

## **Chapter Twenty-Two**

### **Dispute Settlement**

#### **Article 22.1: 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 and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

#### **Article 22.2: Scope of Application**

Except as 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) wherever a Party considers that a measure of the other Party is inconsistent with the obligations of this Agreement or that the other Party has otherwise failed to carry out its obligations under this Agreement; and
- (c) wherever a Party considers that a measure of the other Party causes nullification or impairment in the sense of Annex 22.2.

#### **Article 22.3: Choice of Forum**

1. Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which both Parties are party or the WTO Agreement, the complaining Party may select the 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 22.4: Consultations**

1. Either Party may request in writing consultations with the other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.

2. The requesting Party 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, and shall deliver the request to the other Party.

3. Consultations on matters regarding perishable goods shall commence within 15 days of the date of delivery of the request.

4. The 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 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 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.

5. In consultations under this Article, a Party may request the other Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.

#### **Article 22.5: Commission - Good Offices, Conciliation, and Mediation**

1. A Party may request in writing a meeting of the Commission if the Parties fail to resolve a matter pursuant to Article 22.4 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.

2. A Party may also request in writing a meeting of the Commission where consultations have been held pursuant to Article 18.6 (Cooperative Consultations), Article 19.6 (Environmental Consultations) or Article 7.8 (Committee on Technical Barriers to Trade).

3. The requesting Party shall state in the request the measure or other matter complained of and deliver the request to the other Party.

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. 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 Parties to reach a mutually satisfactory resolution of the dispute.

#### **Article 22.6: Request for an Arbitral Panel**

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

- (a) 30 days of the Commission convening pursuant to Article 22.5;
- (b) 75 days after a Party has delivered a request for consultations under Article 22.4, if the Commission has not convened pursuant to Article 22.5(4);
- (c) 30 days after a Party has delivered a request for consultations under Article 22.4 in a matter regarding perishable goods, if the Commission has not convened pursuant to Article 22.5(4); or
- (d) such other period as the Parties agree,

either Party may request in writing the establishment of an arbitral panel to consider the matter. 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 Party. An arbitral panel shall be established upon delivery of a request.

2. Unless the Parties otherwise agree, the panel shall be established and perform its functions in a manner consistent with the provisions of this Chapter.

3. Notwithstanding paragraphs 1 and 2, an arbitral panel may not be established to review a proposed measure.

### **Article 22.7: Roster**

1. The Parties shall establish within six months of the entry into force of this Agreement and maintain a roster of at least 20 individuals who are willing and able to serve as panelists. Unless the Parties otherwise agree, six roster members shall be selected from among individuals who are non-Party nationals. The roster members shall be appointed by mutual agreement of the Parties, 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.

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;
- (b) be chosen strictly on the basis of objectivity, 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 to be established by the Commission.

### **Article 22.8: Qualifications of Panelists**

All panelists shall meet the qualifications set out in Article 22.7(2). Individuals may not serve as panelists for a dispute in which they have participated pursuant to Article 22.5(4)(a).

### **Article 22.9: Panel Selection**

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

- (a) the panel shall comprise three members;
- (b) the 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 Parties are unable to agree on the chair within this period, the chair shall be selected by lot within three days from among the roster members who are non-Party nationals;
- (c) within 15 days of selection of the chair, each Party shall select one panelist;

- (d) if a Party fails to select its panelist within such period, the panelist shall be selected by lot within three days from among the roster members who are nationals of the Party; and
  - (e) each Party shall endeavor to select panelists who have expertise or experience relevant to the subject matter of the dispute.
2. Panelists shall normally be selected from the roster. A Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by the other Party within 15 days after the individual has been proposed.
3. If a Party believes that a panelist is in violation of the code of conduct, the 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 22.10: Rules of Procedure**

1. The Commission shall establish, by the date of entry into force of this Agreement, 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 Party to provide initial and rebuttal submissions;
  - (c) that each Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the panel will be made public within 10 days after they are submitted, subject to subparagraph (e);
  - (d) that the panel will consider requests from non-governmental entities located in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties; and
  - (e) the protection of confidential information.
2. Unless the Parties otherwise agree, the panel shall conduct its proceedings in accordance with the Rules of Procedure and may, after consulting with the Parties, adopt additional procedural rules not inconsistent with the Rules of Procedure.
3. The Commission may modify the Rules of Procedure.

4. Unless the 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 Article 22.12(3) and to deliver the written reports referred to in Articles 22.12 and 22.13."

5. If the complaining Party wishes to argue that a matter has nullified or impaired benefits, the terms of reference shall so indicate.

6. If a Party wishes the panel to make findings as to the degree of adverse trade effects on a Party of any measure or other matter found not to conform with the obligations of this Agreement or to have caused nullification or impairment in the sense of Annex 22.2, the terms of reference shall so indicate.

#### **Article 22.11: Experts and Technical Advice**

1. On request of a Party, or, unless the Parties disapprove, on its own initiative, the panel may seek information and technical advice, including information and technical advice concerning environmental, labor, health, safety, or other technical matters raised by a Party in a proceeding, from any person or body that it deems appropriate.

2. Before a panel seeks information or technical advice, it shall establish appropriate procedures in consultation with the Parties. The panel shall provide the Parties:

- (a) advance notice of, and an opportunity to provide comments to the panel on, proposed requests for information and technical advice pursuant to paragraph 1; and
- (b) a copy of any information or technical advice submitted in response to a request pursuant to paragraph 1 and an opportunity to provide comments.

3. Where the panel takes the information or technical advice into account in the preparation of its report, it shall also take into account any comments by the Parties on the information or technical advice.

#### **Article 22.12: Initial Report**

1. Unless the Parties otherwise agree, the panel shall base its report on the relevant provisions of this Agreement and the submissions and arguments of the Parties.

2. If the Parties agree, the panel may make recommendations for resolution of the dispute.
3. Unless the Parties otherwise agree, the panel shall, within 120 days after the last panelist is selected, present to the Parties an initial report containing:
  - (a) findings of fact, including any findings pursuant to a request under Article 22.10(6);
  - (b) its determination as to whether a 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 Annex 22.2, or any other determination requested in the terms of reference; and
  - (c) its recommendations, if the Parties have requested them, for resolution of the dispute.
4. Panelists may furnish separate opinions on matters not unanimously agreed.
5. A Party may submit written comments to the panel on its initial report within 14 days of presentation of the report or within such other period as the Parties may agree.
6. After considering any written comments on the initial report, the panel may reconsider its report and make any further examination it considers appropriate.

#### **Article 22.13: Final Report**

1. The panel shall present a final report to the Parties, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report, unless the Parties otherwise agree. The 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 22.14: Implementation of Final Report**

1. On receipt of the final report of a panel, the 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 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 Annex 22.2, the resolution, whenever possible, shall be to eliminate the non-conformity or the nullification or impairment.<sup>1</sup>

3. Where appropriate, the Parties may agree on a mutually satisfactory action plan to resolve the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel. If the Parties agree on such an action plan, the complaining Party may have recourse to Article 22.15(2) or Article 22.16(1), as the case may be, only if it considers that the Party complained against has failed to carry out the action plan.

#### **Article 22.15: Non-Implementation - Suspension of Benefits**

1. If a panel has made a determination of the type described in Article 22.14(2) and the Parties are unable to reach agreement on a resolution pursuant to Article 22.14 within 45 days of receiving the final report, or such other period as the Parties agree, the Party complained against shall enter into negotiations with the other Party with a view to developing mutually acceptable compensation.

2. If the 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 22.14 and the complaining Party considers that the other Party has failed to observe the terms of the agreement,

the complaining Party may at any time thereafter provide written notice to the other Party that it intends to suspend the application to the other Party of benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend. 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

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<sup>1</sup> 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.



- (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 other Party. The panel shall reconvene as soon as possible after delivery of the request and shall present its determination to the 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.

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 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. 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 other Party that it will pay an annual monetary assessment. The 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 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.

6. Unless the Commission otherwise decides, a monetary assessment shall be paid to the complaining Party in U.S. currency, or in an equivalent amount of Chilean currency, 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 Parties, including by further reducing unreasonable trade barriers or by assisting a Party in carrying out its obligations under the Agreement.

7. 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.

8. This Article shall not apply with respect to a matter described in Article 22.16(1).

### **Article 22.16: Non-Implementation in Certain Disputes**

1. If, in its final report, a panel determines that a Party has not conformed with its obligations under Article 18.2(1)(a) (Enforcement of Labor Laws) or Article 19.2(1)(a) (Enforcement of Environmental Laws), and the Parties:

- (a) are unable to reach agreement on a resolution pursuant to Article 22.14 within 45 days of receiving the final report; or
- (b) have agreed on a resolution pursuant to Article 22.14 and the complaining Party considers that the other Party has failed to observe the terms of the agreement,

the complaining Party may at any time thereafter request that the panel be reconvened to impose an annual monetary assessment on the other Party. The complaining Party shall deliver its request in writing to the other Party. The panel shall reconvene as soon as possible after delivery of the request.

2. The panel shall determine the amount of the monetary assessment in U.S. dollars within 90 days after it reconvenes under paragraph 1. In determining the amount of the assessment, the panel shall take into account:

- (a) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;
- (b) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;
- (c) the reasons for the Party's failure to effectively enforce the relevant law;
- (d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;
- (e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel, including through the implementation of any mutually agreed action plan; and
- (f) any other relevant factors.

The amount of the assessment shall not exceed 15 million dollars annually, adjusted for inflation as specified in Annex 22.16.

3. On the date on which the panel determines the amount of the monetary assessment under paragraph 2, or at any time thereafter, the complaining Party may provide notice in writing to the other Party demanding payment of the monetary assessment. The monetary assessment shall be payable in U.S. currency, or in an equivalent amount of Chilean currency, in equal, quarterly, installments beginning 60 days after the complaining Party provides such notice.

4. Assessments shall be paid into a fund established by the Commission and shall be expended at the direction of the Commission for appropriate labor or environmental initiatives, including efforts to improve or enhance labor or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law. In deciding how to expend monies paid into the fund, the Commission shall consider the views of interested persons in the Parties' territories.

5. If the Party complained against fails to pay a monetary assessment, the complaining Party may take other appropriate steps to collect the assessment or otherwise secure compliance. These steps may include suspending tariff benefits under the Agreement as necessary to collect the assessment, while bearing in mind the Agreement's objective of eliminating barriers to bilateral trade and while seeking to avoid unduly affecting parties or interests not party to the dispute.

#### **Article 22.17: Compliance Review**

1. Without prejudice to the procedures set out in Article 22.15(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 other Party. 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 shall promptly reinstate any benefits it has suspended under Article 22.15 or 22.16 and the Party complained against shall no longer be required to pay any monetary assessment it has agreed to pay under Article 22.15(5) or that has been imposed on it under Article 22.16(1).

#### **Article 22.18: Five-Year Review**

The Commission shall review the operation and effectiveness of Articles 22.15 and 22.16 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 imposed in five proceedings initiated under this Chapter, whichever occurs first.

#### **Article 22.19: 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 Party. 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, either Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

#### **Article 22.20: Private Rights**

Neither Party may provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

#### **Article 22.21: 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*.

## **Annex 22.2**

### **Nullification or Impairment**

1. If either Party considers that any benefit it could reasonably have expected to accrue to it under any provision of:

- (a) Chapters Three through Five (National Treatment and Market Access for Goods, Rules of Origin and Origin Procedures, and Customs Administration);
- (b) Chapter Seven (Technical Barriers to Trade);
- (c) Chapter Nine (Government Procurement);
- (d) Chapter Eleven (Cross-Border Trade in Services); or
- (e) Chapter Seventeen (Intellectual Property Rights),

is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement under this Chapter.

2. Neither Party may invoke paragraph 1(d) or (e) with respect to any measure subject to an exception under Article 23.1 (General Exceptions).

## **Annex 22.16**

### **Inflation Adjustment Formula for Monetary Assessments**

1. An annual monetary assessment imposed before December 31, 2004 shall not exceed 15 million dollars (U.S.).
2. Beginning January 1, 2005, the 15 million dollar (U.S.) annual cap shall be adjusted for inflation in accordance with paragraphs 3 through 5.
3. The period used for the accumulated inflation adjustment shall be calendar year 2003 through the most recent calendar year preceding the one in which the assessment is owed.
4. The relevant inflation rate shall be the U.S. inflation rate as measured by the Producer Price Index for Finished Goods published by the U.S. Bureau of Labor Statistics.
5. The inflation adjustment shall be estimated according to the following formula:

$$\$15 \text{ million} \times (1 + \pi_i) = A$$

$\pi_i$  = accumulated U.S. inflation rate from calendar year 2003 through the most recent calendar year preceding the one in which the assessment is owed.

A = cap for the assessment for the year in question.