

**Observação**

À luz do crescente interesse do público nas negociações recentemente concluídas entre o MERCOSUL e a União Europeia, os governos dos países do MERCOSUL decidiram publicar os textos do pilar comercial, a fim de garantir tanto o efetivo exercício do direito de acesso à informação pública quanto a transparência da gestão pública.

Esses textos são publicados, no entanto, apenas para fins informativos e podem sofrer modificações adicionais em decorrência do processo de revisão legal a que estarão sujeitos, sem prejuízo dos compromissos assumidos.

Os textos só serão definitivos quando o Acordo for assinado. O Acordo será vinculante para as Partes, conforme o direito internacional, somente após a conclusão dos procedimentos legais internos necessários para a entrada em vigor.

**ANNEX I**

**RULES OF PROCEDURE FOR ARBITRATION**

**General Provisions**

1. In Title [XX] of this Agreement and under these rules:

“adviser” means a person retained by a party to a dispute to advise or assist that party in connection with the arbitration panel proceeding;

“arbitrator” means a member of an arbitration panel established under Article 8 of Title [XX] of this Agreement;

“assistant” means a person who, under the terms of appointment of an arbitrator, conducts research or provides assistance to that arbitrator;

“complaining party” means any [P]arty that requests the establishment of an arbitration panel under Article [6 ]of Title [XX] of this Agreement;

“defending party” means the [P]arty against whom a dispute is brought under Article [6 ] of Title [XX] of this Agreement;[

“arbitration panel” means a panel established under Article [8 ] of Title [XX] of the Agreement;

“representative of a party” means an employee or any person appointed by a government department or agency or any other public entity of a party who represents the party for the purposes of a dispute under this Agreement;

### **Costs**

The remuneration paid to the arbitrators shall include all remuneration and expenses due to their assistant(s). The [Trade Committee] shall agree on rules regarding the remuneration and expenses of arbitrators at its first meeting. To the extent that the [Trade Committee] has not established such rules, the remuneration and expenses of arbitrators shall be determined in accordance with WTO practice.

### **Notifications**

5<sup>1</sup>. The parties to a dispute and the arbitration panel shall deliver any request, notice, written submission or other document by e-mail or other electronic means that provides a record of the sending thereof. Unless proven otherwise, the notification shall be deemed to be delivered on the date of its sending. A copy of the documents shall also be provided by post or other means agreed by the parties, including a notification of the date of its sending.

6. Any request, notice, written submission or other document of:

- a) the panel, shall be sent to both parties at the same time,
- b) a party, which is addressed to the panel, shall be copied to the other party at the same time,
- c) a party, which is addressed to the other party, shall be copied to the panel at the same time, as appropriate;
- d) a co-chair of the Trade Committee which is addressed to the arbitrators pursuant to rules 13 and 14 shall be copied to the other co-chair and to the parties to the dispute.

7. All notifications shall be addressed to the Pro Tempore Presidency or to the National Coordinators of the Common Market Group in the case of MERCOSUR or its Member States, as the case may be, and to the Directorate-General for Trade of the Commission of the European Union, respectively. If the parties have already appointed their representatives to the dispute, all notifications shall be also addressed to them.

8. Minor errors of a clerical nature in any request, notice, written submission or other document related to the arbitration panel proceeding may be corrected by delivery of a new document clearly indicating the changes.

9. The documents submitted by the parties shall be signed by their duly authorized representatives in order to be considered officially submitted to the Arbitration Panel.

10. If the last day for delivery of a document falls on an official legal holiday of the party responsible for such delivery, such party may deliver the document in the next business day. The parties shall notify the Arbitration Panel their respective calendars of official legal holidays at the meeting of the Arbitration Panel with the parties, provided for in rule 13 (d).

11. The Chairperson of the arbitration panel shall be responsible for the internal and external communications of the panel, including notifications between the parties and the panel.

12. The Chairperson of the arbitration panel shall be responsible for keeping the file of the proceedings.

---

<sup>1</sup> Note - numbering to be modified and cross-references to be checked and modified

The Chairperson shall provide to any of the parties, upon its request, a copy of the file of the proceedings after the issuing of the arbitral award or ruling. The Chairperson shall keep the original file during five years after the date of issuing of the award or ruling. At the end of this period, the Chairperson shall transmit the original file to the complaining party. The complaining party shall provide a copy of the file to the defending party on its request.

### **Commencing the Arbitration**

13. (a) If pursuant to [Article 8 of Title VIII] of this Agreement or to [rules 30, 31 or 64] of these Rules of Procedure, any member of the arbitration panel is selected by lot, representatives of both parties shall be invited with due anticipation to be present when lots are drawn. In any case, the lot shall be carried out with any disputing party present at the time. The co-chair of the Trade Committee of the complaining party shall promptly inform the co-chair of the party complained against of the date, time and venue of the lot.

(a bis) The co-chair of the Trade Committee of the complaining Party shall select by lot the arbitrator within 5 days from the request referred to in Article X (Establishment of a Panel), if any of the sub-lists referred in paragraph X of Article X (List of Arbitrators):

i) is not established, amongst those individuals who have been formally proposed by one or both Parties for the establishment of that particular sub-list; or

ii) once established, not all individuals included in a particular sub-list could serve as arbitrator in a dispute, amongst those individuals that integrate that particular sub-list.

(b) The co-Chair of the [Trade Committee] of the complaining party shall notify arbitrators regarding their appointment.

(c) An arbitrator who has been appointed according to the procedure established in Article [8] of Title [XX] shall confirm in writing his/her availability to serve as member of the arbitration panel to the co-Chairs of the [Trade Committee] within five days of the date in which s/he was informed of his/her appointment. In this notification, the arbitrator shall also explicitly confirm that s/he complies and commits to comply with the provisions of the Code of Conduct.

(d) Unless the parties to the dispute agree otherwise, they shall meet the arbitration panel within seven days of its establishment in order to determine such matters that the parties or the arbitration panel deem appropriate. Members of the arbitration panel and representatives of the parties to the dispute may take part in this meeting via telephone or video conference. Before this meeting, the parties shall notify their appointed representatives to the arbitration panel, as well as the address, telephone numbers and e-mail addresses to which communications arising in the course of the proceeding shall be sent.

14. (a) Unless the parties agree otherwise within five days from the date of the selection of the arbitrators, the terms of reference of the arbitration panel shall be:

*“to examine, in the light of the relevant provisions of the Agreement cited by the parties, the matter referred to in the request for establishment of the arbitration panel, to rule on the compatibility of the measure in question with the provisions referred to in Article [3] of Title [XX] of this Agreement and to issue an award in accordance with Article [12] of Title [XX] of this Agreement.”*

(b) The Parties must notify the agreed terms of reference to the arbitration panel within three days of their agreement.

### **Initial Submissions**

15. The complaining party shall deliver its initial written submission no later than thirty (30) days after the date of establishment of the arbitration panel. The defending party shall deliver its written counter-submission no later than thirty (30) days after the date of receipt of the initial written submission.

16. The initial submission shall state clearly the party’s claim, including the identification of the measures at issue and the legal basis for the complaint and shall also include a summary of the relevant facts and circumstances.

17. The counter-submission shall state the facts and arguments of the defending party upon which its defense is based.

### **Evidence**

18. The initial submission and the counter-submission shall include any available supporting evidence, including any expert or technical opinion. The parties shall otherwise submit all factual evidence to the arbitration panel as early as possible and not later than 5 days prior to the date of the first hearing, except with respect to evidence necessary for purposes of rebuttals, answers to questions, or comments to answers provided by the other party. Upon good cause being shown, the arbitration panel may grant exceptions to this rule. In such cases, the other party shall be accorded the opportunity to comment on the newly submitted evidence.

19. In all cases, each party shall be accorded the opportunity to comment on the evidence submitted by the other party.

20. All the evidence submitted by the parties shall be kept in the files of the proceedings.

21. The arbitration panel may hear witnesses and/or experts only in the presence of both parties.

### **Working of Arbitration Panels**

22. The chairperson of the arbitration panel shall preside at all its meetings. An arbitration panel may delegate to the chairperson authority to make administrative and procedural decisions. These decisions shall be notified to the other arbitrators and, where appropriate, to the parties.

23. The arbitration panel may conduct its activities by any means, including telephone, facsimile transmissions or computer links or video-conference.

24. Only arbitrators may take part in the deliberations of the arbitration panel, but the arbitration panel may permit its assistants to be present at its deliberations.

25. The drafting of any ruling shall remain the exclusive responsibility of the arbitration panel and must not be delegated.
26. Where a procedural question arises that is not covered by the provisions of Title [XX] of Part [X] of this Agreement and these Rules of Procedure, the arbitration panel, after consulting the parties, may adopt an appropriate procedure that is compatible with those provisions.
27. When the arbitration panel considers that there is a need to modify any time limit applicable in the proceedings or to make any other procedural or administrative adjustment, it shall inform the parties to the dispute in writing of the reasons for the change or adjustment and of the period of time or adjustment needed. The arbitration panel may adopt such change or adjustment after consulting the parties. The time limits of Article [12] of Title [XX] of this Agreement shall not be modified.

#### **Amendment of the list**

X. The list of arbitrators may be amended at any time by initiative of any Party. Any Party can present new candidates by notifying the other Party of the proposed names. The Parties shall discuss the proposal within one month of the delivery (receipt) of the notification of the proposed names. The Trade Committee shall take the decision to amend the list within six months of such notification.

#### **Replacement of arbitrators**

28. If an arbitrator is unable to participate in the proceeding, withdraws, or must be replaced, a replacement shall be selected in accordance with Article [8] of Title [XX] of this Agreement and Rule [13] of these Rules of Procedure.
29. Where a party to the dispute considers that an arbitrator does not comply with the requirements of the Code of Conduct and for this reason should be replaced, this party should notify the other party to the dispute within fifteen (15) days from the time at which it obtained evidence of the circumstances underlying the arbitrator's material violation of the Code of Conduct.
30. Where a party to the dispute considers that an arbitrator other than the chairperson does not comply with the requirements of the Code of Conduct, the parties to the dispute shall consult and, if they so agree, replace the arbitrator and select a replacement following the procedure set out in Article [8] of Title [XX] of Part [X] of this Agreement and Rule [13] of these Rules of Procedure. If the parties to the dispute fail to agree on the need to replace an arbitrator within five days from the date of the notification referred to in Rule [19], any party to the dispute may request that such matter be referred to the chairperson of the arbitration panel, whose decision shall be final.

In case an arbitrator other than the chairperson has to be replaced, and if the party concerned fails to select the replacement of an arbitrator, the chairperson shall select a new arbitrator by lot among the pool of individuals referred to under Article [7] paragraph [4] of Title [XX] of which the original arbitrator was a member. The selection of the new arbitrator shall be done within five days of the date of the submission of the request to the chairperson of the arbitration panel.

31. Where a party considers that the chairperson of the arbitration panel does not comply with the requirements of the Code of Conduct, the parties shall consult and, if they so agree, replace the chairperson and select a replacement following the procedure set out in Article [8] of Title [XX] of this Agreement and Rule [13] of these Rules of Procedure.

If the parties fail to agree on the need to replace the chairperson within five days from the date of the notification referred to in rule 29, a new chairperson shall, unless the parties agree otherwise, be selected by lot by the co-Chairperson of the [Trade Committee] or the Chair's delegate from the relevant part of the list referred to under Article [7], paragraph [4] of Title [XX]. The selection of the new chairperson shall be done within five days of the date of the request to the Chairperson(s) of the [Trade Committee] to that effect.

32. The arbitration panel proceedings shall be suspended for the period taken to carry out the procedures provided for in Rules[ 28, 29, 30 and 31].

### **Hearings**

33. The defending party shall be in charge of the logistical administration of dispute settlement hearings, unless otherwise agreed. The chairperson of the arbitration panel shall fix the date and time of the hearing in consultation with the parties to the dispute and the other members of the arbitration panel, and shall confirm this in writing to the parties to the dispute. This information shall also be made publicly available by the party in charge of the logistical administration of the hearing unless the hearing is closed to the public. Unless a party disagrees, the arbitration panel may decide not to convene a hearing.

34. Unless the parties agree otherwise, the hearing shall be held:

- (a) if the defending party is the EU, in Brussels;
- (b) if the defending party is MERCOSUR, in Asunción; and
- (c) if the defending party is one or more Member States of MERCOSUR, in the place indicated by such Member State/s.

35. The arbitration panel may convene additional hearings if the parties to the dispute so agree.

36. All arbitrators shall be present during the entirety of any hearings.

37. The following persons may attend the hearing, irrespective of whether the proceedings are open to the public or not:

- (a) representatives of the parties to the dispute;
- (b) advisers to the parties to the dispute;
- (c) administrative staff, interpreters, translators; and
- (d) arbitrators' assistants.

Only the representatives and advisers of the parties to the dispute may address the arbitration panel.

38. No later than five days before the date of a hearing, each party to the dispute shall deliver to the arbitration panel a list of the names of persons who will make oral arguments or presentations at the hearing on behalf of that party and of other representatives or advisers who will be attending the hearing. Upon good cause being shown, the parties may modify their lists after that time limit.

39. The hearings of the arbitration panel shall be open to the public, unless the parties to the dispute decide otherwise. The hearings of the arbitration panel shall be partially or completely closed to the public when the submission and arguments of a party contains information which that party has designated as confidential.

40. The arbitration panel shall conduct the hearing in the following manner, ensuring that the complaining party and the defending party are afforded equal time:

*Argument*

- (a) argument of the complaining party
- (b) argument of the defending party

*Rebuttal Argument*

- (a) argument of the complaining party
- (b) argument of the defending party

41. The arbitration panel may direct questions to either party to the dispute at any time during the hearing.

42. The arbitration panel shall arrange for a transcript or audio recording of each hearing to be prepared and delivered as soon as possible to the parties to the dispute. The parties to the dispute may comment on the accuracy of the transcript and the arbitration panel may consider those comments.

43. Each party to the dispute may deliver to the arbitration panel, with a copy to the other party, a supplementary written submission concerning any matter that arose during the hearing within ten (10) days of the date of the hearing.

### **Questions in writing**

44. The arbitration panel may at any time during the proceedings address questions in writing to one or both parties to the dispute and set a reasonable time limit for the submission of their responses. Each of the parties to the dispute shall receive a copy of any questions put by the arbitration panel.

45. A party to the dispute shall also provide a copy of its written response to the arbitration panel's questions to the other party. Each party to the dispute shall be given the opportunity to provide written comments on the other party's reply within **seven (7)** days of the date of receipt of such reply.

### **Confidentiality**

46. The parties to the dispute and their advisers shall maintain the confidentiality of the arbitration panel hearings where the hearings are held in closed session, in accordance with rule 39. Each party to the dispute and its advisers shall treat as confidential any information submitted by the other party to the arbitration panel which that party has designated as confidential. Where a Party to the dispute submits a confidential version of its written submissions to the arbitration panel, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public as soon as possible but not later than thirty (30) days after the date of either the request or the submission, whichever is later. Nothing in these rules shall preclude a Party to the dispute from disclosing statements of its own positions to the public to the extent that, when making reference to information submitted by the other Party, it does not disclose any information designated by the other Party as confidential.

### **Ex parte contacts**

47. The arbitration panel shall not meet or communicate with a party in the absence of the other party.
48. No member of the arbitration panel may discuss any aspect of the subject matter of the proceedings with one party or both parties to the dispute in the absence of the other arbitrators.

### **Information and Technical Advice**

49. The arbitration panel shall notify to the parties of its intention to request the opinion of experts or information from any relevant source. For greater certainty, the opinion or information obtained pursuant this provision do not discharge the parties of their corresponding burden of proof.
50. The arbitration panel will take into account the cost of any request for information or opinion of experts in order not to excessively increase the costs of the dispute settlement procedure.
51. The arbitration panel shall provide the parties with a copy of the information or the expert's opinion received and shall grant them a reasonable time to present their comments.

### **Amicus curiae briefs**

54. Unless the parties agree otherwise within five (5) days of the date of the establishment of the arbitration panel, the arbitration panel shall receive unsolicited written briefs from interested natural persons of a Party or legal persons established in the territory of a party and which are independent from the government of any of the Parties, provided that they are received by the panel within 10 days of the date of the establishment of the arbitration panel.
55. Amicus curiae submission shall:
- (a) be concise and in no case longer than twenty-two thousand five hundred (22,500) characters typed, including spaces, footnotes, notes at the end of the text and any attachment;
  - (b) be directly relevant to the issue under consideration by the arbitration panel;
  - (c) contain a description of the person making the submission, whether natural or legal, including its nationality or place of establishment, the nature of their activities and, in the case of legal persons, information on its members, its legal status, general objectives;
  - (d) provide information on any source of financing;
  - (d) specify the nature of the interest that the person has in the arbitration proceeding.
  - (e) be drafted in the languages chosen by the parties in accordance with Rules 58 and 59 of these Rules of Procedure.
56. The arbitration panel shall list in its ruling all the submissions it has received that conform to Rules 54 and 55. The arbitration panel shall not be obliged to address in its ruling the arguments made in such submissions. The arbitration panel shall ensure that the parties have the opportunity to comment in written on any *amicus curiae* submission before the date of the hearing. The comments of the parties to the dispute shall be delivered within ten (10) days of receipt of the submission, and any such comments shall be taken into consideration by the arbitration panel.

### **Urgent cases**

57. In cases of urgency referred to in Title [XX] of Part [X] of the Agreement, the arbitration panel, after consulting the parties, shall adjust the time limits referred to in these rules as appropriate and shall notify the parties of such adjustments.

### **Translation and interpretation**

58. During the consultations referred to in Article [4] of Title [XX] of this Agreement, and no later than the meeting referred to in Rule [13(d)], the parties shall endeavour to agree on a common working language for the proceedings before the arbitration panel.

59. If the parties are unable to agree on a common working language, each party may choose any of its official languages as its working language for the proceedings.

However, if a party chooses a language that is not an official language of the WTO, it shall provide, at the time of filing, a translated version of all its written submissions into the language chosen by the other party and shall arrange for and bear the costs of interpretation of its oral submissions to and from the language chosen by the other party.

60. Arbitral awards and rulings shall be issued in the common working language chosen by the parties. If the parties are unable to agree on a common working language, the arbitral panel awards and panel rulings shall be issued in any of the official languages of the WTO chosen by the panel. Any costs incurred for translation of an arbitration awards and rulings shall be borne equally by the parties.

61. Any party may provide, within five (5) days of its receipt, comments on the accuracy of the translation of any translated version of a document drawn up in accordance with these rules.

### **Calculation of the time-limits**

62. Where, a party receives a document on a date other than the date on which this document is received by the other Party, any period of time that is calculated on the basis of the date of receipt of that document shall be calculated from the last date of receipt of that document.

### **Other procedures**

63. These Rules of Procedure are also applicable to procedures established under Articles [16, 17, 18 and 19] of Title [XX] of Part [X] of this Agreement. However, the time-limits laid down in these Rules of Procedure shall be adjusted in line with the special time-limits provided for the adoption of a ruling by the arbitration panel in those other procedures.

64. In the event of the original panel, or some of its members, being unable to reconvene for the procedures established under Articles [16, 17, 18 and 19] of Title [XX], the procedures set out in Article [8] of Title [XX] shall apply.

### **Arbitral awards**

65. The arbitral award must contain the following details, in addition to any other elements which the arbitration panel may consider appropriate for inclusion:

- a) the parties;
- b) the name of each of the members of the arbitration panel and the date of its establishment;
- c) the terms of reference of the arbitration panel, including a description of the measure at issue;
- d) the arguments of each of the parties;
- e) a description of the development of the arbitration procedure, including a summary of the actions taken
- c) a description of the factual elements of the dispute;
- d) the decision reached in relation to the dispute, indicating the factual and legal grounds;
- e) the date of issue; and
- f) the signature of all the members of the arbitration panel.

## **ANNEX II**

### **CODE OF CONDUCT FOR MEMBERS OF ARBITRATION PANELS AND MEDIATORS**

#### **Definitions**

1. In this Code of Conduct:

- (a) "arbitrator" means a member of an arbitration panel effectively established under Article [8] of Title [XX] of this Agreement;
- (b) "mediator" means a person who conducts a mediation procedure in accordance with Article [5] of Title [XX] of Part [X] of this Agreement;
- (b) "candidate" means an individual whose name is on the list of arbitrators referred to in Article [7] paragraph [2] of Title [XX] and who is under consideration for selection as a member of an arbitration panel under Article [8] of Title [XX] of Part [X] of this Agreement;
- (c) "assistant" means a person who, under the terms of appointment of an arbitrator, conducts, researches or provides assistance to that arbitrator;
- (d) "proceeding", unless otherwise specified, means an arbitration panel proceeding under Title [XX] of the Agreement;
- (e) "staff", in respect of an arbitrator, means persons under the direction and control of the arbitrator, other than assistants;
- (f) "expert": means a person with specialized and recognized knowledge and experience in the field in question that is requested by an arbitration panel or mediator, or whose opinion is submitted to or requested by any of the parties.

#### **Responsibilities to the Process**

2. Every candidate and arbitrator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Former arbitrators must comply with the obligations established in paragraphs [15, 16, 17 and 18] of this Code of Conduct.

#### **Disclosure obligations**

3. Prior to confirmation of her or his selection as an arbitrator under Article [8] of Title [XX] of the Agreement, a candidate shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.

4. A candidate or arbitrator shall communicate matters concerning actual or potential violations of this Code of Conduct to the [Trade Committee] for consideration by the Parties.

5. Once selected, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 3 of this Code of Conduct and shall disclose them. The disclosure obligation is a continuing duty which requires an arbitrator to disclose any such interests, relationships or matters that may arise during any stage of the proceeding. The arbitrator shall disclose such interests, relationships or matters by informing the [Trade Committee], in writing, for consideration by the parties.

### **Duties of arbitrators**

6. Upon confirmation of his or her selection an arbitrator shall be available to perform and shall perform her or his duties thoroughly and expeditiously throughout the course of the proceeding, including any proceedings on the same dispute under Articles [16, 17, 18 and 19] of Title [XX], and with fairness and diligence.

7. An arbitrator shall consider only those issues raised in the proceeding and necessary for a ruling and shall not delegate this duty to any other person.

8. An arbitrator shall take all appropriate steps to ensure that his or her assistant and staff are aware of, and comply with the relevant provisions of this Code of Conduct, *mutatis mutandis*

9. An arbitrator shall not engage in *ex parte* contacts concerning the proceeding.

### **Independence and impartiality of arbitrators**

10. An arbitrator shall be independent and impartial and avoid creating an appearance of impropriety or bias and shall not be influenced by self-interest, outside pressure, political considerations, public opinion, and loyalty to a Party or fear of criticism. An arbitrator shall not take instructions from any organisation or government or be affiliated to a government, including governmental organization, of a Party to the Agreement.

11. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of her or his duties.

12. An arbitrator may not use her or his position in the arbitration panel to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence her or him.

13. An arbitrator may not allow financial, business, professional, family or social relationships or responsibilities to influence her or his conduct or judgement.

14. An arbitrator must avoid entering into any relationship or acquiring any financial interest that is likely to affect her or his impartiality or that might reasonably create an appearance of impropriety or bias.

### **Obligations of former members**

15. All former arbitrators must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decision or ruling of the arbitration panel.

### **Confidentiality**

16. No arbitrator or former arbitrator shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding except for the purposes of that proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.
17. An arbitrator shall not disclose an arbitration panel ruling or parts thereof prior to its publication in accordance with Article [12 paragraph 4] of Title [XX].
18. An arbitrator or former arbitrator shall not disclose the deliberations of an arbitration panel, or any member's view at any time.

### **Expenses**

19. Each arbitrator shall keep a record and render a final account of her or his expenses, as well as the expenses of his or her assistant.

### **Mediators**

20. The disciplines described in this Code of Conduct as applying to arbitrators or former arbitrators shall apply, *mutatis mutandis*, to mediators and, where applicable, to former mediators.

### **Experts**

21. The following rules apply to the experts whose opinion is requested by the arbitration panel.
  - a) They shall disclose any interest, relationship or matter that could affect their independence or impartiality. Such experts shall act in their own capacity and shall not accept or seek instructions from any government or organization in delivering their opinion.
  - b) They shall not engage in *ex parte* contacts in the course of the proceeding for which their opinion is requested.
  - c) They shall not disclose or use any non-public information acquired during a proceeding for which their opinion is requested except for the purposes of the proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.
  - d) Unless otherwise agreed by the parties, they shall not disclose their opinion or parts thereof prior to the publication of the arbitration panel award.
  - e) They shall keep a record and render a final account of their expenses.

22. The opinions of experts presented to the arbitration panel shall be accompanied, or preceded, by a declaration by the expert confirming its commitment to abide by the obligations described in paragraph [21], as applicable.

### **ANNEX III**

### **MEDIATION**

#### *Article 1*

#### **Objective**

The objective of this Annex is to facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure with the assistance of a mediator.

#### *Article [X]*

#### **Provision of Information**

1. At the request of a Party, the other Party shall promptly provide information and respond to questions pertaining to any existing or proposed measure that materially affects the operation of Part X [Trade] of this Agreement.
2. Information provided under this Article is without prejudice as to whether the measure is consistent with the Part X [Trade] of this Agreement.

#### *Article 3*

#### **Initiation of the Procedure**

1. A Party may request that the Parties enter into a mediation procedure at any time, by means of a written request delivered to the other Party. The request shall be sufficiently detailed to present the concerns of the requesting Party clearly and shall:
  - (a) identify the specific measure at issue;
  - (b) provide a statement of the alleged adverse effects that the requesting Party believes the measure has, or will have, on trade between the Parties; and
  - (c) explain how the requesting Party considers that those effects are linked to the measure.
2. The mediation procedure may only be initiated by mutual agreement of the Parties. When a request is made pursuant to paragraph 1, the Party to which the request is made shall give sympathetic consideration to the request and deliver its written acceptance or rejection to the requesting Party within 10 days of its receipt.

3. Consultations, including under the Dispute Settlement Title [XX], are not required before initiating the mediation procedure. However, a Party should normally avail itself of the other relevant cooperation or consultation provisions provided for in this Agreement before initiating the mediation procedure.

#### Article 4

##### **Selection of the Mediator**

1. The Parties shall endeavour to agree on a mediator within 15 days of the delivery of the acceptance referred to in Article 3 paragraph 2.
2. A mediator shall not be a national of either Party, unless the Parties agree otherwise.
3. In the event that the Parties are unable to agree on the mediator within the time frame laid down in paragraph [1], either Party may request the chair of the [Trade Committee], or the chair's delegate, to select the mediator by lot from the list established under Article [7 paragraph 4] of the Dispute Settlement Title. Representatives of both Parties shall be invited, with sufficient advance notice, to be present when the lots are drawn. In any event, the drawing of lots shall be carried out with the Party/Parties that are present.
4. The chair of the [Trade Committee], or the chair's designee, shall select the mediator within five days of the request made pursuant to paragraph 2 of this Article.
5. Should the list referred to in Article [7 paragraph 4] of the Dispute Settlement Title not be established at the time a request is made pursuant to Article [3], the mediator shall be drawn by lot from the individuals which have been formally proposed by one or both of the Parties.
6. The mediator shall, in an impartial and transparent manner, assist the Parties in bringing clarity to the measure and its possible trade effects, and in reaching a mutually agreed solution.
7. The Code of Conduct for Members of Arbitration Panels and Mediators set out in Annex XX shall apply to mediators, *mutatis mutandis*.
8. [Rules 5 to 12 (Notifications) and 58 to 61] (Translation and interpretation) of the Rules of Procedure for Arbitration set out in Annex [XX] shall apply, *mutatis mutandis*.

#### Article 5

##### **Rules of the Mediation Procedure**

1. Within 10 days of the appointment of the mediator, the Party which invoked the mediation procedure shall deliver a detailed, written description of its concerns to the mediator and to the other Party, in particular of the operation of the measure at issue and its trade effects. Within 20

days of the receipt of this description, the other Party may deliver written comments on the description. Either Party may include any information that it deems relevant in its description or comments.

2. The mediator may decide on the most appropriate way of bringing clarity to the measure concerned and its possible trade effects. In particular, the mediator may organize meetings between the Parties, consult them jointly or individually and provide any additional support requested by the Parties. The mediator shall seek the assistance of, or consult with, relevant experts and stakeholders upon agreement of the Parties.

3. The mediator shall not advise or comment on the consistency of the measure at issue with this Agreement. The mediator may offer advice and propose a solution for the consideration of the Parties. The Parties may accept or reject the proposed solution, or agree on a different solution.

4. The mediation procedure shall take place in the territory of the Party to which the request was addressed, or by mutual agreement in any other location or by any other means.

5. The Parties shall endeavour to reach a mutually agreed solution within 60 days of the appointment of the mediator. Pending a final agreement, the Parties may consider possible interim solutions, particularly if the measure relates to perishable goods.

6. Either Party may make the solution subject to the completion of any necessary internal procedures. Mutually agreed solutions shall be made publicly available. The version disclosed to the public shall not contain any information a Party has designated as confidential.

7. On request of the Parties, the mediator shall deliver a draft factual report to the Parties, providing a brief summary of (1) the measure at issue; (2) the procedures followed; and (3) any mutually agreed solution reached, including possible interim solutions. The mediator shall allow the Parties 15 days to comment on the draft report. After considering the comments of the Parties received within that period, the mediator shall, within 15 days, deliver a final factual report to the Parties. The factual report shall not include any interpretation of this Agreement.

8. The procedure shall be terminated:

(a) by the adoption of a mutually agreed solution by the Parties, on the date of the adoption thereof;

(b) by mutual agreement of the Parties at any stage of the procedure, on the date of that agreement;

(c) by a written declaration of the mediator, after consultation with the Parties, that further efforts at mediation would be to no avail, on the date of that declaration; or

(d) by a written declaration of a Party after exploring any possible mutually agreed solutions under the mediation procedure and after having considered any advice and proposed solutions by the mediator, on the date of that declaration.

*Article 6*

**Implementation of a Mutually Agreed Solution**

1. Where the Parties reached agreement on a solution, each Party shall take the measures it considers necessary to implement the mutually agreed solution within the agreed timeframe.
2. The implementing Party shall notify the other Party, in writing, of any steps or measures taken to implement the mutually agreed solution.

*Article 7*

**Confidentiality**

Unless the Parties agree otherwise, and without prejudice to Article 5(6), all steps of the procedure, including any advice or proposed solution, are confidential. However, any Party may disclose to the public the fact that mediation is taking place.

*Article 8*

**Relationship to Dispute Settlement Procedures**

1. The mediation procedure is without prejudice to the Parties' rights and obligations under the provisions on Dispute Settlement in this Agreement, or any other agreement.
2. A Party shall not rely on, or introduce as evidence, in other dispute settlement procedures under this, or any other Agreement, nor shall a panel take into consideration:
  - (a) positions taken by the other Party in the course of the mediation procedure or information gathered under Article 5.2;
  - (b) the fact that the other Party has indicated its willingness to accept a solution to the measure subject to mediation; or
  - (c) advice given or proposals made by the mediator.
3. A mediator may not serve as a member of a panel in a dispute settlement proceeding under this Agreement or under the WTO Agreement, or other agreement to which the Parties are party, involving the same matter for which they have been a mediator.

*Article [X]*

**Costs**

1. Each Party shall bear its own expenses derived from the participation in the panel or mediation procedure.
2. The Parties shall share jointly and equally the expenses derived from organisational matters, including the remuneration and expenses of the arbitrators and of the mediator in accordance with Annex [X] (Rules of Procedure).