Estados de Direito Democráticos. Assistimos, com alguma frequência, a frustradas tentativas de integração económica regional, levadas a cabo por Estados governados por regimes autoritários ou com altos índices de corrupção. Embora não tenhamos olhado a este acordo, é o que se verifica em relação ao processo de integração da Mercosul. Igualmente, isto também se passou (e passa) na construção da ASEAN, embora neste caso confluam outras razões, nomeadamente a da instabilidade provocada por conflitos recentes e antigos. É necessária estabilidade política regional para que os sistemas edificados possam ser eficazes. Na verdade, se na região em causa não rege a Democracia, um Estado que por ela se ordene pode até hesitar em despoletar os mecanismos de resolução de conflitos, já que perder a causa significa uma demonstração de fraqueza suscetível de provocar movimentos extremistas internos.

TELEOLOGIA DOS SISTEMAS CRIADOS

Mais do que julgar, a prioridade é resolver disputas.

De facto, e como referido a cima, a todos estes sistemas de resolução de conflitos está subjacente de encontrar uma solução rápida para o caso, de forma a que as relações económicas entre os Estados possam retomar o seu curso normal. A preocupação com a justiça material adquire uma relevância secundária face a esse objetivo, até porque, tratando-se de ordens jurídicas distintas, a normatização parte sempre de um mínimo denominador comum entre elas, mínimo esse progressivamente alargado. Assim se explica a preponderância dada a soluções alternativas consagradas fora do sistema dos painéis. Repetidamente de ressalva a exceção de entendimento das partes, seja no sentido de uma solução definitiva do conflito, seja (no caso de conflitos entre Investidores e Estados) na própria determinação dos termos em que a resolução de conflitos se processa. O que, sobretudo, se almeja, é a obtenção de uma "solução mutuamente satisfatória", e, se estivermos perante Estados cujas relações (económicas e políticas) são equilibradas, essa solução poderá manifestar-se como a mais justa, dado que são bilateralmente acordadas. O sistema proposto e a garantia de procedimentos decisórios que podem ser unilateralmente iniciados servem como proteção aos Estados

mais fracos. Importa, aqui sim, que os seus trâmites se revelem justos e transparentes. Assim, ocorre-me apenas uma palavra de ordem sobre a qual tudo se baseia: eficácia.

QUAL O MELHOR SISTEMA?

Como decorre de tudo o que foi exposto, não há melhor sistema.

Isto porque, no fundo (UE à parte), são todos o mesmo sistema, criado no dealbar das Zonas de Comércio Livre. Aquilo a que assistimos, desde há 60 anos para cá, é à progressiva complexificação desse sistema, adaptando-se à realidade das relações económicas entre os Estados e procurando a maior efetividade possível.

Podem depois, comparar-se as abordagens relativas aos conflitos entre Investidores e Estados, mas, fora a proposta da criação de um tribunal no âmbito do TTIP, também se trata substancialmente da mesma solução. O sistema funciona, e faz por isso sentido que se mantenha.

QUADRO COMPARATIVO

Acordos	Sistema de Painéis	Normas de ISDS	Estado de Desenvolvimento Normativo	Eficácia
GATT	Sim	Não	2	1
OMC	Sim	Não	3	4
NAFTA	Sim	Sim	4	4
ASEAN	Sim	Sim	3	2
UE	Não	Não[1]	5	5
TPP	Sim	Sim	4	NA[3]
TTIP	Sim	Não[2]	4	NA[4]

Escala: 0 - 5

N.A. – Não Aplicável

1 – Naturalmente, partes em conflito no seio da EU poderão sempre optar por recorrer a arbitragem.

2 – Há a proposta de criar um sistema judicial para a resolução de conflitos entre investidores e Estado, no entanto a solução final poderá ser outra.

3 – Ainda não houve nenhum processo de resolução de conflitos no âmbito do TPP

4 – O TTIP ainda está em fase de negociações.

GATT

Article XXII
Consultation
1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII
Nullification or Impairment
1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation,
the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

OMC

ANNEX 2

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Members hereby agree as follows:

Article 1

Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 2

Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.8

Article 3

General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

[8] The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.9

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

Article 4

Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.10

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request

[9] This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

[10] Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements11, such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of

[11] The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 5

Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

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

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Article 6

Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.12

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the

[12] If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

Article 7

Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

Article 8

Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Citizens of Members whose governments13 are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications

[13] In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Article 9

Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

Article 10

Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

Article 11

Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should

make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Article 12

Panel Procedures

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties

to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

Article 13

Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel

may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

Article 14

Confidentiality

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

Article 15

Interim Review Stage

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

Article 16

Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting14 unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

Article 17

Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

[14] If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[15] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

[15] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

Article 18

Communications with the Panel or Appellate Body

1. There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Article 19

Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[16] bring the measure into conformity with that agreement.[17] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 20

Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

Article 21

[16] The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[17] With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days[18] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[19] In such arbitration, a guideline for the arbitrator[20] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB

[18] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[19] If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

[20] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) 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 the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;21

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

[21] The list in document MTN.GNS/W/120 identifies eleven sectors.

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator22 appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator23 acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

---

[22] The expression"arbitrator" shall be interpreted as referring either to an individual or a group.

[23] The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.24

Article 23

Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 24

Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country

[24] Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 25

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

Article 26

1. Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it

conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

Article 27

Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

NAFTA
Section A - Institutions

Article 2001: The Free Trade Commission
1. The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees.
2. The Commission shall:
(a) supervise the implementation of this Agreement;
(b) oversee its further elaboration;
(c) resolve disputes that may arise regarding its interpretation or application;
(d) supervise the work of all committees and working groups established under this Agreement, referred to in Annex 2001.2; and
(e) consider any other matter that may affect the operation of this Agreement.
3. The Commission may:
(a) establish, and delegate responsibilities to, ad hoc or standing committees, working groups or expert groups;
(b) seek the advice of non-governmental persons or groups; and
(c) take such other action in the exercise of its functions as the Parties may agree.
4. The Commission shall establish its rules and procedures. All decisions of the Commission shall be taken by consensus, except as the Commission may otherwise agree.
5. The Commission shall convene at least once a year in regular session. Regular sessions of the Commission shall be chaired successively by each Party.
Article 2002: The Secretariat

1. The Commission shall establish and oversee a Secretariat comprising national Sections.
2. Each Party shall:
(a) establish a permanent office of its Section;
(b) be responsible for
(i) the operation and costs of its Section, and
(ii) the remuneration and payment of expenses of panelists and members of committees and scientific review boards established under this Agreement, as set out in Annex 2002.2;
(c) designate an individual to serve as Secretary for its Section, who shall be responsible for its administration and management; and
(d) notify the Commission of the location of its Section's office.
3. The Secretariat shall:
(a) provide assistance to the Commission;
(b) provide administrative assistance to
(i) panels and committees established under Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters), in accordance with the procedures established pursuant to Article 1908, and
(ii) panels established under this Chapter, in accordance with procedures established pursuant to Article 2012; and
(c) as the Commission may direct
(i) support the work of other committees and groups established under this Agreement, and
(ii) otherwise facilitate the operation of this Agreement.

Section B - Dispute Settlement

Article 2003: 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 2004: Recourse to Dispute Settlement Procedures

Except for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement, the dispute settlement provisions of 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 an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

Article 2005: GATT Dispute Settlement

1. Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade , any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.
2. Before a Party initiates a dispute settlement proceeding in the GATT against another Party on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall notify any third Party of its intention. If a third Party wishes to have recourse to dispute settlement procedures under this Agreement regarding the matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreement on a single forum. If those Parties cannot agree, the dispute normally shall be settled under this Agreement.

3. In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.
4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):
(a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and
(b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,
where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.
5. The responding Party shall deliver a copy of a request made pursuant to paragraph 3 or 4 to the other Parties and to its Section of the Secretariat. Where the complaining Party has initiated dispute settlement proceedings regarding any matter subject to paragraph 3 or 4, the responding Party shall deliver its request no later than 15 days thereafter. On receipt of such request, the complaining Party shall promptly withdraw from participation in those proceedings and may initiate dispute settlement procedures under Article 2007.
6. Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.
7. For purposes of this Article, dispute settlement proceedings under the GATT are deemed to be initiated by a Party's request for a panel, such as under Article XXIII:2 of the General Agreement on Tariffs and Trade 1947 , or for a committee investigation, such as under Article 20.1 of the Customs Valuation Code.
Article 2006: Consultations
1. Any Party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.
2. The requesting Party shall deliver the request to the other Parties and to its Section of the Secretariat.
3. Unless the Commission otherwise provides in its rules and procedures established under Article 2001(4), a third Party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on delivery of written notice to the other Parties and to its Section of the Secretariat.
4. Consultations on matters regarding perishable agricultural goods shall commence within 15 days of the date of delivery of the request.
5. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the consulting Parties shall:
(a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation of this Agreement;
(b) treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information; and
(c) seek to avoid any resolution that adversely affects the interests under this Agreement of any other Party.

Article 2007: Commission - Good Offices, Conciliation and Mediation
1. If the consulting Parties fail to resolve a matter pursuant to Article 2006 within:
(a) 30 days of delivery of a request for consultations,
(b) 45 days of delivery of such request if any other Party has subsequently requested or has participated in consultations regarding the same matter,
(c) 15 days of delivery of a request for consultations in matters regarding perishable agricultural goods, or
(d) such other period as they may agree,
any such Party may request in writing a meeting of the Commission.
2. A Party may also request in writing a meeting of the Commission where:
(a) it has initiated dispute settlement proceedings under the GATT regarding any matter subject to Article 2005(3) or (4), and has received a request pursuant to Article 2005(5) for recourse to dispute settlement procedures under this Chapter; or
(b) consultations have been held pursuant to Article 513 (Working Group on Rules of Origin), Article 723 (Sanitary and Phytosanitary Measures Technical Consultations) and Article 914 (Standards-Related Measures Technical Consultations).
3. The requesting Party shall state in the request the measure or other matter complained of and indicate the provisions of this Agreement that it considers relevant, and shall deliver the request to the other Parties and to its Section of the Secretariat.
4. Unless it decides otherwise, the Commission shall convene within 10 days of delivery of the request and shall endeavor to resolve the dispute promptly.
5. The Commission 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 consulting Parties to reach a mutually satisfactory resolution of the dispute.
6. Unless it decides otherwise, the Commission shall consolidate two or more proceedings before it pursuant to this Article regarding the same measure. The Commission may consolidate two or more proceedings regarding other matters before it pursuant to this Article that it determines are appropriate to be considered jointly.
Article 2008: Request for an Arbitral Panel
1. If the Commission has convened pursuant to Article 2007(4), and the matter has not been resolved within:
(a) 30 days thereafter,
(b) 30 days after the Commission has convened in respect of the matter most recently referred to it, where proceedings have been consolidated pursuant to Article 2007(6), or
(c) such other period as the consulting Parties may agree,
any consulting Party may request in writing the establishment of an arbitral panel. The requesting Party shall deliver the request to the other Parties and to its Section of the Secretariat.
2. On delivery of the request, the Commission shall establish an arbitral panel.
3. A third Party that considers it has a substantial interest in the matter shall be entitled to join as a complaining Party on delivery of written notice of its intention to participate to the disputing Parties and its Section of the Secretariat. The notice shall be delivered at the earliest possible time, and in any event no later than seven days after the date of delivery of a request by a Party for the establishment of a panel.

4. If a third Party does not join as a complaining Party in accordance with paragraph 3, it normally shall refrain thereafter from initiating or continuing:
(a) a dispute settlement procedure under this Agreement, or
(b) a dispute settlement proceeding in the GATT on grounds that are substantially equivalent to those available to that Party under this Agreement,
regarding the same matter in the absence of a significant change in economic or commercial circumstances.
5. Unless otherwise agreed by the disputing Parties, the panel shall be established and perform its functions in a manner consistent with the provisions of this Chapter.
Article 2009: Roster
1. The Parties shall establish by January 1, 1994 and maintain a roster of up to 30 individuals who are willing and able to serve as panelists. The roster members shall be appointed by consensus for terms of three years, and may be reappointed.
2. Roster members 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, and shall be chosen strictly on the basis of objectivity, reliability and sound judgment;
(b) be independent of, and not be affiliated with or take instructions from, any Party; and
(c) comply with a code of conduct to be established by the Commission.
Article 2010: Qualifications of Panelists
1. All panelists shall meet the qualifications set out in Article 2009(2).
2. Individuals may not serve as panelists for a dispute in which they have participated pursuant to Article 2007(5).
Article 2011: Panel Selection
1. Where there are two disputing Parties, the following procedures shall apply:
(a) The panel shall comprise five members.
(b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of the panel. If the disputing Parties are unable to agree on the chair within this period, the disputing Party chosen by lot shall select within five days as chair an individual who is not a citizen of that Party.
(c) Within 15 days of selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party.
(d) If a disputing Party fails to select its panelists within such period, such panelists shall be selected by lot from among the roster members who are citizens of the other disputing Party.
2. Where there are more than two disputing Parties, the following procedures shall apply:
(a) The panel shall comprise five members.
(b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of the panel. If the disputing Parties are unable to agree on the chair within this period, the Party or Parties on the side of the dispute chosen by lot shall select within 10 days a chair who is not a citizen of such Party or Parties.
(c) Within 15 days of selection of the chair, the Party complained against shall select two panelists, one of whom is a citizen of a complaining Party, and the other of whom is a citizen of another complaining Party. The complaining Parties shall select two panelists who are citizens of the Party complained against.
(d) If any disputing Party fails to select a panelist within such period, such panelist shall be selected by lot in accordance with the citizenship criteria of subparagraph (c).

3. Panelists shall normally be selected from the roster. Any disputing Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by a disputing Party within 15 days after the individual has been proposed.
4. If a disputing Party believes that a panelist is in violation of the code of conduct, the disputing 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 2012: Rules of Procedure
1. The Commission shall establish by January 1, 1994 Model Rules of Procedure, in accordance with the following principles:
(a) the procedures shall assure a right to at least one hearing before the panel as well as the opportunity to provide initial and rebuttal written submissions; and
(b) the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential.
2. Unless the disputing Parties otherwise agree, the panel shall conduct its proceedings in accordance with the Model Rules of Procedure.
3. Unless the disputing Parties otherwise agree within 20 days from the date of the delivery of the request for the establishment of the panel, the terms of reference shall be: "To examine, in the light of the relevant provisions of the Agreement, the matter referred to the Commission (as set out in the request for a Commission meeting) and to make findings, determinations and recommendations as provided in Article 2016(2)."
4. If a complaining Party wishes to argue that a matter has nullified or impaired benefits, the terms of reference shall so indicate.
5. If a disputing Party wishes the panel to make findings as to the degree of adverse trade effects on any Party of any measure found not to conform with the obligations of the Agreement or to have caused nullification or impairment in the sense of Annex 2004, the terms of reference shall so indicate.
Article 2013: Third Party Participation
A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties and to its Section of the Secretariat, shall be entitled to attend all hearings, to make written and oral submissions to the panel and to receive written submissions of the disputing Parties.
Article 2014: Role of Experts
On request of a disputing 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 disputing Parties so agree and subject to such terms and conditions as such Parties may agree.
Article 2015: Scientific Review Boards
1. On request of a disputing Party or, unless the disputing Parties disapprove, on its own initiative, the panel may request a written report of a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party in a proceeding, subject to such terms and conditions as such Parties may agree.
2. The board shall be selected by the panel from among highly qualified, independent experts in the scientific matters, after consultations with the disputing Parties and the scientific bodies set out in the Model Rules of Procedure established pursuant to Article 2012(1).
3. The participating Parties shall be provided:
(a) advance notice of, and an opportunity to provide comments to the panel on, the proposed factual issues to be referred to the board; and

(b) a copy of the board's report and an opportunity to provide comments on the report to the panel.
4. The panel shall take the board's report and any comments by the Parties on the report into account in the preparation of its report.
Article 2016: Initial Report
1. Unless the disputing Parties otherwise agree, the panel shall base its report on the submissions and arguments of the Parties and on any information before it pursuant to Article 2014 or 2015.
2. Unless the disputing Parties otherwise agree, the panel shall, within 90 days after the last panelist is selected or such other period as the Model Rules of Procedure established pursuant to Article 2012(1) may provide, present to the disputing Parties an initial report containing:
(a) findings of fact, including any findings pursuant to a request under Article 2012(5);
(b) its determination as to whether the measure at issue is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004, or any other determination requested in the terms of reference; and
(c) its recommendations, if any, for resolution of the dispute.
3. Panelists may furnish separate opinions on matters not unanimously agreed.
4. A disputing Party may submit written comments to the panel on its initial report within 14 days of presentation of the report.
5. In such an event, and after considering such written comments, the panel, on its own initiative or on the request of any disputing Party, may:
(a) request the views of any participating Party;
(b) reconsider its report; and
(c) make any further examination that it considers appropriate.
Article 2017: Final Report
1. The panel shall present to the disputing Parties a final report, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report, unless the disputing Parties otherwise agree.
2. No panel may, either in its initial report or its final report, disclose which panelists are associated with majority or minority opinions.
3. The disputing Parties shall transmit to the Commission the final report of the panel, including any report of a scientific review board established under Article 2015, as well as any written views that a disputing Party desires to be appended, on a confidential basis within a reasonable period of time after it is presented to them.
4. Unless the Commission decides otherwise, the final report of the panel shall be published 15 days after it is transmitted to the Commission.
Article 2018: Implementation of Final Report
1. On receipt of the final report of a panel, the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel, and shall notify their Sections of the Secretariat of any agreed resolution of any dispute.
2. Wherever possible, the resolution shall be non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of Annex 2004 or, failing such a resolution, compensation.
Article 2019: Non-Implementation-Suspension of Benefits
1. If in its final report a panel has determined that a measure is inconsistent with the obligations of this Agreement or causes nullification or impairment in the sense of Annex 2004 and the Party complained against has not reached agreement with any complaining Party on a mutually satisfactory resolution pursuant to Article 2018(1)

within 30 days of receiving the final report, such complaining Party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.
2. In considering what benefits to suspend pursuant to paragraph 1:
(a) a complaining Party should first seek to suspend benefits in the same sector or sectors as that 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 Annex 2004; and
(b) a complaining Party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.
3. On the written request of any disputing Party delivered to the other Parties and its Section of the Secretariat, the Commission shall establish a panel to determine whether the level of benefits suspended by a Party pursuant to paragraph 1 is manifestly excessive.
4. The panel proceedings shall be conducted in accordance with the Model Rules of Procedure. The panel shall present its determination within 60 days after the last panelist is selected or such other period as the disputing Parties may agree.

Section C - Domestic Proceedings and Private Commercial Dispute Settlement

Article 2020: Referrals of Matters from Judicial or Administrative Proceedings

1. If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties and its Section of the Secretariat. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible.
2. The Party in whose territory the court or administrative body is located shall submit any agreed interpretation of the Commission to the court or administrative body in accordance with the rules of that forum.
3. If the Commission is unable to agree, any Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

Article 2021: Private Rights

No Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement.

Article 2022: Alternative Dispute Resolution

1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.
3. A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 InterAmerican Convention on International Commercial Arbitration .
4. The Commission shall establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes. The Committee shall report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area.

INVESTIMENTO

Section A - Investment

Article 1101: Scope and Coverage
1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;
(b) investments of investors of another Party in the territory of the Party; and
(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.
2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.
3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).
4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.
Article 1102: National Treatment
1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.
4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.
Article 1103: Most-Favored-Nation Treatment
1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1104: Standard of Treatment
Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.
Article 1105: Minimum Standard of Treatment
1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).
Article 1106: Performance Requirements
1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

(a) to export a given level or percentage of goods or services;
(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.
2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.
3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

(a) to achieve a given level or percentage of domestic content;
(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.
6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
(b) necessary to protect human, animal or plant life or health; or
(c) necessary for the conservation of living or non-living exhaustible natural resources.
Article 1107: Senior Management and Boards of Directors
1. No Party may require that an enterprise of that Party that is an investment of an investor of another Party appoint to senior management positions individuals of any particular nationality.
2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is an investment of an investor of another Party, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.
Article 1108: Reservations and Exceptions
1. Articles 1102, 1103, 1106 and 1107 do not apply to:

(a) any existing non-conforming measure that is maintained by

(i) a Party at the federal level, as set out in its Schedule to Annex I or III,
(ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or
(iii) a local government;
(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.
2. Each Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing nonconforming measure maintained by a state or province, not including a local government.
3. Articles 1102, 1103, 1106 and 1107 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

4. No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
5. Articles 1102 and 1103 do not apply to any measure that is an exception to, or derogation from, the obligations under Article 1703 (Intellectual Property National Treatment) as specifically provided for in that Article.
6. Article 1103 does not apply to treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in its Schedule to Annex IV.
7. Articles 1102, 1103 and 1107 do not apply to:

(a) procurement by a Party or a state enterprise; or
(b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.
8. The provisions of:

(a) Article 1106(1)(a), (b) and (c), and (3)(a) and (b) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;
(b) Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply to procurement by a Party or a state enterprise; and
(c) Article 1106(3)(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
Article 1109: Transfers
1. Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:

(a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
(b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
(c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
(d) payments made pursuant to Article 1110; and
(e) payments arising under Section B.
2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.
3. No Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party.
4. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;
(b) issuing, trading or dealing in securities;
(c) criminal or penal offenses;

(d) reports of transfers of currency or other monetary instruments; or
(e) ensuring the satisfaction of judgments in adjudicatory proceedings.
5. Paragraph 3 shall not be construed to prevent a Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs (a) through (e) of paragraph 4.
6. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.
Article 1110: Expropriation and Compensation
1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and Article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6.
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
3. Compensation shall be paid without delay and be fully realizable.
4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.
6. On payment, compensation shall be freely transferable as provided in Article 1109.
7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).
8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.
Article 1111: Special Formalities and Information Requirements
1. Nothing in Article 1102 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Party, such as a requirement that investors be residents of the Party or that investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of another Party and investments of investors of another Party pursuant to this Chapter.

2. Notwithstanding Articles 1102 or 1103, a Party may require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 1112: Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement by a Party that a service provider of another Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that crossborder service. This Chapter applies to that Party's treatment of the posted bond or financial security.

Article 1113: Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

Article 1114: Environmental Measures

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

Section B Settlement of Disputes between a Party and an Investor of Another Party

Article 1115: Purpose

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both

equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

Article 1118: Settlement of a Claim through Consultation and Negotiation

The disputing parties should first attempt to settle a claim through consultation or negotiation.

Article 1119: Notice of Intent to Submit a Claim to Arbitration

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:

(a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;

(b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;

(c) the issues and the factual basis for the claim; and

(d) the relief sought and the approximate amount of damages claimed.

Article 1120: Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
(c) the UNCITRAL Arbitration Rules.
2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.
Article 1121: Conditions Precedent to Submission of a Claim to Arbitration
1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and
(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.
4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:

(a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and
(b) Annex 1120.1(b) shall not apply.
Article 1122: Consent to Arbitration
1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;

(b) Article II of the New York Convention for an agreement in writing; and
(c) Article I of the InterAmerican Convention for an agreement.
Article 1123: Number of Arbitrators and Method of Appointment
Except in respect of a Tribunal established under Article 1126, and unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
Article 1124: Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator
1. The Secretary-General shall serve as appointing authority for an arbitration under this Section.
2. If a Tribunal, other than a Tribunal established under Article 1126, has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, on the request of either disputing party, shall appoint, in his discretion, the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall be appointed in accordance with paragraph 3.
3. The Secretary-General shall appoint the presiding arbitrator from the roster of presiding arbitrators referred to in paragraph 4, provided that the presiding arbitrator shall not be a national of the disputing Party or a national of the Party of the disputing investor. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties.
4. On the date of entry into force of this Agreement, the Parties shall establish, and thereafter maintain, a roster of 45 presiding arbitrators meeting the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters. The roster members shall be appointed by consensus and without regard to nationality.
Article 1125: Agreement to Appointment of Arbitrators
For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on Article 1124(3) or on a ground other than nationality:

(a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
(b) a disputing investor referred to in Article 1116 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the Tribunal; and
(c) a disputing investor referred to in Article 1117(1) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor and the enterprise agree in writing to the appointment of each individual member of the Tribunal.
Article 1126: Consolidation
1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.
2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in

common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.
3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:

(a) the name of the disputing Party or disputing investors against which the order is sought;
(b) the nature of the order sought; and
(c) the grounds on which the order is sought.
4. The disputing party shall deliver to the disputing Party or disputing investors against which the order is sought a copy of the request.
5. Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 1124(4). In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties. The Secretary-General shall appoint the two other members from the roster referred to in Article 1124(4), and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors.
6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

(a) the name and address of the disputing investor;
(b) the nature of the order sought; and
(c) the grounds on which the order is sought.
7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 3.
8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.
9. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, unless the latter Tribunal has already adjourned its proceedings.
10. A disputing Party shall deliver to the Secretariat, within 15 days of receipt by the disputing Party, a copy of:

(a) a request for arbitration made under paragraph (1) of Article 36 of the ICSID Convention;
(b) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules; or

(c) a notice of arbitration given under the UNCITRAL Arbitration Rules.
11. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 3:

(a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;
(b) within 15 days of making the request, in the case of a request made by the disputing Party.

12. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 6 within 15 days of receipt of the request.
13. The Secretariat shall maintain a public register of the documents referred to in paragraphs 10, 11 and 12.
Article 1127: Notice
A disputing Party shall deliver to the other Parties:

(a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted; and
(b) copies of all pleadings filed in the arbitration.
Article 1128: Participation by a Party
On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.
Article 1129: Documents
1. A Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party a copy of:

(a) the evidence that has been tendered to the Tribunal; and
(b) the written argument of the disputing parties.
2. A Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.
Article 1130: Place of Arbitration
Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:

(a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or
(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.
Article 1131: Governing Law
1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.
Article 1132: Interpretation of Annexes
1. Where a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II, Annex III or Annex IV, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal.

2. Further to Article 1131(2), a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

Article 1133: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 1134: Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

Article 1135: Final Award

1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is made under Article 1117(1):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A Tribunal may not order a Party to pay punitive damages.

Article 1136: Finality and Enforcement of an Award

1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

3. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules

(i) three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
4. Each Party shall provide for the enforcement of an award in its territory.
5. If a disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by a Party whose investor was a party to the arbitration, shall establish a panel under Article 2008 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
(b) a recommendation that the Party abide by or comply with the final award.
6. A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the InterAmerican Convention regardless of whether proceedings have been taken under paragraph 5.
7. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the InterAmerican Convention.
Article 1137: General
Time when a Claim is Submitted to Arbitration
1. A claim is submitted to arbitration under this Section when:

(a) the request for arbitration under paragraph (1) of Article 36 of the ICSID Convention has been received by the Secretary-General;
(b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General; or
(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.
Service of Documents
2. Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 1137.2.
Receipts under Insurance or Guarantee Contracts
3. In an arbitration under this Section, a Party shall not assert, as a defense, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.
Publication of an Award
4. Annex 1137.4 applies to the Parties specified in that Annex with respect to publication of an award.
Article 1138: Exclusions
1. Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to Article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to that Article shall not be subject to such provisions.
2. The dispute settlement provisions of this Section and of Chapter Twenty shall not apply to the matters referred to in Annex 1138.2.
Section C - Definitions

Article 1139: Definitions
For purposes of this Chapter:
disputing investor means an investor that makes a claim under Section B;
disputing parties means the disputing investor and the disputing Party;
disputing party means the disputing investor or the disputing Party;
disputing Party means a Party against which a claim is made under Section B;
enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;
enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.
equity or debt securities includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants;
G7 Currency means the currency of Canada, France, Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland or the United States;
ICSID means the International Centre for Settlement of Investment Disputes;
ICSID Convention means the Convention on the Settlement of Investment Disputes between States and Nationals of other States , done at Washington, March 18, 1965;
InterAmerican Convention means the InterAmerican Convention on International Commercial Arbitration , done at Panama, January 30, 1975;
investment means:

(a) an enterprise;
(b) an equity security of an enterprise;
(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the debt security is at least three years,
but does not include a debt security, regardless of original maturity, of a state enterprise;
(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the loan is at least three years,
but does not include a loan, regardless of original maturity, to a state enterprise;
(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
(j) any other claims to money,
that do not involve the kinds of interests set out in subparagraphs (a) through (h);
investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;
investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;
investor of a non-Party means an investor other than an investor of a Party, that seeks to make, is making or has made an investment;
New York Convention means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards , done at New York, June 10, 1958;
Secretary-General means the Secretary-General of ICSID;
transfers means transfers and international payments;
Tribunal means an arbitration tribunal established under Article 1120 or 1126; and
UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976.

ASEAN

ASEAN Protocol on Enhanced Dispute Settlement Mechanism
The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, Member States of the Association of South East Asian Nations (hereinafter collectively referred to as "ASEAN" or "Member States" or singularly as "Member State");
RECALLING the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992, as amended by the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Bangkok on 15 December 1995 (the "Agreement") and the Protocol on Dispute Settlement Mechanism signed in Manila on 20 November 1996 (the "1996 Protocol on DSM");
FURTHER RECALLING that the 9th ASEAN Summit held in Bali on 7-8 October 2003, had decided on institutional strengthening of ASEAN, including the improvement of the ASEAN Dispute Settlement Mechanism, as reflected in the Bali Concord II;
DESIRING to replace the 1996 Protocol on DSM with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (hereinafter referred to as "Protocol");
HAVE AGREED AS FOLLOWS:
ARTICLE 1
Coverage and Application
1. The rules and procedures of this Protocol shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the

agreements listed in Appendix I and future ASEAN economic agreements (the "covered agreements").
2. The rules and procedures of this Protocol shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements. To the extent that there is a difference between the rules and procedures of this Protocol and the special or additional rules and procedures in the covered agreements, the special or additional rules and procedures shall prevail.
3. The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting ("SEOM") to establish a panel pursuant to paragraph 1 Article 5 of this Protocol.

ARTICLE 2

Administration

1. The SEOM shall administer this Protocol and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the SEOM shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of findings and recommendations of panel and Appellate Body reports adopted by the SEOM and authorise suspension of concessions and other obligations under the covered agreements.
2. The SEOM and other relevant ASEAN bodies shall be notified of mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements.

ARTICLE 3

Consultations

1. Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation, interpretation or application of the Agreement or any covered agreement. Any differences shall, as far as possible, be settled amicably between the Member States.
2. Member States which consider that any benefit accruing to them directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or the existence of any other situation may, with a view to achieving satisfactory settlement of the matter, make representations or proposals to the other Member State concerned, which shall give due consideration to the representations or proposals made to it.
3. All such requests for consultations shall be notified to the SEOM. Any request for consultations shall be submitted in writing and shall give the reason for the request including identification of the measures at issue and an indication of the legal basis for the complaint.
4. If a request for consultations is made, the Member State to which the request is made shall reply to the request within ten (10) days after the date of its receipt and shall enter into consultations within a period of thirty (30) days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.
5. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

ARTICLE 4

Good Offices, Conciliation or Mediation

1. Member States which are parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request to the SEOM for the establishment of a panel.
2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.
3. The Secretary-General of ASEAN may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Member States to settle a dispute.

ARTICLE 5

Establishment of Panels

1. If the Member State to which the request for consultations is made does not reply within ten (10) days after the date of receipt of the request, or does not enter into consultations within a period of thirty (30) days after the date of receipt of the request, or the consultations fail to settle a dispute within sixty (60) days after the date of receipt of the request, the matter shall be raised to the SEOM if the complaining party wishes to request for a panel. The panel shall be established by the SEOM, unless the SEOM decides by consensus not to establish a panel.
2. A panel shall be established at the meeting of the SEOM held immediately after the receipt of the request for a panel and accordingly the request shall be placed on the agenda of the SEOM at that meeting. In the event that no the SEOM meeting is scheduled or planned within forty five (45) days of receipt of the request, the establishment of the panel or the decision not to establish it shall be done or taken, as the case may be, by circulation. A non-reply shall be considered as agreement to the request for the establishment of a panel. The issue of the establishment of the panel shall be settled within the forty five (45) day-period, irrespective of whether it is settled at the SEOM or by circulation.
3. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the complainant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of the special terms of reference.

ARTICLE 6

Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise prior to the establishment of a panel:

"To examine in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the SEOM by (name of party) in (document) … and to make such findings as will assist the SEOM in the adoption of the panel report or in making its decision not to adopt the report."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.
3. In establishing a panel, the SEOM may authorise its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, notwithstanding the provisions in paragraph 1 hereof. The terms of reference thus drawn up shall be circulated to all Member States. If other than standard terms of reference are agreed

upon, any Member State may raise any point relating thereto with the SEOM at the time of establishment of a panel.

ARTICLE 7

Function of Panel

The function of the panel is to make an objective assessment of the dispute before it, (including an examination of the facts of the case and the applicability of and conformity with the sections of the Agreement or any covered agreements) and its findings and recommendations in relation to the case.

ARTICLE 8

Panel Procedures, Deliberations and Findings

1. A panel shall, apart from the matters covered in Appendix II regulate its own procedures in relation to the rights of parties to be heard and its deliberations.
2. A panel shall submit its findings and recommendations to the SEOM in the form of a written report within sixty (60) days of its establishment. In exceptional cases, the panel may take an additional ten (10) days to submit its findings and recommendations to the SEOM.
3. Before submitting its findings and recommendations to the SEOM, the panel shall accord adequate opportunity to the parties to the dispute to review the report.
4. A panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. A Member State shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.
5. Panel deliberations shall be confidential. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

ARTICLE 9

Treatment of Panel Report

1. The SEOM shall adopt the panel report within thirty (30) days of its submission by the panel unless a party to the dispute formally notifies the SEOM of its decision to appeal or the SEOM decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the SEOM until after the completion of the appeal. SEOM representatives from Member States which are parties to a dispute can be present during the deliberations of the SEOM.
2. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the panel report, as the case may be, within the thirty (30) day period in paragraph 1 hereof, the adoption shall be done by circulation. A non-reply shall be considered as acceptance of the decision and/or recommendation in the panel report. The adoption or non-adoption shall be completed within the thirty (30) day period in paragraph 1 hereof, notwithstanding the resort to a circulation process.

ARTICLE 10

Procedures for Multiple Complainants

1. Where more than one Member State requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Member States concerned. A single panel should be established to examine such complaints whenever feasible.
2. The single panel shall organize its examination and present its findings and recommendations to the SEOM in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate

reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.
3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

ARTICLE 11
Third Parties

1. The interests of the parties to a dispute and those of other Member States under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member State having a substantial interest in a matter before a panel and having notified its interest to the SEOM (referred to in this Protocol as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
3. Third parties shall receive the submissions of the parties to the dispute to the first substantive meeting of the panel.
4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member State may have recourse to normal dispute settlement procedures under this Protocol. Such a dispute shall be referred to the original panel wherever possible.

ARTICLE 12
Appellate Review

1. An Appellate Body shall be established by the ASEAN Economic Ministers ("AEM"). The Appellate Body shall hear appeals from panel cases. It shall be composed of seven (7) persons, three (3) of whom shall serve on any one case. Persons serving on the Appellate Body shall serve on cases in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.
2. The AEM shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.
3. The Appellate Body shall comprise of persons of recognised authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of ASEAN. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.
4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties, which have notified the SEOM of a substantial interest in the matter pursuant to paragraph 2 of Article 11 may make written submissions to, and be given an opportunity to be heard by the Appellate Body.
5. As a general rule, the proceedings of the Appellate Body shall not exceed sixty (60) days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 5 of Article 3. When the Appellate

Body considers that it cannot provide its report within sixty (60) days, it shall inform the SEOM in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ninety (90) days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with the appropriate administrative and legal support as it requires.

8. Working procedures of the Appellate Body shall be drawn up by the SEOM. Any amendments thereto, shall be drawn up from time to time as necessary by the Appellate Body in consultation with the SEOM and the Secretary-General of ASEAN, and communicated to the Member States for their information.

9. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

10. Opinions expressed in the Appellate Body report by the individuals serving on the Appellate Body shall be anonymous.

11. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 hereof during the appellate proceeding.

12. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

13. An Appellate Body report shall be adopted by the SEOM and unconditionally accepted by the parties to the dispute unless the SEOM decides by consensus not to adopt the Appellate Body report within thirty (30) days following its circulation to the Member States. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the report, as the case may be, within the thirty (30) day period, adoption shall be done by circulation. A non-reply within the said thirty (30) day period shall be considered as an acceptance of the Appellate Body report. This adoption procedure is without prejudice to the rights of Member States to express their views on an Appellate Body report. The adoption process shall be completed within the thirty (30) day period irrespective of whether it is settled at the SEOM or by circulation.

ARTICLE 13

Communications with the Panel or Appellate Body

1. There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or the Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but it shall be made available to the parties to the dispute. Nothing in this Protocol shall preclude a party to a dispute from disclosing statement of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel or the Appellate Body which that Member State has designated as confidential. A party to a dispute shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

ARTICLE 14

Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member State concerned bring the measure into conformity with that agreement. In addition to its recommendations, a panel or the Appellate Body may suggest ways in which the Member State concerned could implement the recommendations.

2. In their findings and recommendations, a panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.
3. The panels and the Appellate Body shall also deal with the issue of expenses to be borne by the parties to the dispute, including third parties, to replenish the ASEAN Dispute Settlement Mechanism ("DSM") Fund as part of their findings and recommendations. The panels and the Appellate Body may apportion the expenses in the manner appropriate to the particular case.

ARTICLE 15

Surveillance of Implementation of Findings and Recommendations

1. Since prompt compliance with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM is essential in order to ensure effective resolution of disputes, parties to the dispute who are required to do so shall comply with the findings and recommendations of panel reports adopted by the SEOM within sixty (60) days from the SEOM's adoption of the same, or in the event of an appeal sixty (60) days from the SEOM's adoption of the findings and recommendations of the Appellate Body reports, unless the parties to the dispute agree on a longer time period.
2. When a party to the dispute requests for a longer time period for compliance, the other party shall take into account the circumstances of the particular case and accord favourable consideration to the complexity of the actions required to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM. The request for a longer period of time shall not be unreasonably denied. Where it is necessary to pass national legislation to comply with the findings and recommendations of panel and Appellate Body reports, a longer period appropriate for that purpose shall be allowed.
3. The decision of the parties on the extension of time shall be made within fourteen (14) days from the SEOM's adoption of the findings and recommendations of the panel report, or in the event of an appeal fourteen (14) days from the SEOM's adoption of the findings and recommendations of the Appellate Body's reports.
4. Any party required to comply with the findings and recommendations shall provide the SEOM with a status report in writing of their progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.
5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within sixty (60) days, after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the SEOM in writing of the reasons for the delay together with an indication of the period within which it will submit its report. In no case shall the proceedings for this purpose and the submission of the report exceed ninety (90) days after the date of reference of the matter to the panel.
6. The SEOM shall keep under surveillance the implementation of the findings and recommendations of panel and Appellate Body reports adopted by it. The issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM may be raised at the SEOM by any Member State at any time following their adoption. Unless the SEOM decides otherwise, the issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM shall be placed on the agenda of the SEOM meeting and shall remain on the SEOM's agenda until the issue is resolved. At least ten (10) days

prior to each such the SEOM meeting, the party concerned shall provide the SEOM with a status report in writing of its progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.

ARTICLE 16

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the findings and recommendations of panel and Appellate Body reports adopted by the SEOM are not implemented within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member State concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, such Member State shall, if so requested, and no later than the expiry of the period of sixty (60) days or the longer time period referred to in Article 15, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within twenty (20) days after the date of expiry of the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, any party having invoked the dispute settlement procedures may request authorization from the SEOM to suspend the application to the Member State concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) 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 sector(s) under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sector(s) under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) for purposes of this paragraph, “sector” means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current schedules of commitments under the ASEAN Framework Agreement on Services (AFAS).

(f) for purposes of this paragraph, “agreement” means:
(i) with respect to goods, the agreements in relation to goods listed in Appendix I to this Protocol;
(ii) with respect to services, the ASEAN Framework Agreement of Services and subsequent protocols;
(iii) any other covered agreement as defined in Article 1 of this Protocol.
4 The level of the suspension of concessions or other obligations authorized by the SEOM shall be equivalent to the level of the nullification or impairment.
5. The SEOM shall not authorise suspension of concessions or other obligations if a covered agreement prohibits such suspension.
6. When the situation described in paragraph 2 hereof occurs, the SEOM, upon request, shall grant authorization to suspend concessions or other obligations within thirty (30) days of the expiry of the sixty (60) day-period or the expiry of the longer period agreed upon by the parties to the dispute, as the case may be, referred to in Article 15, unless the SEOM decides by consensus to reject the request. In the event that no meeting of the SEOM is scheduled or planned to enable authorisation to suspend concessions or other obligations within the thirty (30) day period, the authorisation shall be done by circulation. A non-reply within the said thirty (30) day period shall be considered as an acceptance of the authorisation. The authorisation process shall be completed within the thirty (30) day period irrespective of whether it is settled at the SEOM or by circulation.
7. However, if the Member State concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorisation to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitration appointed by the Secretary-General of ASEAN and shall be completed within sixty (60) days after the date of expiry of the sixty (60) day period or the expiry of the longer period agreed upon by the parties to the dispute, as the case may be, referred to in Article 15. Concessions or other obligations shall not be suspended during the course of the arbitration.
8. The arbitrator acting pursuant to paragraph 7 hereof shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 hereof have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3 hereof. The parties shall accept the arbitrator’s decision as final and the parties concerned shall not seek a second arbitration. The SEOM shall be informed promptly of the decision of the arbitrator and shall, upon request, grant authorisation to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the SEOM decides by consensus to reject the request.
9. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member State that must implement recommendations and findings of the panel and Appellate Body reports adopted by the SEOM provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 15, the

SEOM shall continue to keep under surveillance the implementation of adopted recommendations and findings of the panel and Appellate Body reports adopted by the SEOM, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

10. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member State. When the SEOM has ruled that a provision of a covered agreement has not been observed, the responsible Member State shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Protocol relating to compensation and suspension of concessions or other obligations shall apply in cases where it has not been possible to secure such observance.

ARTICLE 17

ASEAN DSM Fund

1. There shall be established an ASEAN DSM Fund (hereinafter referred to as 'the Fund') for the purposes of this Protocol. The Fund shall be a revolving fund, separate from ASEAN Secretariat's regular budget. The initial sum for the Fund shall be contributed equally by all the Member States. Any drawdown from the Fund shall be replenished by the parties to the dispute in line with the provision of paragraph 3 of Article 14. The ASEAN Secretariat shall be responsible for administering the Fund.

2. The Fund shall be used to meet the expenses of the panels, the Appellate Body and any related administration costs of the ASEAN Secretariat. All other expenses, including legal representation, incurred by any party to a dispute shall be borne by that party.

3. The subsistence allowances and other expenses of the panels and the Appellate Body shall be in accordance with the criteria approved by the AEM on the recommendations of the ASEAN Budget Committee.

ARTICLE 18

Maximum Time-Frame

The total period for the disposal of disputes under this Protocol until the stage contemplated under paragraph 7 of Article 16, shall not exceed 445 days, unless the longer time period under Article 15 applies.

ARTICLE 19

Responsibilities of the Secretariat

1. The ASEAN Secretariat shall have the responsibility of assisting the panels and the Appellate Body, especially on the legal, historical and the procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. The ASEAN Secretariat shall assist the SEOM to monitor and maintain surveillance of the implementation of the findings and recommendations of the panel and Appellate Body reports adopted by it.

3. The ASEAN Secretariat shall be the focal point to receive all documentations in relation to disputes and shall deal with them as appropriate.

4. The ASEAN Secretariat in consultation with the SEOM shall administratively update the list of covered agreements in Appendix I, as may be required from time to time. The Secretariat shall inform Member States as and when the changes have been made.

ARTICLE 20

Venue for Proceedings

1. The venue for proceedings of the panels and the Appellate Body shall be the ASEAN Secretariat.

2. Notwithstanding the provisions of paragraph 1 above, panel and Appellate Body proceedings, apart from substantive meetings, may be held at any venue which the panels and the Appellate Body consider appropriate in consultation with the parties to the dispute, having regard to the convenience and cost effectiveness of such venue.

ARTICLE 21

Final Provisions

1. This Protocol shall enter into force upon signing.
2. This Protocol shall replace the 1996 Protocol on DSM and shall not apply to any dispute which has arisen before its entry into force. Such dispute shall continue to be governed by the 1996 Protocol on DSM.
3. The provisions of this Protocol may be modified through amendments mutually agreed upon in writing by all Member States.
4. This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof, to each ASEAN Member State.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

DONE at Vientiane, Lao PDR on 29 November 2004, in a single copy in the English language.

TPP – Resolução de Conflitos
(https://ustr.gov/sites/default/files/TPP-Final-Text-Dispute-Settlement.pdf)

CHAPTER 28
DISPUTE SETTLEMENT
Section A: Dispute Settlement
Article 28.1: Definitions
For the purposes of this Chapter:
complaining Party means a Party that requests the establishment of a panel under Article 28.7.1 (Establishment of a Panel);
consulting Party means a Party that requests consultations under Article 28.5.1 (Consultations) or the Party to which the request for consultations is made;
disputing Party means a complaining Party or a responding Party;
panel means a panel established under Article 28.7 (Establishment of a Panel);
perishable goods means perishable agricultural and fish goods classified in HS Chapters 1 through 24;
responding Party means a Party that has been complained against under Article 28.7 (Establishment of a Panel);
Rules of Procedure means the rules referred to in Article 28.13 (Rules of Procedure for Panels) and established in accordance with Article 27.2.1(f) (Functions of the Commission); and
third Party means a Party, other than a disputing Party, that delivers a written notice in accordance with Article 28.14 (Third Party Participation).
Article 28.2: Cooperation
The Parties shall at all times endeavour 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 or application.

Article 28.3: Scope

1.Unless otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply:

(a)with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement;

(b)when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of this Agreement or that another Party has otherwise failed to carry out an obligation under this Agreement; or

(c)when a Party considers that a benefit it could reasonably have expected to accrue to it under Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Rules of Origin and Origin Procedures), Chapter 4 (Textile and Apparel Goods), Chapter 5 (Customs Administration and Trade Facilitation), Chapter 8 (Technical Barriers to Trade), Chapter 10 (Cross-Border Trade in Services) or Chapter 15 (Government Procurement), is being nullified or impaired as a result of the application of a measure of another Party that is not inconsistent with this Agreement.

2.No later than six months after the effective date that Members of the WTO have the right to initiate non-violation nullification or impairment complaints under Article 64 of the TRIPS Agreement, the Parties shall consider whether to amend paragraph 1(c) to include Chapter 18 (Intellectual Property).

3.An instrument entered into by two or more Parties in connection with the conclusion of this Agreement:

(a)does not constitute an instrument related to this Agreement within the meaning of paragraph 2(b) of Article 31 of the Vienna Convention on the Law of Treaties, done at Vienna on May 23, 1969 and shall not affect the rights and obligations under this Agreement of Parties which are not party to the instrument; and

(b)may be subject to the dispute settlement procedures under this Chapter for any matter arising under the instrument if that instrument so provides.

Article 28.4: Choice of Forum

1. If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party,

---

including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. Once a complaining Party has requested the establishment of, or referred a matter to, a panel or other tribunal under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of other fora.

Article 28.5: Consultations

1.Any Party may request consultations with any other Party with respect to any matter described in Article 28.3 (Scope). The Party making the request for consultations shall do so in writing, and shall set out the reasons for the request, including identification of the actual or proposed measure1 or other matter at issue and an indication of the legal basis for the complaint. The requesting Party shall circulate the request concurrently to the other Parties through the overall contact points designated under Article 27.5.1 (Contact Points).

2.The Party to which a request for consultations is made shall, unless the consulting Parties agree otherwise, reply in writing to the request no later than seven days after the date of its receipt of the request.2 That Party shall circulate its reply

concurrently to the other Parties through the overall contact points and enter into consultations in good faith.
3.A Party other than a consulting Party that considers it has a substantial interest in the matter may participate in the consultations by notifying the other Parties in writing no later than seven days after the date of circulation of the request for consultations. The Party shall include in its notice an explanation of its substantial interest in the matter.
4.Unless the consulting Parties agree otherwise, they shall enter into consultations no later than:
(a)15 days after the date of receipt of the request for matters concerning perishable goods; or
(b)30 days after the date of receipt of the request for all other matters.
5.Consultations may be held in person or by any technological means
1The Parties shall, in the case of a proposed measure, make every effort to make the request for consultation under this provision within 60 days of the date of publication of the proposed measure, without prejudice to the right to make such request at any time.
2For greater certainty, if the Party to which a request for consultations is made does not reply within the time period specified in this paragraph, it shall be deemed to have received the request seven days after the date on which the Party making the request for consultations transmitted that request.

available to the consulting Parties. If the consultations are held in person, they shall be held in the capital of the Party to which the request for consultations was made, unless the consulting Parties agree otherwise.
6.The consulting Parties shall make every attempt to reach a mutually satisfactory resolution of the matter through consultations under this Article. To this end:
(a)each consulting Party shall provide sufficient information to enable a full examination of how the actual or proposed measure might affect the operation or application of this Agreement; and
(b)a Party that participates in the consultations shall treat any information exchanged in the course of the consultations that is designated as confidential on the same basis as the Party providing the information.
7.In consultations under this Article, a consulting Party may request that another consulting Party make available personnel of its government agencies or other regulatory bodies who have expertise in the matter at issue.
8.Consultations shall be confidential and without prejudice to the rights of any Party in any other proceedings.
Article 28.6: Good Offices, Conciliation and Mediation
1.Parties may at any time agree to voluntarily undertake an alternative method of dispute resolution, such as good offices, conciliation or mediation.
2.Proceedings that involve good offices, conciliation or mediation shall be confidential and without prejudice to the rights of the Parties in any other proceedings.
3.Parties participating in proceedings under this Article may suspend or terminate those proceedings at any time.
4.If the disputing Parties agree, good offices, conciliation or mediation may continue while the dispute proceeds for resolution before a panel established under Article 28.7 (Establishment of a Panel).
Article 28.7: Establishment of a Panel
1. A Party that requested consultations under Article 28.5.1 (Consultations) may request, by means of a written notice addressed to the responding Party, the establishment of a panel if the consulting Parties fail to resolve the matter within:

(a)a period of 60 days after the date of receipt of the request for consultations under Article 28.5.1 (Consultations);
(b)a period of 30 days after the date of receipt of the request for consultations under Article 28.5.1 (Consultations) in a matter regarding perishable goods; or
(c)any other period as the consulting Parties may agree.
2.The complaining Party shall circulate the request concurrently to all Parties through the overall contact points designated under Article 27.5.1 (Contact Points).
3.The complaining Party shall include in the request to establish a panel an identification of the measure or other matter at issue and a brief summary of the legal basis of the complaint sufficient to present the problem clearly.
4.A panel shall be established upon delivery of the request.
5.Unless the disputing Parties agree otherwise, the panel shall be composed in a manner consistent with this Chapter and the Rules of Procedure.
6.If a panel has been established regarding a matter and another Party requests the establishment of a panel regarding the same matter, a single panel should be established to examine those complaints whenever feasible.
7.A panel shall not be established to review a proposed measure.
Article 28.8: Terms of Reference
1.Unless the disputing Parties agree otherwise no later than 20 days after the date of delivery of the request for the establishment of a panel, the terms of reference shall be to:
(a)examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel); and
(b)make findings and determinations, and any jointly requested recommendations, together with its reasons therefor, as provided for in Article 28.17.4 (Initial Report).
2.If, in its request for the establishment of a panel, a complaining Party claims that a measure nullifies or impairs benefits within the meaning of Article 28.3.1(c) (Scope), the terms of reference shall so indicate.

Article 28.9: Composition of Panels
1.A panel shall be composed of three members.
2.Unless the disputing Parties agree otherwise, they shall apply the following procedures to compose a panel:
(a)Within a period of 20 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel), the complaining Party or Parties, on the one hand, and the responding Party, on the other, shall each appoint a panellist and notify each other of those appointments.
(b)If the complaining Party or Parties fail to appoint a panellist within the period specified in subparagraph (a), the dispute settlement proceedings shall lapse at the end of that period.
(c)If the responding Party fails to appoint a panellist within the period specified in subparagraph (a), the complaining Party or Parties shall select the panellist not yet appointed:
(i)from the responding Party's list established under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists);
(ii)if the responding Party has not established a list under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists), from the roster of panel chairs established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists); or

(iii)if the responding Party has not established a list under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists) and no roster of panel chairs has been established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists), by random selection from a list of three candidates nominated by the complaining Party or Parties, no later than 35 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel).
(d)For appointment of the third panellist, who shall serve as chair:
(i)the disputing Parties shall endeavour to agree on the appointment of a chair;

(ii)if the disputing Parties fail to appoint a chair under subparagraph (d)(i) by the time the second panellist is appointed or within a period of 35 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel), whichever is longer, the two panellists appointed shall, by agreement, appoint the chair from the roster established under Article
28.11(Roster of Panel Chairs and Party Specific Lists);
(iii)if the two panellists do not agree on the appointment of the chair under subparagraph (d)(ii) within a period of 43 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel), the two panellists shall appoint the chair with the agreement of the disputing Parties;
(iv)if the two panellists fail to appoint the chair under subparagraph (d)(iii) within a period of 55 days after the date of delivery of the request for the establishment of the panel, the disputing Parties shall select the chair by random selection from the roster established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists) within a period of 60 days after the date of delivery of the request for the establishment of the panel;
(v)notwithstanding subparagraph (d)(iv), if the two panellists fail to appoint the chair under subparagraph (d)(iii) within a period of 55 days after the date of delivery of the request for the establishment of the panel, a disputing Party may elect to have the chair appointed from the roster established under Article 28.11(Roster of Panel Chairs and Party Specific Lists) by an independent third party, provided that the following conditions are met:
(A)any costs associated with the appointment are borne by the electing Party;
(B)the request to the independent third party to appoint the chair shall be made jointly by the disputing Parties. Any subsequent communication between a disputing Party and the independent third party shall be copied to the other disputing Party or Parties. No disputing Party shall attempt to influence the independent third party's appointment process; and

(C)if the independent third party is unable or unwilling to complete the appointment as requested within a period of 60 days after the date of delivery of the request for the establishment of the panel, then the chair shall be randomly selected within a further period of five days using the process set out in subparagraph (d)(iv);
(vi)if a roster has not been established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists), and subparagraphs (d)(ii) through (v) cannot apply, the complaining Party or Parties, on the one hand, and the responding Party, on the other hand, may nominate three candidates. The chair shall be randomly selected from those candidates that are nominated within a period of 60 days after the date of delivery of the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel); and

(vii)notwithstanding subparagraph (d)(vi), if a roster has not been established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists), and subparagraphs (d)(i) through (v) cannot apply, a disputing Party may, following the nomination of candidates under subparagraph (d)(vi), elect to have the chair appointed from those candidates by an independent third party, provided that the following conditions are met:
(A)any costs associated with such appointment are borne by the electing Party;
(B)the request to the independent third party to appoint the chair shall be made jointly by the disputing Parties. Any subsequent communication between a disputing Party and the independent third party shall be copied to the other disputing Party or Parties. No disputing Party shall attempt to influence the independent third party's appointment process; and
(C)if the independent third party is unable or unwilling to complete the appointment as requested within a period of 60 days after the date of delivery of the request for the establishment of the panel, then the chair shall be randomly selected within a further period of five days using the process set out in
subparagraph (vi).
3.Unless the disputing Parties agree otherwise, the chair shall not be a national of any of the disputing Parties or a third Party and any nationals of the disputing Parties or a third Party appointed to the roster established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists) shall be excluded from a selection process under paragraph 2(d).
4.Each disputing Party shall endeavour to select panellists who have expertise or experience relevant to the subject matter of the dispute.
5.For a dispute arising under Chapter 19 (Labour), Chapter 20 (Environment) or Chapter 26 (Transparency and Anti-corruption), each disputing Party shall select panellists in accordance with the following requirements, in addition to those set out in Article 28.10.1 (Qualifications of Panellists):
(a)in any dispute arising under Chapter 19 (Labour), panellists other than the chair shall have expertise or experience in labour law or practice;
(b)in any dispute arising under Chapter 20 (Environment), panellists other than the chair shall have expertise or experience in environmental law or practice; and
(c)in any dispute arising under section C of Chapter 26 (Transparency and Anti-corruption), panellists other than the chair shall have expertise or experience in anti-corruption law or practice.
6.If a panellist selected under paragraph 2 is unable to serve on the panel, the complaining Party, the responding Party, or the disputing Parties, as the case may be, shall, no later than seven days after learning that the panellist is unavailable, select another panellist in accordance with the same method of selection that was used to select the panellist who is unable to serve, unless the disputing Parties agree otherwise.
7.If the process for selecting the new panellist under paragraph 6 is not completed within the time frame set out in that paragraph then the disputing Parties shall select the panellist by random selection from the roster established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists) no later than
15days after learning that the original panellist is no longer able to serve.
8.If a roster has not been established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists) then the disputing Parties shall select the panellist by using the method of selection set out in paragraph 2(d)(vi) no later than 15 days after learning that the original panellist is no longer able to serve.
9.If a panellist appointed under this Article resigns or becomes unable to
serve on the panel, either during the course of the proceeding or when the panel is reconvened under Article 28.20 (Non-Implementation - Compensation and Suspension

of Benefits) or Article 28.21 (Compliance Review), a replacement panellist shall be appointed within 15 days in accordance with paragraphs 6, 7 and 8. The replacement shall have all the powers and duties of the original panellist. The work of the panel shall be suspended pending the appointment of the replacement panellist, and all time frames set out in this Chapter and in the Rules of Procedure shall be extended by the amount of time that the work was suspended.

10. If a disputing Party believes that a panellist is in violation of the code of conduct referred to in Article 28.10.1(d) (Qualifications of Panellists), the disputing Parties shall consult and, if they agree, the panellist shall be removed and a new panellist shall be selected in accordance with this Article.

Article 28.10: Qualifications of Panellists

1.All panellists 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, reliability and sound judgment;

(c)be independent of, and not affiliated with or take instructions from, any Party; and

(d)comply with the code of conduct in the Rules of Procedure.

2.An individual shall not serve as a panellist for a dispute in which that person has participated under Article 28.6 (Good Offices, Conciliation and Mediation).

Article 28.11: Roster of Panel Chairs and Party Specific Lists

Roster of Panel Chairs

1. No later than 120 days after the date of entry into force of this Agreement, those Parties for which this Agreement has come into force under Article 30.5 (Entry into Force) shall establish a roster to be used for the selection of panel chairs.

2.If the Parties are unable to establish a roster within the time period specified in paragraph 1, the Commission shall immediately convene to appoint individuals to the roster. Taking into account the nominations made under paragraph 4 and the qualifications set out in Article 28.10 (Qualifications of Panellists), the Commission shall establish the roster no later than 180 days after the date of entry into force of this Agreement.

3.The roster shall consist of at least 15 individuals, unless the Parties agree otherwise.

4.Each Party may nominate up to two individuals for the roster and may include up to one national of any Party among its nominations.

5.The Parties shall appoint individuals to the roster by consensus. The roster may include up to one national of each Party.

6.Once established under paragraph 1 or 2, or if reconstituted following a review by the Parties, a roster shall remain in effect for a minimum of three years or until the Parties constitute a new roster. Members of the roster may be reappointed.

7.The Parties may appoint a replacement at any time if a roster member is no longer willing or available to serve.

8.Subject to paragraphs 4 and 5, any acceding Party may nominate up to two individuals for the roster. Either or both of those individuals may be included on the roster by consensus of the Parties.

Party Specific Indicative List

9.At any time after the date of entry into force of this Agreement, a Party may establish a list of individuals who are willing and able to serve as panellists.

10.The list referred to in paragraph 9 may include individuals who are nationals of that Party or non-nationals. Each Party may appoint any number of individuals to its list and appoint additional individuals or replace a list member at any time.

11.A Party that establishes a list in accordance with paragraph 9 shall promptly make it available to the other Parties.

Article 28.12: Function of Panels

1. A panel's function is to make an objective assessment of the matter before it, which includes an examination of the facts and the applicability of and conformity with this Agreement, and to make the findings, determinations and recommendations as are called for in its terms of reference and necessary for the resolution of the dispute.

2.Unless the disputing Parties agree otherwise, the panel shall perform its functions and conduct its proceedings in a manner consistent with this Chapter and the Rules of Procedure.

3.The panel shall consider this Agreement in accordance with the rules of interpretation under international law as reflected in Articles 31 and 32 of the
Vienna Convention on the Law of Treaties (1969). With respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body. The findings, determinations and recommendations of the panel shall not add to or diminish the rights and obligations of the Parties under this Agreement.

4.A panel shall take its decisions by consensus, except that, if a panel is unable to reach consensus, it may take its decisions by majority vote.

Article 28.13: Rules of Procedure for Panels

The Rules of Procedure, established under this Agreement in accordance with Article 27.2.1(f) (Functions of the Commission), shall ensure that:

(a)disputing Parties have the right to at least one hearing before the panel at which each may present views orally;

(b)subject to subparagraph (f), any hearing before the panel shall be open to the public, unless the disputing Parties agree otherwise;

(c)each disputing Party has an opportunity to provide an initial and a rebuttal written submission;

(d)subject to subparagraph (f), each disputing Party shall:

(i)make its best efforts to release to the public its written submissions, written version of an oral statement and written response to a request or question from the panel, if any, as soon as possible after those documents are filed; and

(ii)if not already released, release all these documents by the time the final report of the panel is issued;

(e)the panel shall consider requests from non-governmental entities located in the territory of a disputing Party to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties;

(f)confidential information is protected;

(g)written submissions and oral arguments shall be made in English, unless the disputing Parties agree otherwise; and

(h)unless the disputing Parties agree otherwise, hearings shall be held in the capital of the responding Party.

Article 28.14: Third Party Participation

A Party that is not a disputing Party and that considers it has an interest in the matter before the panel shall, on delivery of a written notice to the disputing Parties, be entitled to attend all hearings, make written submissions, present views orally to the panel, and receive written submissions of the disputing Parties. The Party shall provide written notice no later than 10 days after the date of circulation of the request for the establishment of the panel under Article 28.7.2 (Establishment of a Panel).

Article 28.15: Role of Experts

At the request of a disputing Party, or on its own initiative, a panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties agree and subject to any terms and conditions agreed by the disputing Parties. The disputing Parties shall have an opportunity to comment on any information or advice obtained under this Article.

Article 28.16: Suspension or Termination of Proceedings

1.The panel may suspend its work at any time at the request of the complaining Party or, if there is more than one complaining Party, at the joint request of the complaining Parties, for a period not to exceed 12 consecutive months. The panel shall suspend its work at any time if the disputing Parties request it to do so. In the event of a suspension, the time frames set out in this Chapter and in the Rules of Procedure shall be extended by the amount of time that the work was suspended. If the work of the panel is suspended for more than

12consecutive months, the panel proceedings shall lapse unless the disputing Parties agree otherwise.

2.The panel shall terminate its proceedings if the disputing Parties request it to do so.

Article 28.17: Initial Report

1.The panel shall draft its report without the presence of any Party.

2.The panel shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the disputing Parties and any third Parties, and on any information or advice put before it under Article 28.15 (Role of Experts). At the joint request of the disputing Parties, the panel may make recommendations for the resolution of the dispute.

3.The panel shall present an initial report to the disputing Parties no later than 150 days after the date of the appointment of the last panellist. In cases of urgency, including those related to perishable goods, the panel shall endeavour to present an initial report to the disputing Parties no later than 120 days after the date of the appointment of the last panellist.

4.The initial report shall contain:

(a)findings of fact;

(b)the determination of the panel as to whether:

(i)the measure at issue is inconsistent with obligations in this Agreement;

(ii)a Party has otherwise failed to carry out its obligations in this Agreement; or

(iii)the measure at issue is causing nullification or impairment within the meaning of Article 28.3.1(c) (Scope);

(c)any other determination requested in the terms of reference;

(d)recommendations, if the disputing Parties have jointly requested them, for the resolution of the dispute; and

(e)the reasons for the findings and determinations.

5.In exceptional cases, if the panel considers that it cannot release its initial report within the time period specified in paragraph 3, it shall inform the disputing Parties in writing of the reasons for the delay together with an estimate of when it will issue its report. A delay shall not exceed an additional period of 30 days unless the disputing Parties agree otherwise.

6.Panellists may present separate opinions on matters not unanimously

agreed.

7.A disputing Party may submit written comments to the panel on its initial report no later than 15 days after the presentation of the initial report or within another period as the disputing Parties may agree.
8.After considering any written comments by the disputing Parties on the initial report, the panel may modify its report and make any further examination it considers appropriate.
Article 28.18: Final Report
1.The panel shall present a final report to the disputing Parties, including any separate opinions on matters not unanimously agreed, no later than 30 days after presentation of the initial report, unless the disputing Parties agree otherwise. After taking any steps to protect confidential information, and no later than 15 days after the presentation of the final report, the disputing Parties shall release the final report to the public.
2.No panel shall, either in its initial report or its final report, disclose which panellists are associated with majority or minority opinions.
Article 28.19: Implementation of Final Report
1.The Parties recognise the importance of prompt compliance with determinations made by panels under Article 28.18 (Final Report) in achieving the aim of the dispute settlement procedures in this Chapter, which is to secure a positive solution to disputes.
2.If in its final report the panel determines that:
(a)the measure at issue is inconsistent with a Party's obligations in this Agreement;
(b)a Party has otherwise failed to carry out its obligations in this Agreement; or
(c)the measure at issue is causing nullification or impairment within the meaning of Article 28.3.1(c) (Scope),
the responding Party shall, whenever possible, eliminate the non-conformity or the nullification or impairment.
3. Unless the disputing Parties agree otherwise, the responding Party shall have a reasonable period of time in which to eliminate the non-conformity or nullification or impairment if it is not practicable to do so immediately.

4.The disputing Parties shall endeavour to agree on the reasonable period of time. If the disputing Parties fail to agree on the reasonable period of time within a period of 45 days after the presentation of the final report under Article 28.18.1 (Final Report), any disputing Party may, no later than 60 days after the presentation of the final report under Article 28.18.1 (Final Report), refer the matter to the chair to determine the reasonable period of time through arbitration.
5.The chair shall take into consideration as a guideline that the reasonable period of time should not exceed 15 months from the presentation of the final report under Article 28.18.1 (Final Report). However, that time may be shorter or longer, depending upon the particular circumstances.
6.The chair shall determine the reasonable period of time no later than 90 days after the date of referral to the chair under paragraph 4.
7.The disputing Parties may agree to vary the procedures set out in paragraphs 4 through 6 for the determination of the reasonable period of time.
Article 28.20: Non-Implementation – Compensation and Suspension of
Benefits
1.The responding Party shall, if requested by the complaining Party or Parties, enter into negotiations with the complaining Party or Parties no later than
15days after receipt of that request, with a view to developing mutually acceptable compensation, if:

(a)the responding Party has notified the complaining Party or Parties that it does not intend to eliminate the non-conformity or the nullification or impairment; or
(b)following the expiry of the reasonable period of time established in accordance with Article 28.19 (Implementation of Final Report), there is disagreement between the disputing Parties as to whether the responding Party has eliminated the non-conformity or the nullification or impairment.
2.A complaining Party may suspend benefits in accordance with paragraph 3 if that complaining Party and the responding Party have:
(a)been unable to agree on compensation within a period of 30 days after the period for developing compensation has begun; or
(b)agreed on compensation but the relevant complaining Party considers that the responding Party has failed to observe the terms of the agreement.

3.A complaining Party may, at any time after the conditions set out in paragraph 2 are met in relation to that complaining Party, provide written notice to
the responding Party that it intends to suspend benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend.3 The complaining Party may begin suspending benefits 30 days after the later of the date on which it provides notice under this paragraph or the date that the panel issues its determination under paragraph 5, as the case may be.
4.In considering what benefits to suspend under paragraph 3, the complaining Party shall apply the following principles and procedures:
(a)it should first seek to suspend benefits in the same subject matter as that in which the panel has determined non-conformity or nullification or impairment to exist;
(b)if it considers that it is not practicable or effective to suspend benefits in the same subject matter, and that the circumstances are serious enough, it may suspend benefits in a different subject matter. In the written notice referred to in paragraph 3, the complaining Party shall indicate the reasons on which its decision to suspend benefits in a different subject matter is based; and
(c)in applying the principles set out in subparagraphs (a) and (b), it shall take into account:
(i)the trade in the good, the supply of the service or other subject matter in which the panel has found the non- conformity or nullification or impairment, and the importance of that trade to the complaining Party;
(ii)that goods, all financial services covered under Chapter 11 (Financial Services), services other than such financial services, and each section in Chapter 18 (Intellectual Property), are each distinct subject matters; and
(iii)the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of benefits.
5.If the responding Party considers that:
3 For greater certainty, the phrase “the level of benefits that the Party proposes to suspend” refers to the level of concessions under this Agreement, the suspension of which a complaining Party considers will have an effect equivalent to that of the non-conformity, or nullification or impairment in the sense of Article 28.3.1(c) (Scope), determined to exist by the panel in its final report issued under Article 28.18.1 (Final Report).

(a)the level of benefits proposed to be suspended is manifestly excessive or the complaining Party has failed to follow the principles and procedures set out in paragraph 4; or
(b)it has eliminated the non-conformity or the nullification or impairment that the panel has determined to exist,
it may, within 30 days of the date of delivery of the written notice provided by the complaining Party under paragraph 3, request that the panel be reconvened to consider the matter. The responding Party shall deliver its request in writing to the complaining Party. The panel shall reconvene as soon as possible after the date of delivery of the request and shall present its determination to the disputing Parties no later than 90 days after it reconvenes to review a request under subparagraph (a) or (b), or 120 days after it reconvenes for a request under both subparagraphs (a) and (b). If the panel determines that the level of benefits the complaining Party proposes to suspend is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect.
6.Unless the panel has determined that the responding Party has eliminated the non-conformity or the nullification or impairment, 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 complaining Party has proposed to suspend under paragraph 3. If the panel determines that the complaining Party has not followed the principles and procedures set out in paragraph 4, the panel shall set out in its determination the extent to which the complaining Party may suspend benefits in which subject matter in order to ensure full compliance with the principles and procedures set out in paragraph 4. The complaining Party may suspend benefits only in a manner consistent with the panel's determination.
7.The complaining Party shall not suspend benefits if, within 30 days after it provides written notice of intent to suspend benefits or, if the panel is reconvened under paragraph 5, within 20 days after the panel provides its determination, the responding Party provides written notice to the complaining Party that it will pay a monetary assessment. The disputing Parties shall begin consultations no later than 10 days after the date on which the responding Party has given notice that it intends to pay a monetary assessment, with a view to reaching agreement on the amount of the assessment. If the disputing Parties are unable to reach an agreement within 30 days after consultations begin and are not engaged in discussions regarding the use of a fund under paragraph 8, the amount of the assessment shall be set at a level, in U.S. dollars, equal to 50 per cent of the level of the benefits the panel has determined under paragraph 5 to be of equivalent effect or, if the panel has not determined the level, 50 per cent of the level that the complaining Party has proposed to suspend under paragraph 3.
8.If a monetary assessment is to be paid to the complaining Party, then it shall be paid in U.S. dollars, or in an equivalent amount of the currency of the responding Party or in another currency agreed to by the disputing Parties in equal, quarterly instalments beginning 60 days after the date on which the responding Party gives notice that it intends to pay an assessment. If the circumstances warrant, the disputing Parties may decide that the responding Party shall pay an assessment into a fund designated by the disputing Parties for appropriate initiatives to facilitate trade between the Parties, including by further reducing unreasonable trade barriers or by assisting the responding Party to carry out its obligations under this Agreement.
9.At the same time as the payment of its first quarterly instalment is due, the responding Party shall provide to the complaining Party a plan of the steps it intends to take to eliminate the non-conformity or the nullification or impairment.

10.A responding Party may pay a monetary assessment in lieu of suspension of benefits by the complaining Party for a maximum of 12 months from the date on which the responding Party has provided written notice under paragraph 7 unless the complaining Party agrees to an extension.
11.A responding Party that seeks an extension of the period for the payment under paragraph 10 shall make a written request for that extension no later than 30 days before the expiration of the 12 month period. The disputing Parties shall determine the length and terms of any extension, including the amount of the assessment.
12.The complaining Party may suspend the application to the responding Party of benefits in accordance with paragraphs 3, 4 and 6, if:
(a)the responding Party fails to make a payment under paragraph 8 or fails to make the payment under paragraph 13 after electing to do so;
(b)the responding Party fails to provide the plan as required under paragraph 9; or
(c)the monetary assessment period, including any extension, has lapsed and the responding Party has not yet eliminated the non- conformity or the nullification or impairment.
13.If the responding Party notified the complaining Party that it wished to discuss the possible use of a fund and the disputing Parties do not agree on the use of a fund within three months of the date of the responding Party's notice under paragraph 7, and this time period has not been extended by agreement of the disputing Parties, the responding Party may elect to make the monetary assessment payment equal to 50 per cent of the amount determined under paragraph 5 or the level proposed by the complaining Party under paragraph 3 if there has been no determination under paragraph 5. If this election is made, the payment must be made within nine months of the responding Party's notice under paragraph 7 in U.S. dollars, or in an equivalent amount of the currency of the responding Party or in another currency agreed to by the disputing Parties. If the election is not made, the complaining Party may suspend the application of benefits in the amount determined under paragraph 5, or the level proposed by the complaining Party under paragraph 3 if there has been no determination under paragraph 5, at the end of the election period.
14.The complaining Party shall accord sympathetic consideration to the notice provided by the responding Party regarding the possible use of the fund referred to in paragraphs 8 and 13.
15.Compensation, suspension of benefits and the payment of a monetary assessment shall be temporary measures. None of these measures is preferred to full implementation through elimination of the non-conformity or the nullification or impairment. Compensation, suspension of benefits and the payment of a monetary assessment shall only be applied until the responding Party has eliminated the non-conformity or the nullification or impairment, or until a mutually satisfactory solution is reached.
Article 28.21: Compliance Review
1.Without prejudice to the procedures in Article 28.20 (Non-Implementation - Compensation and Suspension of Benefits), if a responding Party considers that it has eliminated the non-conformity or the nullification or impairment found by the panel, it may refer the matter to the panel by providing a written notice to the complaining Party or Parties. The panel shall issue its report on the matter no later than 90 days after the responding Party provides written notice.
2.If the panel determines that the responding Party has eliminated the non- conformity or the nullification or impairment, the complaining Party or Parties shall promptly

reinstate any benefits suspended under Article 28.20 (Non- Implementation - Compensation and Suspension of Benefits).
Section B: Domestic Proceedings and Private Commercial Dispute
Settlement
Article 28.22: Private Rights
No Party shall provide for a right of action under its law against any other Party on the ground that a measure of that 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.

Article 28.23: Alternative Dispute Resolution
1.Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
2.To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.
3.A Party shall be deemed to be in compliance with paragraph 2 if it is a party to, and is in compliance with, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on
10June 1958.

TPP – Investimento
(https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf)

CHAPTER 9
INVESTMENT
Section A
Article 9.1: Definitions
For the purposes of this Chapter:
Centre means the International Centre for Settlement of Investment Disputes (ICSID) established by the ICSID Convention;
claimant means an investor of a Party that is a party to an investment dispute with another Party. If that investor is a natural person, who is a permanent resident of a Party and a national of another Party, that natural person may not submit a claim to arbitration against that latter Party;
covered investment means, with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement for those Parties or established, acquired, or expanded thereafter;
disputing parties means the claimant and the respondent;
disputing party means either the claimant or the respondent;
enterprise means an enterprise as defined in Article 1.3 (General Definitions), and a branch of an enterprise;
enterprise of a Party means an enterprise constituted or organised under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there;1

freely usable currency means "freely usable currency" as determined by the International Monetary Fund under its Articles of Agreement;
ICC Arbitration Rules means the arbitration rules of the International Chamber of Commerce;
1 For greater certainty, the inclusion of a "branch" in the definitions of "enterprise" and "enterprise of a Party" is without prejudice to a Party's ability to treat a branch under its laws as an entity that has no independent legal existence and is not separately organised.

ICSID Additional Facility Rules means the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes;
ICSID Convention means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;
Inter-American Convention means the Inter-American Convention on International Commercial Arbitration, done at Panama, January 30, 1975;
investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
(a)an enterprise;
(b)shares, stock and other forms of equity participation in an enterprise;
(c)bonds, debentures, other debt instruments and loans;2, 3
(d)futures, options and other derivatives;
(e)turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
(f)intellectual property rights;
(g)licences, authorisations, permits and similar rights conferred pursuant to the Party's law;4 and
2 Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.
3 A loan issued by one Party to another Party is not an investment.
4 Whether a particular type of licence, authorisation, permit or similar instrument (including a concession to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the Party's law. Among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the Party's law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.
9-2

(h)other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges,
but investment does not mean an order or judgment entered in a judicial or administrative action.
investment agreement means a written agreement5 that is concluded and takes effect after the date of entry into force of this Agreement6 between an authority at the central level of government7 of a Party and a covered investment or an investor of another

Party and that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 9.25.2 (Governing Law), on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, and that grants rights to the covered investment or investor:

(a)with respect to natural resources that a national authority controls,

such as oil, natural gas, rare earth minerals, timber, gold, iron ore and other similar resources,8 including for their exploration, extraction, refining, transportation, distribution or sale;

5 "Written agreement" refers to an agreement in writing, negotiated and executed by both parties, whether in a single instrument or in multiple instruments. For greater certainty:

(a)a unilateral act of an administrative or judicial authority, such as a permit, licence, authorisation, certificate, approval, or similar instrument issued by a Party in its regulatory capacity, or a subsidy or grant, or a decree, order or judgment, standing alone; and

(b)an administrative or judicial consent decree or order,

shall not be considered a written agreement.

6 For greater certainty, a written agreement that is concluded and takes effect after the entry into force of this Agreement does not include the renewal or extension of an agreement in accordance with the provisions of the original agreement, and on the same or substantially the same terms and conditions as the original agreement, which has been concluded and entered in force prior to the entry into force of this Agreement.

7 For the purposes of this definition, "authority at the central level of government" means, for unitary states, an authority at the ministerial level of government. Ministerial level of government means government departments, ministries or other similar authorities at the central level of government, but does not include: (a) a governmental agency or organ established by a Party's constitution or a particular legislation that has a separate legal personality from government departments, ministries or other similar authorities under a Party's law, unless the day to day operations of that agency or organ are directed or controlled by government departments, ministries or other similar authorities; or (b) a governmental agency or organ that acts exclusively with respect to a particular region or province.

8 For the avoidance of doubt, this subparagraph does not include an investment agreement with respect to land, water or radio spectrum.

---

investment authorisation10

(b)to supply services on behalf of the Party for consumption by the general public for: power generation or distribution, water treatment or distribution, telecommunications, or other similar

services supplied on behalf of the Party for consumption by the general public;9 or

(c)to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams or pipelines or other similar projects; provided, however, that the infrastructure is not for the exclusive or predominant use and benefit of the government;

means an authorisation that the foreign investment authority of a Party11 grants to a covered investment or an investor of another Party;

investor of a non-Party means, with respect to a Party, an investor that attempts to make,12 is making, or has made an investment in the territory of that Party, that is not an investor of a Party;

investor of a Party means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party;
LCIA Arbitration Rules means the arbitration rules of the London Court of International Arbitration;
9 For the avoidance of doubt, this subparagraph does not cover correctional services, healthcare services, education services, childcare services, welfare services or other similar social services.
10For greater certainty, the following are not encompassed within this definition: (i) actions taken by a Party to enforce laws of general application, such as competition, environmental, health or other regulatory laws; (ii) non-discriminatory licensing regimes; and (iii) a Party's decision to grant to a covered investment or an investor of another Party a particular investment incentive or other benefit, that is not provided by a foreign investment authority in an investment authorisation.
11For the purposes of this definition, "foreign investment authority" means, as of the date of entry into force of this Agreement: (a) for Australia, the Treasurer of the Commonwealth of Australia under Australia's foreign investment policy including the Foreign Acquisitions and Takeovers Act 1975; (b) for Canada, the Minister of Industry, but only when issuing a notice under Section 21 or
22of the Investment Canada Act; (c) for Mexico, the National Commission of Foreign Investments (Comisión Nacional de Inversiones Extranjeras); and (d) for New Zealand, the Minister of Finance, the Minister of Fisheries or the Minister for Land Information, to the extent that they make a decision to grant consent under the Overseas Investment Act 2005.
12For greater certainty, the Parties understand that, for the purposes of the definitions of "investor of a non-Party" and "investor of a Party", an investor "attempts to make" an investment when that investor has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or licence.

negotiated restructuring means the restructuring or rescheduling of a debt instrument that has been effected through (a) a modification or amendment of that debt instrument, as provided for under its terms, or (b) a comprehensive debt exchange or other similar process in which the holders of no less than 75 per cent of the aggregate principal amount of the outstanding debt under that debt instrument have consented to the debt exchange or other process;
New York Convention means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;
non-disputing Party means a Party that is not a party to an investment dispute;
protected information means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law, including classified government information;
respondent means the Party that is a party to an investment dispute;
Secretary-General means the Secretary-General of ICSID; and
UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law.
Article 9.2: Scope
1.This Chapter shall apply to measures adopted or maintained by a Party relating to:
(a)investors of another Party;
(b)covered investments; and

(c)with respect to Article 9.10 (Performance Requirements) and Article 9.16 (Investment and Environmental, Health and other Regulatory Objectives), all investments in the territory of that Party.

2.A Party's obligations under this Chapter shall apply to measures adopted or maintained by:

(a)the central, regional or local governments or authorities of that Party; and

(b)any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party.13

3.For greater certainty, this Chapter shall not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement for that Party.

Article 9.3: Relation to Other Chapters

1.In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency.

2.A requirement of a Party that a service supplier of another Party post a bond or other form of financial security as a condition for the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter shall apply to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that the bond or financial security is a covered investment.

3.This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 11 (Financial Services).

Article 9.4: National Treatment14

1.Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2.Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

13For greater certainty, governmental authority is delegated under the Party's law, including through a legislative grant or a government order, directive or other action transferring or authorising the exercise of governmental authority.

14For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

9-6

---

3. For greater certainty, the treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

Article 9.5: Most-Favoured-Nation Treatment

1.Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party

with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2.Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3.For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).
Article 9.6: Minimum Standard of Treatment15
1.Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security.
2.For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:
(a)"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
15 Article 9.6 (Minimum Standard of Treatment) shall be interpreted in accordance with Annex 9- A (Customary International Law).

(b)"full protection and security" requires each Party to provide the level of police protection required under customary international law.
3.A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
4.For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.
5.For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.
Article 9.7: Treatment in Case of Armed Conflict or Civil Strife
1.Notwithstanding Article 9.12.6(b) (Non-Conforming Measures), each Party shall accord to investors of another Party and to covered investments non- discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
2.Notwithstanding paragraph 1, if an investor of a Party, in a situation referred to in paragraph 1, suffers a loss in the territory of another Party resulting from:
(a)requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
(b)destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,
the latter Party shall provide the investor restitution, compensation or both, as appropriate, for that loss.

3. Paragraph 1 shall not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 9.4 (National Treatment) but for Article 9.12.6(b) (Non-Conforming Measures).

Article 9.8: Expropriation and Compensation16

1.No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except:

(a)for a public purpose;17, 18

(b)in a non-discriminatory manner;

(c)on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and

(d)in accordance with due process of law.

2.Compensation shall:

(a)be paid without delay;

(b)be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);

(c)not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d)be fully realisable and freely transferable.

3.If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

16Article 9.8 (Expropriation and Compensation) shall be interpreted in accordance with Annex 9- B (Expropriation) and is subject to Annex 9-C (Expropriation Relating to Land).

17For greater certainty, for the purposes of this Article, the term "public purpose" refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as "public necessity", "public interest" or "public use".

18For the avoidance of doubt: (i) if Brunei Darussalam is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the Land Code (Cap. 40) and the Land Acquisition Act (Cap. 41), as of the date of entry into force of the Agreement for it; and (ii) if Malaysia is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the Land Acquisitions Act 1960, Land Acquisition Ordinance 1950 of the State of Sabah and the Land Code 1958 of the State of Sarawak, as of the date of entry into force of the Agreement for it.

9-9

4.If the fair market value is denominated in a currency that is not freely usable, the compensation paid, converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than:

(a)the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus

(b)interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5.This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property
rights, to the extent that the issuance, revocation, limitation or creation is consistent with Chapter 18 (Intellectual Property) and the TRIPS Agreement.19
6.For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant,
(a)in the absence of any specific commitment under law or contract to issue, renew or maintain that subsidy or grant; or
(b)in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction and maintenance of that subsidy or grant,
standing alone, does not constitute an expropriation.
Article 9.9: Transfers20
1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
(a)contributions to capital;21
(b)profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance fees and other fees;
19For greater certainty, the Parties recognise that, for the purposes of this Article, the term "revocation" of intellectual property rights includes the cancellation or nullification of those rights, and the term "limitation" of intellectual property rights includes exceptions to those rights.
20For greater certainty, this Article is subject to Annex 9-E (Transfers).
21For greater certainty, contributions to capital include the initial contribution.

(c)proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
(d)payments made under a contract, including a loan agreement;
(e)payments made pursuant to Article 9.7 (Treatment in Case of Armed Conflict or Civil Strife) and Article 9.8 (Expropriation and Compensation); and
(f)payments arising out of a dispute.
2.Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
3.Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of another Party.
4.Notwithstanding paragraphs 1, 2 and 3, a Party may prevent or delay a
transfer through the equitable, non-discriminatory and good faith application of its laws22 relating to:
(a)bankruptcy, insolvency or the protection of the rights of creditors;
(b)issuing, trading or dealing in securities, futures, options or derivatives;
(c)criminal or penal offences;
(d)financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
(e)ensuring compliance with orders or judgments in judicial or administrative proceedings.
5.Notwithstanding paragraph 3, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

22 For greater certainty, this Article does not preclude the equitable, non-discriminatory and good faith application of a Party's laws relating to its social security, public retirement or compulsory savings programmes.

Article 9.10: Performance Requirements

1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:23

(a)to export a given level or percentage of goods or services;

(b)to achieve a given level or percentage of domestic content;

(c)to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d)to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment;

(e)to restrict sales of goods or services in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings;

(f)to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory;

(g)to supply exclusively from the territory of the Party the goods that the investment produces or the services that it supplies to a specific regional market or to the world market;

(h)(i) to purchase, use or accord a preference to, in its territory,

technology of the Party or of a person of the Party;24 or

(ii)that prevents the purchase or use of, or the according of a preference to, in its territory, a particular technology; or

(i)to adopt:

23For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "requirement" or a "commitment or undertaking" for the purposes of paragraph 1.

24For the purposes of this Article, the term "technology of the Party or of a person of the Party" includes technology that is owned by the Party or a person of the Party, and technology for which the Party or a person of the Party holds an exclusive licence.

(i)a given rate or amount of royalty under a licence contract;

or

(ii)a given duration of the term of a licence contract,

in regard to any licence contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future licence contract25 freely entered into between the investor and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with that licence contract by an exercise of

non- judicial governmental authority of a Party. For greater certainty, paragraph 1(i) does not apply when the licence contract is concluded between the investor and a Party.
2.No Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, on compliance with any requirement:
(a)to achieve a given level or percentage of domestic content;
(b)to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
(c)to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment; or
(d)to restrict sales of goods or services in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings.
3.(a) Nothing in paragraph 2 shall be construed to prevent a Party from
conditioning the receipt or continued receipt of an advantage, in connection with an investment of an investor of a Party or of a non-Party in its territory, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
(b)Paragraphs 1(f), 1(h) and 1(i) shall not apply:
25 A "licence contract" referred to in this subparagraph means any contract concerning the licensing of technology, a production process, or other proprietary knowledge.

(i)if a Party authorises use of an intellectual property right in accordance with Article 3126 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
(ii)if the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.27, 28
(c)Paragraph 1(i) shall not apply if the requirement is imposed or the commitment or undertaking is enforced by a tribunal as equitable remuneration under the Party's copyright laws.
(d)Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
(i)necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
(ii)necessary to protect human, animal or plant life or health; or
(iii)related to the conservation of living or non-living exhaustible natural resources.
(e)Paragraphs 1(a), 1(b), 1(c), 2(a) and 2(b) shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
(f)Paragraphs 1(b), 1(c), 1(f), 1(g), 1(h), 1(i), 2(a) and 2(b) shall not apply to government procurement.

26The reference to "Article 31" includes any waiver or amendment to the TRIPS Agreement implementing paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health
(WT/MIN (01)/DEC/2).
27The Parties recognise that a patent does not necessarily confer market power.
28In the case of Brunei Darussalam, for a period of 10 years after the entry into force of this Agreement for it or until it establishes a competition authority or authorities, whichever occurs earlier, the reference to the Party's competition laws includes competition regulations.

(g)Paragraphs 2(a) and 2(b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
(h)Paragraphs (1)(h) and (1)(i) shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment.
4.For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, from imposing or enforcing a requirement, or enforcing a commitment or undertaking, to employ or train workers in its territory provided that the employment or training does not require the transfer of a particular technology, production process or other proprietary knowledge to a person in its territory.
5.For greater certainty, paragraphs 1 and 2 shall not apply to any commitment, undertaking or requirement other than those set out in those paragraphs.
6.This Article does not preclude enforcement of any commitment, undertaking or requirement between private parties, if a Party did not impose or require the commitment, undertaking or requirement.
Article 9.11: Senior Management and Boards of Directors
1.No Party shall require that an enterprise of that Party that is a covered investment appoint to a senior management position a natural person of any particular nationality.
2.A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 9.12: Non-Conforming Measures
1.Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to:
(a)any existing non-conforming measure that is maintained by a Party at:
(i)the central level of government, as set out by that Party in its Schedule to Annex I;
(ii)a regional level of government, as set out by that Party in its Schedule to Annex I; or
(iii)a local level of government;
(b)the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
(c)an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed

immediately before the amendment, with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10
(Performance Requirements) or Article 9.11 (Senior Management and Boards of Directors).29
2.Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out by that Party in its Schedule to Annex II.
3.If a Party considers that a non-conforming measure applied by a regional level of government of another Party, as referred to in paragraph 1(a)(ii), creates a material impediment to investment in relation to the former Party, it may request consultations with regard to that measure. These Parties shall enter into
consultations with a view to exchanging information on the operation of the measure and to considering whether further steps are necessary and appropriate.30
29With respect to Viet Nam, Annex 9-I (Non-Conforming Measures Ratchet Mechanism) applies.
30For greater certainty, any Party may request consultations with another Party regarding a non- conforming measure applied by a central level of government, as referred to in paragraph 1(a)(i).
9-16
4.No Party shall, under any measure adopted after the date of entry into force of this Agreement for that Party and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
5.(a) Article 9.4 (National Treatment) shall not apply to any measure
that falls within an exception to, or derogation from, the obligations which are imposed by:
(i)Article 18.8 (National Treatment); or
(ii)Article 3 of the TRIPS Agreement, if the exception or derogation relates to matters not addressed by Chapter 18 (Intellectual Property).
(b)Article 9.5 (Most-Favoured-Nation Treatment) shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, or an exception to, or derogation from, the obligations which are imposed by:
(i)Article 18.8 (National Treatment); or
(ii)Article 4 of the TRIPS Agreement.
6.Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to:
(a)government procurement; or
(b)subsidies or grants provided by a Party, including government- supported loans, guarantees and insurance.
7.For greater certainty, any amendments or modifications to a Party's Schedules to Annex I or Annex II, pursuant to this Article, shall be made in accordance with Article 30.2 (Amendments).
Article 9.13: Subrogation
If a Party, or any agency, institution, statutory body or corporation designated by the Party, makes a payment to an investor of the Party under a guarantee, a contract of insurance or other form of indemnity that it has entered into with respect to a covered investment, the other Party in whose territory the covered investment was made shall recognise the subrogation or transfer of any rights the investor would have possessed

under this Chapter with respect to the covered investment but for the subrogation, and the investor shall be precluded from pursuing these rights to the extent of the subrogation.

Article 9.14: Special Formalities and Information Requirements

1.Nothing in Article 9.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with a covered investment, such as a residency requirement for registration or a requirement that a covered investment be legally constituted under the laws or regulations of the Party, provided that these formalities do not materially impair the protections afforded by the Party to investors of another Party and covered investments pursuant to this Chapter.

2.Notwithstanding Article 9.4 (National Treatment) and Article 9.5 (Most- Favoured-Nation Treatment), a Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 9.15: Denial of Benefits

1.A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if the enterprise:

(a)is owned or controlled by a person of a non-Party or of the denying Party; and

(b)has no substantial business activities in the territory of any Party other than the denying Party.

2.A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

Article 9.16: Investment and Environmental, Health and other Regulatory Objectives

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

Article 9.17: Corporate Social Responsibility

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.

Section B: Investor-State Dispute Settlement

Article 9.18: Consultation and Negotiation

1.In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.

2.The claimant shall deliver to the respondent a written request for consultations setting out a brief description of facts regarding the measure or measures at issue.

3.For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.
Article 9.19: Submission of a Claim to Arbitration
1. If an investment dispute has not been resolved within six months of the receipt by the respondent of a written request for consultations pursuant to Article
9.18.2(Consultation and Negotiation):
(a)the claimant, on its own behalf, may submit to arbitration under this Section a claim:
(i)that the respondent has breached:

(A)an obligation under Section A;
(B)an investment authorisation;31 or
(C)an investment agreement; and
(ii)that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
(b)the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim:
(i)that the respondent has breached:
(A)an obligation under Section A;
(B)an investment authorisation; or
(C)an investment agreement; and
(ii)that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,
provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.
2.When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in
connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.32
3.At least 90 days before submitting any claim to arbitration under this
Section, the claimant shall deliver to the respondent a written notice of its
31Without prejudice to a claimant's right to submit to arbitration other claims under this Article, a claimant shall not submit to arbitration a claim under subparagraph (a)(i)(B) or subparagraph (b)(i)(B) that a Party covered by Annex 9-H has breached an investment authorisation by enforcing conditions or requirements under which the investment authorisation was granted.
32In the case of investment authorisations, this paragraph shall apply only to the extent that the investment authorisation, including instruments executed after the date the authorisation was granted, creates rights and obligations for the disputing parties
.intention to submit a claim to arbitration (notice of intent). The notice shall specify:
(a)the name and address of the claimant and, if a claim is submitted on behalf of an enterprise, the name, address and place of incorporation of the enterprise;
(b)for each claim, the provision of this Agreement, investment authorisation or investment agreement alleged to have been breached and any other relevant provisions;
(c)the legal and factual basis for each claim; and
(d)the relief sought and the approximate amount of damages claimed.

4.The claimant may submit a claim referred to in paragraph 1 under one of the following alternatives:
(a)the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;
(b)the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention;
(c)the UNCITRAL Arbitration Rules; or
(d)if the claimant and respondent agree, any other arbitral institution or any other arbitration rules.
5.A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration (notice of arbitration):
(a)referred to in the ICSID Convention is received by the Secretary- General;
(b)referred to in the ICSID Additional Facility Rules is received by the Secretary-General;
(c)referred to in the UNCITRAL Arbitration Rules, together with the statement of claim referred to therein, are received by the respondent; or
(d)referred to under any arbitral institution or arbitration rules selected under paragraph 4(d) is received by the respondent.
9-21
A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitration rules.
6.The arbitration rules applicable under paragraph 4 that are in effect on the date the claim or claims were submitted to arbitration under this Section shall govern the arbitration except to the extent modified by this Agreement.
7.The claimant shall provide with the notice of arbitration:
(a)the name of the arbitrator that the claimant appoints; or
(b)the claimant's written consent for the Secretary-General to appoint that arbitrator.
Article 9.20: Consent of Each Party to Arbitration
1.Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.
2.The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall be deemed to satisfy the requirements of:
(a)Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;
(b)Article II of the New York Convention for an "agreement in writing"; and
(c)Article I of the Inter-American Convention for an "agreement".
Article 9.21: Conditions and Limitations on Consent of Each Party
1.No claim shall be submitted to arbitration under this Section if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 9.19.1 (Submission of a Claim to Arbitration) and knowledge that the claimant (for claims brought under Article 9.19.1(a)) or the enterprise (for claims brought under Article 9.19.1(b)) has incurred loss or damage.
2.No claim shall be submitted to arbitration under this Section unless:
(a)the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b)the notice of arbitration is accompanied:

(i)for claims submitted to arbitration under Article 9.19.1(a) (Submission of a Claim to Arbitration), by the claimant's written waiver; and
(ii)for claims submitted to arbitration under Article 9.19.1(b) (Submission of a Claim to Arbitration), by the claimant's and the enterprise's written waivers,
of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 9.19 (Submission of a Claim to Arbitration).
3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 9.19.1(a) (Submission of a Claim to Arbitration)) and the claimant or the enterprise (for claims brought under Article 9.19.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.
Article 9.22: Selection of Arbitrators
1.Unless the disputing parties agree otherwise, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
2.The Secretary-General shall serve as appointing authority for an arbitration under this Section.
3.If a tribunal has not been constituted within a period of 75 days after the date that a claim is submitted to arbitration under this Section, the Secretary- General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either the respondent or the Party of the claimant as the presiding arbitrator unless the disputing parties agree otherwise.
4.For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:
(a)the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
(b)a claimant referred to in Article 9.19.1(a) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
(c)a claimant referred to in Article 9.19.1(b) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.
5.In the appointment of arbitrators to a tribunal for claims submitted under Article 9.19.1(a)(i)(B) (Submission of a Claim to Arbitration), Article 9.19.1(b)(i)(B), Article 9.19.1(a)(i)(C) or Article 9.19.1(b)(i)(C), each disputing party shall take into account the expertise or relevant experience of particular candidates with respect to the relevant governing law under Article 9.25.2 (Governing Law). If the parties fail to agree on the appointment of the presiding arbitrator, the Secretary-General shall also take into account the expertise or relevant experience of particular candidates with respect to the relevant governing law under Article 9.25.2.

6.The Parties shall, prior to the entry into force of this Agreement, provide guidance on the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter 28 (Dispute Settlement) to arbitrators selected to serve on investor-State dispute settlement tribunals pursuant to this Article, including any necessary modifications to the Code of Conduct to conform to the context of investor-State dispute settlement. The Parties shall also provide guidance on the application of other relevant rules or guidelines on conflicts of interest in international arbitration. Arbitrators shall comply with that guidance in addition to the applicable arbitral rules regarding independence and impartiality of arbitrators.

Article 9.23: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitration rules applicable under Article 9.19.4 (Submission of a Claim to Arbitration). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2.A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

3.After consultation with the disputing parties, the tribunal may accept and consider written amicus curiae submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. Each submission shall identify the author; disclose any affiliation, direct or indirect, with any disputing party; and identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in a language of the arbitration and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions. The tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

4.Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal's jurisdiction, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.29 (Awards) or that a claim is manifestly without legal merit.

(a)An objection under this paragraph shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.

(b)On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c)In deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.29 (Awards), the tribunal shall assume to be true the claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment

9-25

thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d)The respondent does not waive any objection as to competence, including an objection to jurisdiction, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5.In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6.When the tribunal decides a respondent's objection under paragraph 4 or 5, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7.For greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 9.6 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.

8.A respondent may not assert as a defence, counterclaim, right of set-off or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

9.A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 9.19 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation.

10.In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any comments and issue its decision or award no later than 45 days after the expiration of the 60 day comment period.

11.In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for

transparency of proceedings similar to the transparency provisions established in Article 9.24 (Transparency of Arbitral Proceedings).

Article 9.24: Transparency of Arbitral Proceedings

1.Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

(a)the notice of intent;

(b)the notice of arbitration;

(c)pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);

(d)minutes or transcripts of hearings of the tribunal, if available; and

(e)orders, awards and decisions of the tribunal.

2.The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such

---

information from disclosure which may include closing the hearing for the duration of the discussion of that information.

3.Nothing in this Section, including paragraph 4(d), requires a respondent to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing, protected information, or to furnish or allow access to information that it may withhold in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information).33

4.Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a)subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information if the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b)any disputing party claiming that certain information constitutes protected information shall clearly designate the information according to any schedule set by the tribunal;

(c)a disputing party shall, according to any schedule set by the tribunal, submit a redacted version of the document that does not contain the protected information. Only the redacted version shall be disclosed in accordance with paragraph 1; and

(d)the tribunal, subject to paragraph 3, shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that the information was not properly designated, the disputing party that submitted the information may:

(i)withdraw all or part of its submission containing that information; or

(ii)agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under subparagraph (d)(i) by the

33 For greater certainty, when a respondent chooses to disclose to the tribunal information that may be withheld in accordance with Article 29.2 (Security Exceptions)

or Article 29.7 (Disclosure of Information), the respondent may still withhold that information from disclosure to the public.

---

disputing party that first submitted the information or redesignate the information consistent with the designation under subparagraph (d)(ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavour to apply those laws in a manner sensitive to protecting from disclosure information that has been designated as protected information.

Article 9.25: Governing Law

1.Subject to paragraph 3, when a claim is submitted under Article 9.19.1(a)(i)(A) (Submission of a Claim to Arbitration) or Article 9.19.1(b)(i)(A),
the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.34

2.Subject to paragraph 3 and the other provisions of this Section, when a claim is submitted under Article 9.19.1(a)(i)(B) (Submission of a Claim to Arbitration), Article 9.19.1(a)(i)(C), Article 9.19.1(b)(i)(B) or Article 9.19.1(b)(i)(C), the tribunal shall apply:

(a)the rules of law applicable to the pertinent investment authorisation or specified in the pertinent investment authorisation or investment agreement, or as the disputing parties may agree otherwise; or

(b)if, in the pertinent investment agreement the rules of law have not been specified or otherwise agreed:

(i)the law of the respondent, including its rules on the conflict of laws;35 and

(ii)such rules of international law as may be applicable.

3.A decision of the Commission on the interpretation of a provision of this Agreement under Article 27.2.2(f) (Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

34For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent when it is relevant to the claim as a matter of fact.

35The “law of the respondent” means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case. For greater certainty, the law of the respondent includes the relevant law governing the investment agreement, including law on damages, mitigation, interest and estoppel.

Article 9.26: Interpretation of Annexes

1.If a respondent asserts as a defence that the measure alleged to be a breach is within the scope of a non-conforming measure set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Commission on the issue. The Commission shall submit in writing any decision on its interpretation under Article 27.2.2(f) (Functions of the Commission) to the tribunal within 90 days of delivery of the request.

2.A decision issued by the Commission under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Commission fails to issue such a decision within 90 days, the tribunal shall decide the issue.

Article 9.27: Expert Reports

Without prejudice to the appointment of other kinds of experts when authorised by the applicable arbitration rules, a tribunal, on request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning scientific matters raised by a disputing party in a proceeding, subject to any terms and conditions that the disputing parties may agree.

Article 9.28: Consolidation

1.If two or more claims have been submitted separately to arbitration under Article 9.19.1 (Submission of a Claim to Arbitration) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2.A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

(a)the names and addresses of all the disputing parties sought to be covered by the order;

(b)the nature of the order sought; and

(c)the grounds on which the order is sought.

9-30

3.Unless the Secretary-General finds within a period of 30 days after the date of receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4.Unless all the disputing parties sought to be covered by the order agree otherwise, a tribunal established under this Article shall comprise three arbitrators:

(a)one arbitrator appointed by agreement of the claimants;

(b)one arbitrator appointed by the respondent; and

(c)the presiding arbitrator appointed by the Secretary-General, provided that the presiding arbitrator is not a national of the respondent or of a Party of any claimant.

5.If, within a period of 60 days after the date when the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary- General, on request of any disputing party sought to be covered by the order, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

6.If a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 9.19.1 (Submission of a Claim to Arbitration) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a)assume jurisdiction over, and hear and determine together, all or part of the claims;

(b)assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c)instruct a tribunal previously established under Article 9.22 (Selection of Arbitrators) to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:

(i)that tribunal, on request of a claimant that was not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii)that tribunal shall decide whether a prior hearing shall be repeated.

9-31

7. If a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 9.19.1 (Submission of a Claim to Arbitration) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6. The request shall specify:
(a)the name and address of the claimant;
(b)the nature of the order sought; and
(c)the grounds on which the order is sought.
The claimant shall deliver a copy of its request to the Secretary-General.
8.A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.
9.A tribunal established under Article 9.22 (Selection of Arbitrators) shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.
10.On the application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 9.22 (Selection of Arbitrators) be stayed, unless the latter tribunal has already adjourned its proceedings.
Article 9.29: Awards
1.When a tribunal makes a final award, the tribunal may award, separately or in combination, only:
(a)monetary damages and any applicable interest; and
(b)restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.
2.For greater certainty, if an investor of a Party submits a claim to arbitration under Article 9.19.1(a) (Submission of a Claim to Arbitration), it may recover only for loss or damage that it has incurred in its capacity as an investor of a Party.
3.A tribunal may also award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceeding, and shall determine how and by whom those costs and attorney's fees shall be paid, in accordance with this Section and the applicable arbitration rules.
4.For greater certainty, for claims alleging the breach of an obligation under Section A with respect to an attempt to make an investment, when an award is made in favour of the claimant, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages. If the tribunal determines such claims to be frivolous, the tribunal may award to the respondent reasonable costs and attorney's fees.
5.Subject to paragraph 1, if a claim is submitted to arbitration under Article 9.19.1(b) (Submission of a Claim to Arbitration) and an award is made in favour of the enterprise:
(a)an award of restitution of property shall provide that restitution be made to the enterprise;
(b)an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
(c)the award shall provide that it is made without prejudice to any right that any person may have under applicable domestic law with respect to the relief provided in the award.
6.A tribunal shall not award punitive damages.
7.An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

8.Subject to paragraph 9 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
9.A disputing party shall not seek enforcement of a final award until:
(a)in the case of a final award made under the ICSID Convention:
(i)120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
(ii)revision or annulment proceedings have been completed; and
(b)in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected
9-33
pursuant to Article 9.19.4(d) (Submission of a Claim to Arbitration):
(i)90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or
(ii)a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
10.Each Party shall provide for the enforcement of an award in its territory.
11.If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 28.7 (Establishment of a Panel). The requesting Party may seek in those proceedings:
(a)a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
(b)in accordance with Article 28.17 (Initial Report), a recommendation that the respondent abide by or comply with the final award.
12.A disputing party may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 11.
13.A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention and Article I of the Inter- American Convention.
Article 9.30: Service of Documents
Delivery of notice and other documents to a Party shall be made to the place named for that Party in Annex 9-D (Service of Documents on a Party Under Section B). A Party shall promptly make publicly available and notify the other Parties of any change to the place referred to in that Annex.
9-34

TTIP
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the
negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.
1
EU-US TTIP Negotiations
TEXTUAL PROPOSAL
DISPUTE SETTLEMENT
General Notes:

1. Articles are numbered from 1 for ease of reading, especially when an Article cross-refers
to another provision of the Dispute Settlement chapter. The final numbering will be revised once the chapter is integrated into the rest of the Agreement.
2. All reference to institutional bodies is provisional and will be revised in the light of the
institutional part of the FTA.
Section 1
Objective and Scope
ARTICLE 1
Objective
The objective of this Chapter is to establish an effective and efficient mechanism for avoiding
and settling any dispute between the Parties concerning the interpretation and application of
this Agreement with a view to arriving, where possible, at a mutually agreed solution.
ARTICLE 2
Scope of application
This Chapter shall apply with respect to any dispute concerning the interpretation and application of the provisions of this Agreement, except as otherwise provided.
Section 2
Consultations and mediation
ARTICLE 3
Consultations
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the
negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.
2
EU-US TTIP Negotiations
1. The Parties shall endeavour to resolve any dispute referred to in Article 2 by entering into consultations in good faith with the aim of reaching a mutually agreed solution.
2. A Party shall seek consultations by means of a written request to the other Party, copied to the [institutional body to be defined], identifying the measure at issue and the provisions referred to in Article 2 that it considers applicable.
3. Consultations shall be held within 30 days of the date of receipt of the request and take place, unless the Parties agree otherwise, in the territory of the Party to which the request is made. The consultations shall be deemed concluded within 30 days of the date of receipt of the request, unless both Parties agree to continue consultations. Consultations, in particular all information disclosed and positions taken by the Parties during these proceedings, shall be confidential, and without prejudice to the rights of either Party in any further proceedings.
4. Consultations on matters of urgency, including those regarding perishable goods or seasonal goods or services shall be held within 15 days of the date of receipt of the request by the requested Party, and shall be deemed concluded within those 15 days unless both Parties agree to continue consultations.
5. If the Party to which the request is made does not respond to the request for

consultations within 10 days of the date of its receipt, or if consultations are not held within the timeframes laid down in paragraph 3 or in paragraph 4 of this Article respectively, or if the Parties agree not to have consultations, or if consultations have been concluded and no mutually agreed solution has been reached, the Party that sought consultations may have recourse to Article 5.
6. During consultations each Party shall deliver sufficient factual information, so as to allow a complete examination of the manner in which the measure at issue could affect the operation and application of this Agreement.
ARTICLE 4
Any Party may request the other Party to enter into a mediation procedure with respect to any measure adversely affecting trade or investment between the Parties pursuant to Annex III (Mediation Mechanism) to this Agreement.
Section 3
Dispute Settlement Procedures
Sub-Section 1: Arbitration Procedure
ARTICLE 5
Initiation of the arbitration procedure
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the
negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.
3
EU-US TTIP Negotiations
1. Where the Parties have failed to resolve the dispute by recourse to consultations as provided for in Article 3, the Party that sought consultations may request the establishment of an arbitration panel in accordance with this Article.
2. The request for the establishment of an arbitration panel shall be made in writing to the other Party and the [institutional body to be defined]. The complaining Party shall identify in its request the measure at issue, and it shall explain how such measure constitutes a breach of the provisions referred to in Article 2 in a manner sufficient to present the legal basis for the complaint clearly.
ARTICLE 6
Establishment of the arbitration panel
1. An arbitration panel shall be composed of three arbitrators.
2. Within 10 days of the date of receipt by the Party complained against of the request for the establishment of an arbitration panel, the Parties shall consult in order to reach an agreement on the composition of the arbitration panel.
3. In the event that the Parties are unable to agree on the composition of the arbitration panel within the time frame laid down in paragraph 2 of this Article, each Party may appoint an arbitrator from the sub-list of that Party established under Article 22 within 5 days from the expiry of the timeframe established in paragraph 2 of this Article. If any of the Parties fails to appoint the arbitrator, the arbitrator shall, upon request of the other Party, be selected by lot by the chair of the [institutional body to be defined], or the chair's delegate, from the sub-list of that Party [contained in the list established under Article 22].
4. Unless the Parties reach an agreement concerning the chairperson of the arbitration panel within the timeframe established in paragraph 2 of this Article, the chair of the

[institutional body to be defined] or the chair's delegate, shall, upon request of any of the Parties, select by lot the chairperson of the arbitration panel from the sub-list of chairpersons [contained in the list established under Article 22].
5. The chair of the [institutional body to be defined], or the chair's delegate, shall select the arbitrators within five days of the request by either party referred to in paragraph 3 or paragraph 4.
6. The date of establishment of the arbitration panel shall be the date on which the three selected arbitrators accept their appointment according to the Rules of Procedure.
7. Should any of the lists provided for in Article 22 not be established or not contain sufficient names at the time a request is made pursuant to paragraph 3 or paragraph 4 of this Article, the arbitrators shall be drawn by lot from the individuals who have been formally proposed by one or both of the Parties.
ARTICLE 7
Preliminary ruling on urgency
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the
negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.

If a Party so requests the arbitration panel shall give, within 10 days of its establishment, a
preliminary ruling on whether it deems the case to be urgent.
ARTICLE 8
Panel report
1. The arbitration panel shall issue an interim report to the Parties setting out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes, not later than 90 days from the date of establishment of the arbitration panel. Where it considers that this deadline cannot be met, the chairperson of the arbitration panel shall notify the Parties and the [institutional body to be defined] in writing, stating the reasons for the delay and the date on which the panel plans to issue its interim report. Under no circumstances should the interim report be issued later than 120 days after the date of establishment of the arbitration panel.
2. Any Party may submit a written request to the arbitration panel to review precise aspects of the interim report within 14 days of its notification.
3. In cases of urgency, including those involving perishable goods or seasonal goods or services, the arbitration panel shall make every effort to issue its interim report within 45 days and, in any case, no later than 60 days after the date of establishment of the arbitration panel. Any Party may submit a written request to the arbitration panel to review precise aspects of the interim report, within 7 days of the notification of the interim report.
4. After considering any written comments by the Parties on the interim report, the arbitration panel may modify its report and make any further examination it considers appropriate. The findings of the final panel ruling shall include a sufficient discussion of the arguments made at the interim review stage, and shall answer clearly to the questions and observations of the two Parties.

ARTICLE 9
Notification of the Ruling of the Arbitration Panel
1. The arbitration panel shall notify its ruling to the Parties and to the [institutional body to be defined] within 120 days from the date of establishment of the arbitration panel. Where it considers that this deadline cannot be met, the chairperson of the arbitration panel shall notify the Parties and the [institutional body to be defined] in writing, stating the reasons for the delay and the date on which the panel plans to issue its ruling. Under no circumstances should the ruling be notified later than 150 days after the date of establishment of the arbitration panel.
2. In cases of urgency, including those involving perishable goods or seasonal goods or services, the arbitration panel shall make every effort to notify its ruling within 60
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the
negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.

days from the date of its establishment. Under no circumstances should the ruling be notified later than 75 days after the date of its establishment.
Sub-Section 2: Compliance
ARTICLE 10
Compliance with the arbitration panel ruling
The Party complained against shall take any measure necessary to comply promptly and in
good faith with the arbitration panel ruling.
ARTICLE 11
Reasonable period of time for compliance
1. If immediate compliance is not possible, the Parties shall endeavour to agree on the period of time to comply with the ruling. In such a case, the Party complained against shall, no later than 30 days after the receipt of the notification of the arbitration panel ruling to the Parties, notify the complaining Party and the [institutional body to be defined] of the time it will require for compliance ("reasonable period of time").
2. If there is disagreement between the Parties on the reasonable period of time to comply with the arbitration panel ruling, the complaining Party shall, within 20 days of the receipt of the notification made under paragraph 1 by the Party complained against, request in writing the original arbitration panel to determine the length of the reasonable period of time. Such request shall be notified simultaneously to the other Party and to the [institutional body to be defined]. The arbitration panel shall notify its ruling to the Parties and to the [institutional body to be defined] within 20 days from the date of the submission of the request.
3. The Party complained against shall inform the complaining Party in writing of its progress to comply with the arbitration panel ruling at least one month before the expiry of the reasonable period of time.
4. The reasonable period of time may be extended by mutual agreement of the Parties.
ARTICLE 12
Review of any measure taken to comply with the arbitration panel ruling

1. The Party complained against shall notify the complaining Party and the [institutional body to be defined] before the end of the reasonable period of time of any measure that it has taken to comply with the arbitration panel ruling.
2. In the event that there is disagreement between the Parties concerning the existence or the consistency of any measure taken to comply with the provisions referred to in Article 2, the complaining Party may request in writing the original arbitration panel
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the
negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.

to rule on the matter. Such request shall identify the specific measure at issue and explain how such measure is inconsistent with the provisions referred to in Article 2, in a manner sufficient to present the legal basis for the complaint clearly. The arbitration panel shall notify its ruling to the Parties and to the [institutional body to be defined] within 45 days of the date of the submission of the request.
ARTICLE 13
Temporary remedies in case of non-compliance
1. If the Party complained against fails to notify any measure taken to comply with the arbitration panel ruling before the expiry of the reasonable period of time, or if the arbitration panel rules that no measure taken to comply exists or that the measure notified under Article 12 paragraph 1 is inconsistent with that Party's obligations under the provisions referred to in Article 2, the Party complained against shall, if so requested by the complaining Party and after consultations with that Party, present an offer for temporary compensation.
2. If the complaining Party decides not to request an offer for temporary compensation under paragraph 1 of this Article, or, in case such request is made, if no agreement on compensation is reached within 30 days after the end of the reasonable period of time or of the issuance of the arbitration panel ruling under Article 12 that no measure taken to comply exists or that a measure taken to comply is inconsistent with the provisions referred to in Article 2, the complaining Party shall be entitled, upon notification to the other Party and to the [institutional body to be defined], to suspend obligations arising from any provision referred to in Article 2 at a level equivalent to the nullification or impairment caused by the violation. The notification shall specify the level of suspension of obligations. The complaining Party may implement the suspension at any moment after the expiry of 10 days from the date of receipt of the notification by the Party complained against, unless the Party complained against has requested arbitration under paragraph 3 of this Article.
3. If the Party complained against considers that the level of suspension is not equivalent to the nullification or impairment caused by the violation, it may request in writing the original arbitration panel to rule on the matter. Such request shall be notified to the complaining Party and to the [institutional body to be defined] before the expiry of the 10 day period referred to in paragraph 2. The original arbitration panel shall notify its ruling on the level of the suspension of obligations to the Parties and to the [institutional body to be defined] within 30 days of the date of the submission of the request. Obligations shall not be suspended until the original

arbitration panel has notified its ruling, and any suspension shall be consistent with the arbitration panel ruling.
4. The suspension of obligations and the compensation foreseen in this Article shall be temporary and shall not be applied after:
(a) the Parties have reached a mutually agreed solution pursuant to Article 17; or
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the
negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.
7
EU-US TTIP Negotiations
(b) the Parties have agreed that the measure notified under Article 12 paragraph 1 brings the Party complained against into conformity with the provisions referred to in Article 2; or
(c) any measure found to be inconsistent with the provisions referred to in Article 2 has been withdrawn or amended so as to bring it into conformity with those provisions, as ruled under Article 12 paragraph 2.
ARTICLE 14
Review of any measure taken to comply after the adoption of temporary remedies for noncompliance]
1. The Party complained against shall notify the complaining Party and the [institutional body to be defined] of the measure it has taken to comply with the ruling of the arbitration panel following the suspension of concessions or following the application of temporary compensation, as the case may be. With the exception of cases under paragraph 2, the complaining party shall terminate the suspension of concessions within thirty (30) days from the receipt of the notification. In cases where compensation has been applied, and with the exception of cases under paragraph 2, the defending party may terminate the application of such compensation within thirty (30) days from its notification that it has complied with the ruling of the arbitration panel.
2. If the Parties do not reach an agreement on whether the notified measure brings the Party complained against into conformity with the provisions referred to in Article 2 within 30 days of the date of receipt of the notification, the complaining Party shall request in writing the original arbitration panel to rule on the matter. Such a request shall be notified simultaneously to the other Party and to the [institutional body to be defined]. The arbitration panel ruling shall be notified to the Parties and to the [institutional body to be defined] within 45 days of the date of the submission of the request. If the arbitration panel rules that the measure taken to comply is in conformity with the provisions referred to in Article 2, the suspension of obligations or compensation, as the case may be, shall be terminated. Where relevant, the level of suspension of obligations or of compensation shall be adapted in light of the arbitration panel ruling.
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the

negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.
8
EU-US TTIP Negotiations
Sub-Section 3: Common Provisions
ARTICLE 15
Replacement of Arbitrators
If in an arbitration proceeding under Chapter […], the original panel, or some of its members,
are unable to participate, withdraw, or need to be replaced because they do not comply with
the requirements of the Code of Conduct set out in Annex II to this Agreement, the procedure
set out in Article 6 of Chapter […] shall apply. The time limit for the notification of the ruling
shall be extended for the time necessary for the appointment of a new arbitrator but for no
more than 20 days.
ARTICLE 16
Suspension and termination of Arbitration and Compliance Procedures
The arbitration panel shall, at the request of both Parties, suspend its work at any time for a
period agreed by the Parties not exceeding 12 consecutive months. The arbitration panel shall
resume its work before the end of that period at the written request of both Parties or at the
end of that period at the written request of any Party. The requesting Party shall inform the
Chairperson of the [institutional body] and the other Party, accordingly. If a Party does not
request the resumption of the arbitration panel's work at the expiry of the agreed suspension
period, the procedure shall be terminated. The suspension and termination of the arbitration
panel's work are without prejudice to the rights of either Party in another proceeding subject
to Article 23.
ARTICLE 17
Mutually Agreed Solution
The Parties may reach a mutually agreed solution to a dispute under this Chapter at any time.
They shall jointly notify the [institutional body to be defined] and the chairperson of the
arbitration panel, where applicable, of any such solution. If the solution requires approval
pursuant to the relevant domestic procedures of either party, the notification shall refer to this
requirement, and the dispute settlement procedure shall be suspended. If such approval is not
required, or if the completion of any such domestic procedures is notified, the dispute

settlement procedure shall be terminated.
ARTICLE 18
Rules of Procedure
1. Dispute settlement procedures under this Chapter shall be governed by the Rules of Procedure set out in Annex I to this Agreement and by Code of Conduct set out in Annex II to this Agreement.
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the
negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.

2. Any hearing of the arbitration panel shall be open to the public unless provided otherwise in the Rules of Procedure.
ARTICLE 19
Information and technical advice
At the request of a Party, or upon its own initiative, the arbitration panel may request any
information it deems appropriate for the arbitration panel proceeding from any source, including the Parties involved in the dispute. The arbitration panel also has the right to seek
the opinion of experts, as it deems appropriate. The arbitration panel shall consult the Parties
before choosing such experts. Natural or legal persons established in the territory of a Party
may submit amicus curiae briefs to the arbitration panel in accordance with the Rules of Procedure. Any information obtained under this Article shall be disclosed to each of the Parties and submitted for their comments.
ARTICLE 20
Rules of interpretation
Any arbitration panel shall interpret the provisions referred to in Article 2 in accordance with
customary rules of interpretation of public international law, including those codified in the
Vienna Convention of 1969 on the Law of Treaties. The panel shall also take into account
relevant interpretations in reports of panels and the Appellate Body adopted by the WTO
Dispute Settlement Body (hereinafter referred to as the “DSB”). The rulings of the arbitration
panel cannot add to or diminish the rights and obligations of the Parties under this Agreement.
ARTICLE 21
Decisions and Rulings of the Arbitration Panel
1. The arbitration panel shall make every effort to take any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by majority vote. However, in no case shall dissenting opinions of

arbitrators be disclosed.
2. The ruling of the arbitration panel shall be unconditionally accepted by the Parties. It shall not create any rights or obligations for natural or legal persons. The ruling shall set out the findings of fact, the applicability of the relevant provisions referred to in Article 2 and the basic rationale behind any findings and conclusions that it makes. The [institutional body to be defined] shall make the ruling of the arbitration panel publicly available in its entirety within 10 days of its issuance, unless it decides not to do so in order to protect the confidentiality of confidential information.
This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute
Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the
negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the
final agreement will be a result of negotiations between the EU and US.
10
EU-US TTIP Negotiations
Section 4
General Provisions
ARTICLE 22
Lists of arbitrators
1. The [institutional body to be defined] shall, no later than six months after the entry into force of this Agreement, establish a list of at least 15 individuals who are willing and able to serve as arbitrators. The list shall be composed of three sub-lists: one sublist for each Party and one sub-list of individuals that are not nationals of either Party and who may serve as chairperson to the arbitration panel. Each sub-list shall include at least five individuals. The [institutional body to be defined] will ensure that the list is always maintained at that level.
2. Arbitrators shall have specialised knowledge and experience of law and international trade. They shall be independent, serve in their individual capacities and not take instructions from any organisation or government, or be affiliated with the government of any of the Parties, and shall comply with the Code of Conduct set out in Annex II to this Agreement.
3. The [institutional body to be defined] may establish additional lists of X individuals with knowledge and experience in specific sectors covered by this Agreement. Subject to the agreement of the Parties, such additional lists shall be used to compose the panel in accordance with the procedure set out in Article 6 of this Chapter.
ARTICLE 23
Relation with WTO obligations
1. Recourse to the dispute settlement provisions of this Title shall be without prejudice to any action in the WTO framework, including dispute settlement action.
2. However, a Party shall not, for a particular measure, seek redress for the breach of a substantially equivalent obligation under both this Agreement and the WTO Agreement in both fora. In such case, once a dispute settlement proceeding has been initiated, the Party shall not bring a claim seeking redress for the breach of the substantially equivalent obligation under the other agreement to the other forum, unless the forum selected first fails for procedural or jurisdictional reasons to make findings on the claim seeking redress of that obligation.
3. For the purposes of this Article,
– dispute settlement proceedings under the WTO Agreement are deemed to be

initiated by a Party’s request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO ;

This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the final agreement will be a result of negotiations between the EU and US.

– dispute settlement proceedings under this Chapter are deemed to be initiated by a Party's request for the establishment of an arbitration panel under Article 5 paragraph 1.

4. Nothing in this Agreement shall preclude a Party from implementing the suspension of obligations authorised by the Dispute Settlement Body of the WTO. The WTO Agreement shall not be invoked to preclude a Party from suspending obligations under this Chapter.

ARTICLE 24

Time limits

1. All time limits laid down in this Chapter, including the limits for the arbitration panels to notify their rulings, shall be counted in calendar days from the day following the act or the fact to which they refer, unless otherwise specified.

2. Any time limit referred to in this Chapter may be modified by mutual agreement of the Parties to the dispute. The arbitration panel may at any time propose to the Parties to modify any time-limit referred to in this Chapter, stating the reasons for the proposal.

[ARTICLE 25

Review and Modification of the Chapter

The [institutional body to be defined] may decide to modify this Chapter and its Annexes.] [Comment: Article to be discussed at a later stage in line with the general/horizontal provisions on modifications of the Agreement and its Annexes.]

This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the final agreement will be a result of negotiations between the EU and US.

TTIPI - Investimento
(http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf)

This document is the European Union's proposal for Investment Protection and Resolution of Investment Disputes. It was tabled for discussion with the United States and made public on 12 November 2015. The actual text in the final agreement will be a result of negotiations between the EU and US.

Transatlantic Trade and Investment Partnership
TRADE IN SERVICES, INVESTMENT AND E-COMMERCE

Section 3 - Resolution of Investment Disputes and Investment Court System SUB-SECTION 1: SCOPE AND DEFINITIONS
Article 1
Scope and Definitions

This Section shall apply to a dispute between, on the one hand, a claimant of one Party and, on the other hand, the other Party concerning treatment alleged to breach Section 2 [Investment Protection] or Article 2-3(2) [National Treatment] or Article 2-4(2) [Most-Favoured Nation] of Section 1 [Liberalisation of Investments] , which breach allegedly causes loss or damage to the claimant or its locally established company.

For the purposes of this Section:

"proceeding", unless otherwise specified, means a proceeding before the Tribunal or Appeal Tribunal under this Section;

"disputing parties" means the claimant and the respondent;

"claimant " means an investor of a Party, as defined in Article 1(1)(a) of [Chapter 1 (General Provisions) Trade in Services, Investment and E-Commerce], which seeks to submit or has submitted a claim pursuant to this section, either

acting on its own behalf; or
acting on behalf of a locally established company which it owns or controls.
The locally established company shall be treated as a national of another Contracting State for the purposes of Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID-Convention).

"non-disputing Party" means either the United States, when the respondent is the European Union or a Member State of the European Union; or the European Union, when the United States is the respondent.

"respondent" means either the United States; or in the case of the European Union, either the European Union or the Member State of the European Union concerned as determined pursuant to Article 5.

“locally established company” means a juridical person established in the territory of one Party, and owned or controlled by an investor of the other Party.5

5 A juridical person is: (i) owned by natural or juridical persons of the other Party if more than 50 per cent of the equity interest in it is beneficially owned by natural or juridical persons of that Party; (ii) controlled by natural or juridical persons of the other Party if such natural or juridical persons have the power to name a majority of its directors or otherwise to legally direct its actions.
"UNCITRAL Transparency Rules" means the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

"Third Party funding" means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.

SUB-SECTION 2: ALTERNATIVE DISPUTE RESOLUTION AND CONSULTATIONS

Article 2
Amicable Resolution

Any dispute should, as far as possible, be settled amicably through negotiations or mediation and, where possible, before the submission of a request for consultations pursuant to Article 4. Such settlement may be agreed at any time, including after proceedings under this Section have been commenced.

A mutually agreed solution between the disputing parties shall be notified to the non-disputing Party within 15 days of the mutually agreed solution being agreed. The [..] Committee shall keep under surveillance the implementation of such mutually agreed solutions and the Party to the mutually agreed solution shall regularly report to the [..] Committee on the implementation of such solution.

Article 3 Mediation

The disputing parties may at any time agree to have recourse to mediation.

Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.

Recourse to mediation shall be governed by the rules set out in Annex I. Any time limit mentioned in Annex I may be modified by agreement between the disputing parties.

The [..] Committee shall, upon the entry into force of this Agreement, establish a list of six individuals, of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.

The mediator shall be appointed by agreement of the disputing parties. The disputing parties may jointly request the President of the Tribunal to appoint a mediator from the

list established pursuant to this Article, or, in the absence of a list, from individuals proposed by either Party.

Once the disputing parties agree to have recourse to mediation, the time-limits set out in Articles 4(3), 4(5), 28(6) and 29(3) shall be extended by the amount of time from the date on which it was agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation, by way of written notice to the mediator and the other disputing party. At the request of both parties, the Tribunal or the Appeal Tribunal shall stay the proceedings.

Article 4 Consultations

Where a dispute cannot be resolved as provided for under Article 2, a claimant of a Party alleging a breach of the provisions referred to in Article 1(1) may submit a request for consultations to the other Party.

The request shall contain the following information:

the name and address of the claimant and, where such request is submitted on behalf of a locally established company, the name, address and place of incorporation of the locally established company;
the provisions referred to in Article 1(1) alleged to have been breached;
the legal and factual basis for the claim, including the treatment alleged to be inconsistent with the provisions in Article 1(1);
the relief sought and the estimated amount of damages claimed;
evidence establishing that the claimant is an investor of the other Party and that it owns or controls the investment and, where it acts on behalf of a locally established company, that it owns or controls the locally established company.

Where a request for consultations is submitted by more than one claimant or on behalf of more than one locally established company, the information in (a) and (e) shall be submitted for each claimant or each locally established company, as the case may be.

Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations.

Unless the disputing parties agree otherwise, the place of consultation shall be:

Washington DC where the consultations concern treatment afforded by the United States;
Brussels where the consultations concern treatment afforded by the European Union; or
the capital of the Member State of the European Union concerned, where the consultations concern treatment afforded exclusively by that Member State.

Consultations may also take place by videoconference or other means, particularly where a small or medium sized enterprise is involved.

The request for consultations must be submitted:

within three years of the date on which the claimant or, as applicable, the locally established company first acquired, or should have first acquired, knowledge of the treatment alleged to be inconsistent with the provisions referred to in Article 1(1) and of the loss or damage alleged to have been incurred thereby; or
within two years of the date on which the claimant or, as applicable, the locally established company ceases to pursue claims or proceedings before a tribunal or court under the domestic law of a Party; and, in any event, no later than 10 years after the date on which the claimant or, as applicable, its locally established company, first acquired, or should have first acquired knowledge, of the treatment alleged to be inconsistent with the provisions referred to in Article 1(1) and of the loss or damage alleged to have been incurred thereby.

In the event that the claimant has not submitted a claim pursuant to Article 6 within 18 months of submitting the request for consultations, the claimant shall be deemed to have withdrawn its request for consultations and, where applicable, the notice requesting a determination of the respondent pursuant to Article 5 and may not submit a claim under this Section. This period may be extended by agreement between the parties involved in the consultations.

The time periods in paragraphs 5 and 6 shall not render a claim inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim is due to the claimant's inability to act as a result of actions taken by the other Party, provided that the claimant acts as soon as reasonably possible after it is able to act.

In the event that the request for consultations concerns an alleged breach of the agreement by the European Union, or by a Member State of the European Union, it shall be sent to the European Union. Where treatment afforded by a Member State of the European Union is identified, it shall also be sent to the Member State concerned.

SUB -SECTION 3: SUBMISSION OF A CLAIM AND CONDITIONS PRECEDENT

Article 5
Request for determination of the respondent

If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of the agreement by the European Union or a Member State of the European Union and the claimant intends to initiate proceedings pursuant to Article 6, the claimant shall deliver a notice to the European Union requesting a determination of the respondent.

The notice shall identify the treatment in respect of which the claimant intends to initiate proceedings. Where treatment of a Member State of the European Union is identified, such notice shall also be sent to the Member State concerned.

The European Union shall, after having made a determination, inform the claimant within 60 days of the receipt of the notice referred to in paragraph 1 as to whether the European Union or a Member State of the European Union shall be the respondent.

If the claimant submits a claim pursuant to Article 6, it shall do so on the basis of such determination.

Where either the European Union or a Member State of the European Union acts as respondent following a determination made pursuant to paragraph 3, neither the European Union nor the Member State concerned may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise assert that the claim or award is unfounded or invalid on the ground that the proper respondent should be or should have been the European Union rather than the Member State or vice versa.

The Tribunal and the Appeal Tribunal shall be bound by the determination made pursuant to paragraph 3.

Nothing in this Agreement or the applicable rules on dispute settlement shall prevent the exchange of all information relating to a dispute between the European Union and the Member State concerned.

Article 6 Submission of a claim

If the dispute cannot be settled within six months of the submission of the request for consultations and, where applicable, at least three months have elapsed from the submission of the notice requesting a determination of the respondent pursuant to Article 5 (Request for determination of the respondent), the claimant, provided that it satisfies the requirements set out in this Article and in Article 7, may submit a claim to the Tribunal established pursuant to Article 9.

A claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement:

the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);

the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the conditions for proceedings pursuant to paragraph (a) do not apply;

the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or,

any other rules agreed by the disputing parties at the request of the claimant. In the event that the claimant proposes a specific set of dispute settlement rules and if, within 30 days of receipt of the proposal, the disputing parties have not agreed in writing on such rules, or the respondent has not replied to the claimant, the claimant may submit a claim under one of the set of rules provided for in paragraphs (a), (b) or (c); The rules on dispute settlement referred to in paragraph 2 shall apply subject to the rules set out in this Chapter, as supplemented by any rules adopted by the [...] Committee, by the Tribunal or by the Appeal Tribunal.

All the claims identified by the claimant in the submission of its claim pursuant to this Article must be based on treatment identified in its request for consultations pursuant to Article 4(2)(c).

Claims submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interests of a number of identified or unidentified claimants that delegate all decisions relating to the proceedings on their behalf, shall not be admissible.

For greater certainty, a claimant may not submit a claim under this Section if its investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

Article 7 Consent

The respondent consents to the submission of a claim under this Section.

The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of:

Article 25 of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the disputing parties; and,

Article II of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards for an “agreement in writing”.

The claimant is deemed to give consent in accordance with the procedures provided for in this Section at the time of submitting a claim pursuant to Article 6.

For greater certainty, the consent provided pursuant to this Article requires that:

the claimant refrains from enforcing an award rendered pursuant to this Section before such award has become final pursuant to Articles 28(6) or 28(7); and

the respondent refrains from seeking to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this section.
rticle 8
Third party funding

Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal, the name and address of the third party funder.

Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission

of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

SUB-SECTION 4: INVESTMENT COURT SYSTEM

Article 9
Tribunal of First Instance (‘Tribunal’)

A Tribunal of First Instance ('Tribunal') is hereby established to hear claims submitted pursuant to Article 6.

The […] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries.

The […] Committee may decide to increase or to decrease the number of the Judges by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2.

The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.

The Judges appointed pursuant to this Section shall be appointed for a six-year term, renewable once. However, the terms of seven of the fifteen persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to nine years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

The Tribunal shall hear cases in divisions consisting of three Judges, of whom one shall be a national of a Member State of the European Union, one a national of the United States and one a national of a third country. The division shall be chaired by the Judge who is a national of a third country.

Within 90 days of the submission of a claim pursuant to Article 6, the President of the Tribunal shall appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve.

The President and Vice-President of the Tribunal shall be responsible for organisational issues and will be appointed for a two-year term and shall be drawn by lot from among the Judges who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the [..] Committee. The Vice- President shall replace the President when the President is unavailable.

Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Judge who is a national of a third country, to be selected by the President of the Tribunal. The respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request should be made at the same time as the filing of the claim pursuant to Article 6.

The Tribunal shall draw up its own working procedures.
The Judges shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities under this Agreement.
In order to ensure their availability, the Judges shall be paid a monthly retainer fee to be fixed by decision of the […] Committee. [Note: the retainer fee suggested by the EU would be around 1/3rd of the retainer fee for WTO Appellate Body members (i.e. around € 2,000 per month)]. The President of the Tribunal and, where applicable, the Vice-President, shall receive a fee equivalent to the fee determined pursuant to Article 10(12) for each day worked in fulfilling the functions of President of the Tribunal pursuant to this Section.
The retainer fee shall be paid equally by both Parties into an account managed by the Secretariat of [ICSID/the Permanent Court of Arbitration]. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest.
Unless the [..] Committee adopts a decision pursuant to paragraph 15, the amount of the other fees and expenses of the Judges on a division of the Investment Tribunal shall be those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the submission of the claim and allocated by the Tribunal among the disputing parties in accordance with Article 28(4).
Upon a decision by the […] Committee, the retainer fee and other fees and expenses may be permanently transformed into a regular salary. In such an event, the Judges shall serve on a full-time basis and the […] Committee shall fix their remuneration and related organisational matters. In that event, the Judges shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Tribunal. The Secretariat of [ICSID/the Permanent Court of Arbitration] shall act as Secretariat for the Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties to the Agreement equally.

Article 10
Appeal Tribunal

A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal.
The Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of the United States and two shall be nationals of third countries.
The […] Committee, shall, upon the entry into force of this Agreement, appoint the members of the Appeal Tribunal. For this purpose, each Party shall propose three candidates, two of which may be nationals of that Party and one shall be a non-national, for the […] Committee to thereafter jointly appoint the Members.
The Committee may agree to increase the number of the Members of the Appeal Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 3.
The Appeal Tribunal Members shall be appointed for a six-year term, renewable once. However, the terms of three of the six persons appointed immediately after the entry into force of the agreement, to be determined by lot, shall extend to nine years. Vacancies shall be filled as they arise. A person appointed to replace a person whose

term of office has not expired shall hold office for the remainder of the predecessor's term.
The Appeal Tribunal shall have a President and Vice-President responsible for organisational issues, who shall be selected by lot for a two-year term and shall be selected from among the Members who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the [..] Committee. The Vice-President shall replace the President when the President is unavailable.
The Members of the Appeal Tribunal shall possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.
The Appeal Tribunal shall hear appeals in divisions consisting of three Members, of whom one shall be a national of a Member State of the European Union, one a national of the United States and one a national of a third country. The division shall be chaired by the Member who is a national of a third country.
The composition of the division hearing each appeal shall be established in each case by the President of the Appeal Tribunal on a rotation basis, ensuring that the composition of each division is random and unpredictable, while giving equal opportunity to all Members to serve.
The Appeal Tribunal shall draw up its own working procedures.
All persons serving on the Appeal Tribunal shall be available at all times and on short notice and shall stay abreast of other dispute settlement activities under this agreement.
The Members of the Appeal Tribunal shall be paid a monthly retainer fee and receive a fee for each day worked as a Member, to be determined by decision of the […] Committee. [Note: the retainer and daily fee suggested by the EU would be around the same as for WTO Appeal Tribunal members (i.e. a retainer fee of around € 7,000 per month)]. The President of the Appeal Tribunal and, where applicable, the Vice-President, shall receive a fee for each day worked in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section.
The remuneration of the Members shall be paid equally by both Parties into an account managed by the Secretariat of [ICSID/the Permanent Court of Arbitration]. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest
Upon a decision by the […] Committee, the retainer fee and the fees for days worked may be permanently transformed into a regular salary. In such an event, the Members of the Appeal Tribunal shall serve on a full-time basis and the […] Committee shall fix their remuneration and related organisational matters. In that event, the Members shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Appeal Tribunal.
The Secretariat [ICSID/the Permanent Court of Arbitration] shall act as Secretariat for the Appeal Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties to the Agreement equally.

Article 11
Ethics

The Judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government.6 They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct). In addition, upon appointment, they shall
refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law.

---

6 For greater certainty, this does not imply that persons who are government officials or receive an income from the government, but who are otherwise independent of the government, are ineligible.

If a disputing party considers that a Judge or a Member has conflict of interest, it shall send a notice of challenge to the appointment to the President of the Tribunal or to the President of the Appeal Tribunal, respectively. The notice of challenge shall be sent within 15 days of the date on which the composition of the division of the Tribunal or of the Appeal Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge.

If, within 15 days from the date of the notice of challenge, the challenged Judge or Member has elected not to resign from that division, the President of the Tribunal or the President of the Appeal Tribunal, respectively, shall, after hearing the disputing parties and after providing the Judge or the Member an opportunity to submit any observations, issue a decision within 45 days of receipt of the notice of challenge and forthwith notify the disputing parties and other Judges or Members of the division.

Challenges against the appointment to a division of the President of the Tribunal shall be decided by the President of the Appeal Tribunal and vice-versa.

Upon a reasoned recommendation from the President of the Appeal Tribunal, the Parties, by decision of the […] Committee, may decide to remove a Judge from the Tribunal or a Member from the Appeal Tribunal where his behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his continued membership of the Tribunal or Appeal Tribunal. If the behaviour in question is alleged to be that of the President of the Appeal Tribunal then the President of the Tribunal of First Instance shall submit the reasoned recommendation. Articles 9(2) and 10(3) shall apply mutatis mutandis for filling vacancies that may arise pursuant to this paragraph.

Article 12
Multilateral dispute settlement mechanisms

Upon the entry into force between the Parties of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this section shall cease

to apply. The [] Committee may adopt a decision specifying any necessary transitional arrangements

SUB-SECTION 5: CONDUCT OF PROCEEDINGS

Article 13
Applicable law and rules of interpretation

The Tribunal shall determine whether the treatment subject to the claim is inconsistent with any of the provisions referred to in Article 1(1) alleged by the claimant.
In making its determination, the Tribunal shall apply the provisions of this Agreement and other rules of international law applicable between the Parties. It shall interpret this Agreement in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties.

For greater certainty, pursuant to paragraph 1, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party.

For greater certainty, the meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts or the authorities of either Party. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party

Where serious concerns arise as regards matters of interpretation relating to [the Investment Protection7 or the Resolution of Investment Disputes and Investment Court System Section of this Agreement], the [] Committee may adopt decisions interpreting those provisions. Any such interpretation shall be binding on the Tribunal and the Appeal Tribunal. The [] Committee may decide that an interpretation shall have binding effect from a specific date.

Article 14
Other claims

The Tribunal shall dismiss a claim by a claimant who has submitted a claim to the Tribunal or to any other domestic or international court or tribunal concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1) unless the claimant withdraws such pending claim.

This paragraph shall not apply where the claimant submits a claim to a domestic court or tribunal seeking interim injunctive or declaratory relief.

Before submitting a claim the claimant shall provide:

evidence that it has withdrawn any pending claim or proceedings before any domestic or international court or tribunal under domestic or international law concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1);

a declaration that it will not initiate any claim or proceeding before any domestic or international court or tribunal under domestic or international law concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1).

---

7 As referred to in Article 1(1). For the purposes of this Article, the term "claimant" includes the investor and, where applicable, the locally established company.

In addition, for the purposes of paragraphs 1 and 2(a), the term "claimant" also includes:

where the claim is submitted by an investor acting on its own behalf, all persons who, directly or indirectly, have an ownership interest in or are controlled by the investor; or

where the claim is submitted by an investor acting on behalf of a locally established company, all persons who, directly or indirectly, have an ownership interest in or are controlled by the locally established company,

and claim to have suffered the same loss or damage as the investor or locally established company.8

The declaration provided pursuant to paragraph 2(b) shall cease to apply where the claim is rejected on the basis of a failure to meet the nationality requirements to bring an action under this Agreement.

Where claims are brought both pursuant to this Section and Section [State to State dispute settlement] or another international agreement concerning the same treatment as alleged to be inconsistent with any of the provisions referred to in Article 1(1), a division of the Tribunal constituted under this Section shall, where relevant, after hearing the disputing parties, take into account proceedings pursuant to Section [State to State dispute settlement] or another international agreement in its decision, order or award. To this end, it may also, if it considers necessary, stay its proceedings. In acting pursuant to this provision the Tribunal shall respect Article 28(6).

Article 15
Anti-circumvention

For greater certainty, the Tribunal shall decline jurisdiction where the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and the Tribunal determines, on the basis of the facts of the case, that the claimant has

acquired ownership or control of the investment for the main purpose of submitting the claim under this Section. The possibility to decline jurisdiction in such circumstances is without prejudice to other jurisdictional objections which could be entertained by the Tribunal.

Article 16
Preliminary Objections

---

8 For greater certainty, the same loss or damage means loss or damage flowing from the same treatment which the person seeks to recover in the same capacity as the claimant (e.g. if the claimant sues as a shareholder, this provision would cover a related person also pursuing recovery as a shareholder).

The respondent may, no later than 30 days after the constitution of the division of the Tribunal pursuant to Article 9(4), and in any event before the first session of the division of the Tribunal, or 30 days after the respondent became aware of the facts on which the objection is based, file an objection that a claim is manifestly without legal merit.

The respondent shall specify as precisely as possible the basis for the objection.

The Tribunal, after giving the disputing parties an opportunity to present their observations on the objection, shall, at the first meeting of the division of the Tribunal or promptly thereafter, issue a decision or provisional award on the objection, stating the grounds therefor. In the event that the objection is received after the first meeting of the division of the Tribunal, the Tribunal shall issue such decision or provisional award as soon as possible, and no later than 120 days after the objection was filed. In doing so, the Tribunal shall assume the alleged facts to be true, and may also consider any relevant facts not in dispute.

The decision of the Tribunal shall be without prejudice to the right of a disputing party to object, pursuant to Article 17 (Claims unfounded as a matter of law) or in the course of the proceeding, to the legal merits of a claim and without prejudice to the Tribunal's authority to address other objections as a preliminary question.

Article 17

Claims unfounded as a matter of law

Without prejudice to the Tribunal’s authority to address other objections as a preliminary question or to a respondent’s right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted under this section is not a claim for which an award in favour of the claimant may be made under Article 28 (Provisional Award), even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts not in dispute.

An objection under paragraph 1 shall be submitted to the Tribunal as soon as possible after the division of the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the respondent to submit its counter-memorial or statement of defence. An objection may not be submitted under paragraph 1 as long as proceedings under Article 16 (Preliminary Objections) are pending, unless the Tribunal grants leave to file an objection under this article, after having taken due account of the circumstances of the case.

On receipt of an objection under paragraph 1, and unless it considers the objection manifestly unfounded, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or provisional award on the objection, stating the grounds therefor.

Article 18

Transparency

The "UNCITRAL Transparency Rules" shall apply to disputes under this Section, with the following additional obligations.

The request for consultations under Article 4, the request for a determination and the notice of determination under Article 5, the agreement to mediate under Article 3, the notice of challenge and the decision on challenge under Article 11, the request for consolidation under Article 27 and all documents submitted to and issued by the Appeal Tribunal shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.

Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.

Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the European Union or the United States as the case may be shall make publicly available in a timely manner prior to the constitution of the division, relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules.

A disputing party may disclose to other persons in connection with proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information in those documents.

Article 19
Interim decisions

The Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party

or to protect the Tribunal's jurisdiction. The Tribunal may not order the seizure of assets nor may it prevent the application of the treatment alleged to constitute a breach.

Article 20
Discontinuance

If, following the submission of a claim under this section, the claimant fails to take any steps in the proceeding during 180 consecutive days or such periods as the disputing parties may agree, the claimant shall be deemed to have withdrawn its claim and to have discontinued the proceedings. The Tribunal shall, at the request of the respondent, and after notice to the disputing parties, take note of the discontinuance in an order. After such an order has been rendered the authority of the Tribunal shall lapse. The claimant may not subsequently submit a claim on the same matter.

Article 21
Security for costs

For greater certainty, upon request, the Tribunal may order the claimant to post security for all or a part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against it.

If the security for costs is not posted in full within 30 days after the Tribunal's order or within any other time period set by the Tribunal, the Tribunal shall so inform the disputing parties. The Tribunal may order the suspension or termination of the proceedings.

Article 22
The non-disputing Party to the Agreement

The respondent shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information has been resolved,9 deliver to the non-disputing Party:

a request for consultations referred to in Article 4, a notice requesting a determination referred to in Article 5, a claim referred to in Article 6 and any other documents that are appended to such documents;

on request:
pleadings, memorials, briefs, requests and other submissions made to the Tribunal by a disputing party;
written submissions made to the Tribunal by a third person;
minutes or transcripts of hearings of the Tribunal, where available; and
orders, awards and decisions of the Tribunal.

on request and at the cost of the non-disputing Party, all or part of the evidence that has been tendered to the Tribunal.

The non-disputing Party has the right to attend a hearing held under this Section.

The Tribunal shall accept or, after consultation with the disputing parties, may invite written or oral submissions on issues relating to the interpretation of this Agreement from the non-disputing Party. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the non-disputing Party.

Article 23
Intervention by third parties

---

9 For greater certainty, the term confidential or protected information shall be understood as defined in and determined pursuant to Article 7 of the UNCITRAL Transparency Rules.
The Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties.

An application to intervene must be lodged within 90 days of the publication of submission of the claim pursuant to Article 6. The Tribunal shall rule on the application within 90 days, after giving the disputing parties an opportunity to submit their observations.

If the application to intervene is granted, the intervener shall receive a copy of every procedural document served on the disputing parties, save, where applicable, confidential documents. The intervener may submit a statement in intervention within a time period set by the Tribunal after the communication of the procedural documents. The disputing parties shall have an opportunity to reply to the statement in intervention. The intervener shall be permitted to attend the hearings held under this Chapter and to make an oral statement.

4 In the event of an appeal, a natural or legal person who has intervened before the Tribunal shall be entitled to intervene before the Appeal Tribunal. Paragraph 3 shall apply mutatis mutandis.

The right of intervention conferred by this Article is without prejudice to the possibility for the Tribunal to accept amicus curiae briefs from third parties in accordance with Article 18.

For greater certainty, the fact that a natural or legal person is a creditor of the claimant shall not be considered as sufficient in itself to establish that it has a direct and present interest in result of the dispute.

Article 24

Expert Reports

The Tribunal, at the request of a disputing party or, after consulting the disputing parties, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party in a proceeding.

Article 25 Indemnification and other Compensation

The Tribunal shall not accept as a valid defence, counterclaim, set-off or similar claim the fact that the claimant or the locally established company has received, or will receive indemnification or other compensation pursuant to an insurance or guarantee contract in respect of all or part of the compensation sought in a dispute initiated pursuant to this Section.

Article 26
Role of the Parties to the Agreement

No Party shall bring an international claim, in respect of a dispute submitted pursuant to Article 6 or in respect of treatment covered by this Section and subject to mediation pursuant to Article 3, unless the other Party has failed to abide by and comply with the award rendered in such dispute. This shall not exclude the possibility of dispute settlement under Section [state-to-state dispute settlement] in respect of a measure of general application even if that measure is alleged to have violated the agreement as regards a specific investment in respect of which a dispute has been initiated pursuant to Article 6. This is without prejudice to Article 22 of this Section or Article 5 of the UNICTRAL Transparency Rules.

Paragraph 1 does not preclude informal exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 27
Consolidation

In the event that two or more claims submitted under this Section have a question of law or fact in common and arise out of the same events and circumstances, the respondent may submit to the President of the Tribunal a request for the consolidated consideration of all such claims or part of them. The request shall stipulate:

the names and addresses of the disputing parties to the claims sought to be consolidated;
the scope of the consolidation sought; and
the grounds for the request.

The respondent shall also deliver the request to each claimant in a claim which the respondent seeks to consolidate.

In the event that all disputing parties to the claims sought to be consolidated agree on the consolidated consideration of the claims, the disputing parties shall submit a joint request to the President of the Tribunal pursuant to paragraph 1. The President of the Tribunal shall, after receipt of such joint request, constitute a new division (the

"consolidating division") of the Tribunal pursuant to Article 9 which shall have jurisdiction over all or part of the claims which are subject to the joint consolidation request.

In the event that the disputing parties referred to in paragraph 2 have not reached an agreement on consolidation within thirty days of the receipt of the request for consolidation referred to in paragraph 1 by the last claimant to receive it, the President of the Tribunal shall constitute a consolidating division of the Tribunal pursuant to Article 9. The consolidating division shall assume jurisdiction over all or part of the claims, if, after considering the views of the disputing parties, it decides that to do so would best serve the interest of fair and efficient resolution of the claims, including the interest of consistency of awards.
The consolidated consideration of the claims shall be submitted to the consolidating division of the Tribunal under application of the dispute settlement rules chosen by agreement of the claimants from the list contained in Article 6.

If the claimants have not agreed upon the dispute settlement rules within 30 days after the date of receipt of the request for consolidated consideration by the last claimant to receive it, the consolidated consideration of the claims shall be submitted to the consolidating division of the Tribunal under application of the UNCITRAL arbitration rules;

Divisions of the Tribunal constituted under Article 9 shall cede jurisdiction in relation to the claims, or parts thereof, over which the consolidating division has jurisdiction and the proceedings of such divisions shall be stayed or adjourned, as appropriate. The award of the consolidating division of the Tribunal in relation to the parts of the claims over which it has assumed jurisdiction shall be binding on the divisions which have jurisdiction over the remainder of the claims, as of the date the award becomes final pursuant to Article 28(6) or 28(7).

A claimant whose claim is subject to consolidation may withdraw its claim or the part thereof subject to consolidation from dispute settlement proceedings under this Article and such claim or part thereof may not be resubmitted under Article 6.

At the request of the respondent, the consolidating division of the Tribunal, on the same basis and with the same effect as paragraphs 3 and 6 above, may decide whether it shall have jurisdiction over all or part of a claim falling within the scope of paragraph 1 above, which is submitted after the initiation of the consolidation proceedings.

At the request of one of the claimants, the consolidating division of the Tribunal may take such measures as it sees fit in order to preserve the confidentiality of protected information of that claimant vis-à-vis other claimants. Such measures may include the submission of redacted versions of documents containing protected information to the other claimants or arrangements to hold parts of the hearing in private.

Article 28
Provisional Award

Where the Tribunal concludes that the treatment in dispute is inconsistent with the provisions referred to in Article 1(1) alleged by the claimant, the Tribunal may, on the basis of a request from the claimant, and after hearing the disputing parties, award only:

monetary damages and any applicable interest;
restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with Article 2.5 of Section 2 of Chapter II (Expropriation).

Where the claim was submitted on behalf of a locally-established company, any award under this paragraph shall provide that:

any monetary damages and interest shall be paid to the locally established company;

any restitution shall be made to the locally established company.

The Tribunal may not order the repeal, cessation or modification of the treatment concerned.

Monetary damages shall not be greater than the loss suffered by the claimant or, as applicable, the locally established company, as a result of the breach of the relevant provisions of the agreement, reduced by any prior damages or compensation already provided by the Party concerned.

The Tribunal may not award punitive damages.

The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion such costs between the disputing parties if it determines that apportionment is appropriate in the circumstance of the case. Other reasonable costs, including the reasonable costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the case. Where only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims. The Appeal Tribunal shall deal with costs in accordance with this article.

No later than one year after the entry into force of this Agreement, the […] Committee shall adopt supplemental rules on fees for the purpose of determining the maximum amount of costs of legal representation and assistance that may be borne by an unsuccessful claimant which is a natural person or a small or medium-sized enterprise. Such supplemental rules shall, in particular, take into account the financial resources of such claimants and the amounts of compensation sought.

The Tribunal shall issue a provisional award within 18 months of the date of submission of the claim. If that deadline cannot be respected, the Tribunal shall adopt a decision to that effect, which will specify the reasons for such delay. A provisional award shall become final if 90 days have elapsed after it has been issued and neither disputing party has appealed the award to the Appeal Tribunal.

Either disputing party may appeal the provisional award, pursuant to Article 29. In such an event, if the Appeal Tribunal modifies or reverses the provisional award of the Tribunal then the Tribunal shall, after hearing the disputing parties if appropriate, revise its provisional award to reflect the findings and conclusions of the Appeal Tribunal. The provisional award will become final 90 days after its issuance. The Tribunal shall be bound by the findings made by the Appeal Tribunal. The Tribunal shall seek to issue its revised award within 90 days of receiving the report of the Appeal Tribunal.

Article 29
Appeal procedure

Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are:

that the Tribunal has erred in the interpretation or application of the applicable law;
that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).

If the Appeal Tribunal rejects the appeal, the provisional award shall become final. The Appeal Tribunal may also dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded, in which case the provisional award shall become final. If the appeal is well founded, the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or part. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal.

As a general rule, the appeal proceedings shall not exceed 180 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appeal Tribunal issues its decision. When the Appeal Tribunal considers that it cannot issue its decision within 180 days, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed 270 days.

A disputing party lodging an appeal shall provide security for the costs of appeal and for any amount awarded against it in the provisional award.

The provisions of Articles 8 [Third-Party Financing], 18 [Transparency], 19 [Interim decisions], 20 [Discontinuance], 21 [The non-disputing party to the proceeding] shall apply mutatis mutandis in respect of the appeal procedure.

Article 30
Enforcement of awards

Final awards issued pursuant to this Section by the Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy.
Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.

Execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where such execution is sought.

For greater certainty, Article X (Rights and obligations of natural or juridical persons under this Agreement, Chapter X) shall not prevent the recognition, execution and enforcement of awards rendered pursuant to this Section.

For the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.

For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 6(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).