

## **Chapter Twenty-One**

### **Dispute Settlement**

#### **Section A: Dispute Settlement**

##### **Article 21.1: Cooperation**

The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation, consultations, or other means to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

##### **Article 21.2: Scope of Application**

1. Except 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:

- (a) an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement;
- (b) another Party has otherwise failed to carry out its obligations under this Agreement; or
- (c) a benefit the Party could reasonably have expected to accrue to it under Chapter Two (National Treatment and Market Access for Goods), Three (Textiles and Apparel), Four (Rules of Origin and Origin Procedures), Nine (Government Procurement), Eleven (Cross-Border Trade in Services), or Sixteen (Intellectual Property Rights) is being nullified or impaired as a result of a measure of another Party that is not inconsistent with this Agreement. No Party may invoke this subparagraph with respect to a benefit under Chapter Eleven (Cross-Border Trade in Services) or Sixteen (Intellectual Property Rights) if the measure is subject to an exception under Article 22.1 (General Exceptions).

2. For greater certainty, this Chapter does not apply to disputes between Andean Community members concerning a breach of Andean Community Law.

##### **Article 21.3: Choice of Forum**

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

2. Once the complaining Party has requested a panel under an agreement referred to in

paragraph 1, the forum selected shall be used to the exclusion of the others.

#### **Article 21.4: Consultations**

1. Any Party may request in writing consultations with any other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement. If a Party requests such consultations, the other Party shall promptly reply to the request for consultations, and shall enter into consultations in good faith.
2. The requesting Party shall deliver the request to the other Parties, and shall set out the reasons for the request, including identification of the actual or proposed measure or other matter at issue and an indication of the legal basis for the complaint.
3. A Party that considers it has a substantial trade interest in the matter may participate in the consultations on delivery of written notice to the other Parties within seven days of the date of delivery of the request for consultations. The Party shall include in its notice an explanation of its substantial trade interest in the matter.
4. Consultations may be held in person or by any technological means available to the Parties. If in person, consultations shall be held in the capital of the consulted Party, unless otherwise agreed.
5. In the consultations, each Party shall:
  - (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation and application of this Agreement; and
  - (b) treat any confidential information exchanged in the course of consultations on the same basis as the Party providing the information.
6. In consultations under this Article, a consulting Party may request another consulting Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.

#### **Article 21.5: Intervention of the Commission**

1. If the consulting Parties fail to resolve a matter pursuant to Article 21.4 within:
  - (a) 60 days of delivery of a request for consultations;
  - (b) 15 days of delivery of a request for consultations in matters regarding perishable goods; or
  - (c) such other period as they may agree,

any such Party may request in writing a meeting of the Commission.<sup>1</sup>

2. A consulting Party may also request in writing a meeting of the Commission where consultations have been held pursuant to Article 17.7 (Cooperative Labor Consultations), 18.12 (Environmental Consultations and Panel Procedure), or 7.7 (Committee on Technical Barriers to Trade).

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

4. Unless it decides otherwise, the Commission shall convene within ten days of delivery of the request and shall endeavor to resolve the dispute promptly. To assist the Parties reach a mutually satisfactory resolution of the dispute, 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, or mediation; or
- (c) make recommendations.

5. Unless it decides otherwise, the Commission shall consolidate two or more proceedings before it pursuant to this Article regarding the same measure or matter. 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.<sup>2</sup>

6. The Commission may meet in person or through any other technological means available to the Parties that will allow them to carry out this stage of the proceedings.

#### **Article 21.6: Request for an Arbitral Panel**

1. If the consulting Parties fail to resolve a matter within:

- (a) 30 days after the Commission has convened pursuant to Article 21.5;
- (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 21.5.5;

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<sup>1</sup> For purposes of this paragraph and paragraph 4, the Commission shall consist of the cabinet-level representatives of the consulting Parties, as set out in Annex 20.1 (The Free Trade Commission), or their designees.

<sup>2</sup> For purposes of this paragraph, the Commission shall consist of the cabinet-level representatives of the consulting Parties in the relevant proceedings, as set out in Annex 20.1 (The Free Trade Commission), or their designees.

- (c) 30 days after a Party has delivered a request for consultations under Article 21.4 in a matter regarding perishable goods, if the Commission has not convened pursuant to Article 21.5.4;
- (d) 75 days after a Party has delivered a request for consultations under Article 21.4, if the Commission has not convened pursuant to Article 21.5.4; or
- (e) such other period as the consulting Parties may agree,

any consulting Party that participated at a meeting of the Commission or requested a meeting of the Commission, if the Commission has not convened, may request in writing the establishment of an arbitral panel to consider the matter. The requesting Party shall deliver the request to the other Parties, and shall set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint.

2. An arbitral panel shall be established upon delivery of a request.

3. A Party that is eligible under paragraph 1 to request the establishment of a panel and considers it has a substantial interest in the matter may join the arbitral panel proceedings as a complaining Party on delivery of written notice to the other Parties. 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 the request by the Party for the establishment of a panel.

4. If a 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 under the WTO Agreement or under another free trade agreement to which it and the Party complained against are party, on grounds that are substantially equivalent to those available to it 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 selected and perform its functions in a manner consistent with the provisions of this Chapter and the Model Rules of Procedure.

6. An arbitral panel may not be established to review a proposed measure.

#### **Article 21.7: Indicative Roster**

1. The Parties shall establish within six months of the date of entry into force of this Agreement and maintain an indicative roster of individuals who are willing and able to serve as

panelists. Unless the Parties otherwise agree, three members of the roster shall be nationals of each Party, and two members of the roster shall be individuals who are not nationals of any Party. The roster members shall be appointed by consensus, and may be reappointed. Once established, a roster shall remain in effect for a minimum of three years, and shall remain in effect thereafter until the Parties constitute a new roster. The Parties may appoint a replacement where a roster member is no longer available to serve.

2. Parties may have recourse to the indicative roster even if the roster is not complete.

#### **Article 21.8: Qualifications of Panelists**

1. All panelists shall:

- (a) have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements;
- (b) be chosen strictly on the basis of objectivity, impartiality, reliability, and sound judgment;
- (c) be independent of, and not be affiliated with or take instructions from any Party; and
- (d) comply with a code of conduct established by the Parties.

2. Individuals may not serve as panelists for a dispute in which they have participated pursuant to Article 21.5.4.

#### **Article 21.9: Panel Selection**

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

- (a) the panel shall comprise three members;
- (b) within 15 days of the delivery of the request for the establishment of the panel, the complaining Party or Parties shall appoint one panelist and the Party complained against shall appoint one panelist, in consultation with each other. If the complaining Party or Parties or the Party complained against fail to appoint a panelist within such period, a panelist shall be selected by lot from the indicative roster established under Article 21.7 within 3 days after expiration of this 15-day period;
- (c) the Parties shall endeavor to agree on a third panelist who shall serve as chair within 15 days from the date the second panelist has been appointed or selected. If the Parties are unable to agree on the chair, the chair shall be selected by lot from among the indicative roster members who are not nationals of the disputing

Parties within 3 days after expiration of this 15-day period;

- (d) each disputing Party shall endeavor to select panelists who have expertise or experience relevant to the subject matter of the dispute. In addition, in any dispute arising under Chapter Seventeen (Labor) or Eighteen (Environment), panelists other than those selected by lot shall have expertise or experience relevant to the subject matter under dispute.

2. 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 21.10: Rules of Procedure**

1. The Parties shall establish by the date of entry into force of this Agreement Model Rules of Procedure, which shall ensure:

- (a) a right to at least one hearing before the panel, which, subject to subparagraph (e), shall be open to the public;
- (b) an opportunity for each disputing Party to provide initial and rebuttal written submissions;
- (c) that each participating Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the panel shall be public, subject to subparagraph (e);
- (d) that the panel will consider requests from non-governmental entities in the disputing Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties;
- (e) the protection of confidential information;
- (f) that the Parties have the right to make and receive written submissions and make and hear oral arguments in either English or Spanish; and
- (g) that unless otherwise agreed by the disputing Parties, hearings shall be held in the capital of the Party complained against.

2. Unless the disputing Parties otherwise agree, the panel shall conduct its proceedings in accordance with the Model Rules of Procedure.

3. The Parties may modify the Model Rules of Procedure.

4. 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 this Agreement, the matter referenced in the panel request and to make findings, determinations, and recommendations as provided in Articles 21.10.6 and 21.13.3 and to deliver the written reports referred to in Articles 21.13 and 21.14.”

5. If a complaining Party in its panel request has identified that a measure has nullified or impaired benefits, in the sense of Article 21.2, the terms of reference shall so indicate.

6. If a disputing Party wishes the panel to make findings as to the level of adverse trade effects on any Party of a Party’s failure to conform with the obligations of this Agreement or of a Party’s measure found to have caused nullification or impairment in the sense of Article 21.2, the terms of reference shall so indicate.

### **Article 21.11: Third Party Participation**

A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties, 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 in accordance with the Model Rules of Procedure.

### **Article 21.12: 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 21.13: Initial Report**

1. Unless the disputing Parties otherwise agree, the panel shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the disputing Parties, and on any information before it pursuant to Article 21.12.

2. If the disputing Parties request, the panel may make recommendations for resolution of the dispute.

3. Unless the disputing Parties otherwise agree, the panel shall, within 120 days after the last panelist is selected, present to the disputing Parties an initial report containing:

- (a) findings of fact, including any findings pursuant to a request under Article 21.10.6;
- (b) its determination as to whether a disputing Party has not conformed with its obligations under this Agreement or that a Party’s measure is causing nullification or impairment in the sense of Article 21.2, or any other determination requested in

the terms of reference; and

- (c) its recommendations, if the disputing Parties have requested them, for resolution of the dispute.

4. Panelists may furnish separate opinions on matters not unanimously agreed.

5. A disputing Party may submit written comments or requests for clarifications to the panel on its initial report within 14 days of presentation of the report or within such other period as the disputing Parties may agree.

6. After considering written comments or requests for clarifications on the initial report, the panel shall reply to such requests and to the extent it considers appropriate, make further examinations and reconsider its report.

#### **Article 21.14: Final Report**

1. The panel shall present a final report to the disputing Parties, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report, unless the disputing Parties otherwise agree. The disputing Parties shall release the final report to the public within 15 days thereafter, subject to the protection of confidential information.

2. No panel may, either in its initial report or its final report, disclose which panelists are associated with majority or minority opinions.

#### **Article 21.15: 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, if any, of the panel.

2. If, in its final report, the panel determines that a disputing Party has not conformed with its obligations under this Agreement or that a disputing Party's measure is causing nullification or impairment in the sense of Article 21.2, the resolution, whenever possible, shall be to eliminate the non-conformity or the nullification or impairment.

#### **Article 21.16: Non-Implementation – Suspension of Benefits**

1. If a panel has made a determination of the type described in Article 21.15.2, and the disputing Parties are unable to reach agreement on a resolution pursuant to Article 21.15 within 45 days of receiving the final report, or such other period as the disputing Parties agree, the Party complained against shall enter into negotiations with the complaining Party or Parties with a view to developing mutually acceptable compensation.

2. If the disputing Parties:



- (a) are unable to agree on compensation within 30 days after the period for developing such compensation has begun; or
- (b) have agreed on compensation or on a resolution pursuant to Article 21.15 and a complaining Party considers that the Party complained against has failed to observe the terms of the agreement,

any such complaining Party may at any time thereafter provide written notice to the Party complained against that it intends to suspend the application to the Party complained against of benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend.<sup>3</sup> Subject to paragraph 5, 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 panel issues its determination under paragraph 3, as the case may be.

3. If the Party complained against considers that:

- (a) the level of benefits proposed to be suspended is manifestly excessive; or
- (b) it has eliminated the non-conformity or the nullification or impairment that the panel has found,

it may, within 30 days after the complaining Party provides notice under paragraph 2, request that the panel be reconvened to consider the matter. The Party complained against shall deliver its request in writing to the complaining Party. The panel shall reconvene as soon as possible after delivery of the request and shall present its determination to the disputing Parties within 90 days after it reconvenes to review a request under subparagraph (a) or (b), or within 120 days for a request under subparagraphs (a) and (b). If the panel determines that the level of benefits proposed to be suspended is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect. In determining the level of benefits that may be suspended, the panel shall take into account any findings by the panel on the level of adverse trade effects if a request for such findings was made under Article 21.10.6.

4. The complaining Party may suspend benefits up to the level the panel has determined under paragraph 3 or, if the panel has not determined the level, the level the complaining Party has proposed to suspend under paragraph 2, unless the panel has determined that the Party complained against has eliminated the non-conformity or the nullification or impairment.

5. In considering what benefits to suspend pursuant to paragraph 2:

- (a) the 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

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<sup>3</sup> For greater certainty, the phrase “the level of benefits that the Party proposes to suspend” refers to the level of concessions under the Agreement the suspension of which a complaining Party considers will have an effect equivalent to that of the disputed measure.

be inconsistent with the obligations of this Agreement or to have caused nullification or impairment in the sense of Article 21.2; and

- (b) if the complaining Party considers that it is not practicable or effective to suspend benefits in the same sector or sectors, it may suspend benefits in other sectors.

6. The complaining Party may 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 3, within 20 days after the panel provides its determination, the Party complained against provides written notice to the complaining Party that it will pay an annual monetary assessment. The disputing Parties shall consult, beginning no later than 10 days after the Party complained against provides notice, 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, the amount of the assessment shall be set at a level, in U.S. dollars, equal to 50 percent of the level of the benefits the panel has determined under paragraph 3 to be of equivalent effect or, if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend under paragraph 2.

7. Unless the Commission otherwise decides, a monetary assessment shall be paid to the complaining Party in U.S. dollars, or in an equivalent amount of the currency of the Party complained against, in equal, quarterly installments beginning 60 days after the Party complained against gives notice that it intends to pay an assessment. Where the circumstances warrant, the Commission may decide that an assessment shall be paid into a fund established by the Commission and expended at the direction of the Commission for appropriate initiatives to facilitate trade between the disputing Parties including by further reducing unreasonable trade barriers or by assisting a disputing Party in carrying out its obligations under this Agreement.

8. If the Party complained against fails to pay a monetary assessment, the complaining Party may suspend the application to the Party complained against of benefits in accordance with paragraph 4.

9. Compensation, the payment of monetary assessments, and the suspension of benefits are intended as temporary measures pending the elimination of any non-conformity or nullification or impairment that the panel has found.

#### **Article 21.17: Compliance Review**

1. Without prejudice to the procedures set out in Article 21.16.3, if the Party complained against considers that it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may refer the matter to the panel by providing written notice to the complaining Party or Parties. The panel shall issue its report on the matter within 90 days after the Party complained against provides notice.

2. If the panel decides that the Party complained against has eliminated the non-conformity or the nullification or impairment, the complaining Party or Parties shall promptly reinstate any

benefits that Party has or those Parties have suspended under Article 21.16 and the Party complained against shall no longer be required to pay any monetary assessment it has agreed to pay under Article 21.16.6.

#### **Article 21.18: Five-Year Review**

The Commission shall review the operation and effectiveness of Article 21.16 not later than five years after the Agreement enters into force, or within six months after benefits have been suspended or monetary assessments have been paid in five proceedings initiated under this Chapter, whichever occurs first.

### **Section B: Domestic Proceedings and Private Commercial Dispute Settlement**

#### **Article 21.19: Referral 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. 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 information on or interpretation of the Agreement received from the Commission to the court or administrative body in accordance with the rules of that forum.
3. If the Commission is unable to agree on the information or interpretation requested, any Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

#### **Article 21.20: Private Rights**

No Party may provide for a right of action under its law against any other Party on the ground that the other Party has failed to conform with its obligations under this Agreement.

#### **Article 21.21: 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 *Inter-American Convention on International Commercial Arbitration*.