

## **FTAA – Free Trade Area of the Americas**

### **Draft Agreement**

#### **Chapter on Dispute Settlement**

• **CHAPTER ON DISPUTE SETTLEMENT**

**1. [Article 1. Definitions**

2. For the purposes of this chapter, the following definitions shall apply:

3. **[FTAA Agreement:** normative text resulting from the FTAA negotiations;]

4. **[WTO Agreement:** The Marrakesh Agreement Establishing the World Trade Organization (WTO) and related legal instruments included in Annexes 1, 2 and 3 of this Agreement [, as well as any agreements negotiated thereunder];]

5. **[Regional Agreement:** a trade agreement between two or more parties;]

6. **[Perishable goods:** Those goods that deteriorate in quality in a brief period of time, like agricultural or fish products, among others. It also includes those products that lose their commercial value past a certain date, like Christmas or seasonal goods, among others.]

7. **[[Commission:] [Institutional Body:] [Dispute Settlement Body:]** Body [established within the framework of the FTAA Agreement to administer the FTAA Chapter on Dispute Settlement] **[comprised of the countries that are signatories to the FTAA Agreement];]**

8. **[Understanding:** the Understanding on Rules and Procedures Governing the Settlement of Disputes that forms part of the WTO Agreement;]

9. **[Substantial trade interest:** the situation of a Third Party, with respect to a product or products raised in a dispute in the FTAA, for which the party may derive or ceases to derive benefit, utility or profit as a consequence of the dispute settlement pursuant to the provisions of this chapter.]

10. **[Measure:** any [actual [or proposed] law, decree, agreement, administrative provision [or governmental practice], among others;] [any actual decision taken by any Party on any legislative, judicial, executive or administrative matter of a central or decentralized authority or agency, whether they be called laws, rules, procedures, requirements, decisions, decrees, resolutions, agreements, rulings, sentences or precautionary measures and the decisions mentioned even if not yet implemented, but conditional on the expiration of a time period or confined to granting powers to a given entity or official;]

11. **[Party:** any State in respect to which this Agreement has entered into effect;]

12. **[Consulting Party:** any Party that conducts consultations pursuant to Article XX (Consultations)]

13. **[Party to the Dispute:** the complaining Party or the Party complained against;]

14. **[Party Complained against:** the Party against which a claim is made [, which could be comprised of one or more Parties;]

15. **[Complaining Party:** the Party making a claim, which could be comprised of one or more Parties;]

16. **[Third Party:** [a Party that has a substantial [commercial] interest in the dispute and that is not a Party to the dispute in such dispute] [and that has notified its interest to the Commission.]

17. **[Secretariat:** the FTAA Secretariat;]

**18. Article 2. Scope of Application**

19. [Except as otherwise provided in this Agreement, <sup>1</sup>] the procedures in this chapter shall apply:

a) to the [avoidance or to the] settlement of all disputes arising between the Parties regarding the interpretation [,] [or] application of [or non-compliance with] the FTAA Agreement [or the instruments, decisions or protocols] agreed to under its framework; ] and

b) when a Party considers that an actual [or proposed] measure of another Party is [or would be] inconsistent with the obligations of the FTAA Agreement [or, even if not inconsistent, could cause nullification of impairment of any benefit that a Party could reasonably have expected to accrue to it under this Agreement in the sense of Annex XX (Nullification or Impairment).]

[c) when a Party considers that the purpose or object of the FTAA Agreement is being frustrated or prejudiced.]

20. [Where exhaustion of local remedies is required under international law no dispute between Parties concerned shall be submitted to the procedures set out in this chapter, unless and until such a requirement has been met.]

21. [In cases of infringement, it is presumed that the measure constitutes nullification or impairment, and as such, a breach of the rules has an adverse impact on other Member States. In such cases it will be up to the Party complained against to rebut the charge.]

**22. [Article 3. Principles**

23. The Parties shall at all times, endeavor through cooperation, to arrive at a prompt settlement of any dispute regarding the interpretation and application of this Agreement and shall make every attempt in good faith to arrive at a mutually satisfactory resolution of any matter that might affect its operation [exclusively in accordance with the provisions of this Chapter.]

24. [The Parties shall give special attention to the particular problems and interests of developing country Members. When one of the Parties to a dispute settlement procedure is a developing country, measures such as the following shall be included:

a) establish longer or differential time periods in the different stages of the dispute settlement procedure, as well as for complying with obligations.

b) provide necessary legal advice and assistance, in order to achieve better and more effective participation in the dispute settlement process.]

25. [In the settlement of disputes arising between Member States, in addition to principles of international law, other principles shall apply of good faith, confidentiality, prompt resolution, procedural economy, effective access, special and differential treatment, as well as of maintaining a balance between rights and obligations of the Parties.] ]

**26. Article 4. General Provisions**

27. [The dispute settlement procedure established in this chapter is an essential element in providing security and predictability for Parties in the FTAA. The Parties recognize that this procedure serves to preserve the rights and obligations of the Parties in the framework of this Agreement and to clarify the existing provisions thereof, in

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<sup>1</sup> [The rules and procedures in this Chapter shall apply subject to such special or additional rules and procedures on dispute settlement contained in this FTAA Agreement as are identified in Annex \_\_\_\_\_.]

accordance with customary rules of interpretation of public international law. The rulings of the neutral panels<sup>2</sup> cannot add to or diminish the rights and obligations provided in this Agreement.]

**28.** [The aim of the dispute settlement mechanism is to secure a positive solution to disputes.]

**29.** [All solutions to disputes formally raised under the provisions of this chapter, including reports<sup>3</sup> of neutral panels, must be consistent with the provisions of the FTAA Agreement, and shall not at any time nullify or impair benefits accruing to any Party, nor impede the attainment of any objective of the Agreement.]

**30.** [Non-governmental participation in the dispute settlement system in this Chapter shall not be permitted.]

**31.** [The Parties shall refrain from taking unilateral counter measures in situations of allegations of breaches of the FTAA Agreement.]

**32.** Any time period in proceedings under this Chapter may be extended or shortened by mutual agreement of the consulting or disputing Parties.

**33.** [Where a dispute arises between Parties, they shall proceed expeditiously to an exchange of views for the purpose of agreeing on:

- a) a mode of settlement and where an agreed mode has been exhausted, to another mode of settlement; or
- b) a mutually satisfactory method of implementation where a settlement has been reached and the circumstances require consultation regarding its implementation.]

**34.** [Subject to the provisions of the FTAA Agreement, disputes shall be settled only by recourse to any one of the following modes for the settlement of disputes, namely, good offices, mediation, consultations, conciliation, arbitration and the DSS First Instance and Appellate Structures.]

**35.** [Where a dispute has not been settled following the adoption of one of the modes referred to in the previous paragraph other than arbitration or recourse to the DSS Bodies, either party may have recourse to another mode.]

**36.** [The Parties undertake to complete the constitutional and legislative procedures required for their participation in the procedures outlined in this Chapter. Without prejudice to the generality of the foregoing, the Parties shall ensure the uniformity of their laws, regulations and administrative procedures with the obligations set out in this Chapter and with the other provisions of the FTAA Agreement.]

**37.** [No reservations shall be made in respect of any provisions of this Chapter. Reservations in respect of obligations contained elsewhere in the FTAA Agreement shall be governed by the provisions of the respective chapter. ]

**38.** [All the dispute settlement procedures set out in this Chapter shall be open to all States, that are Parties.

**39.** The dispute settlement procedures in this chapter shall be open to entities subjects of international law, other than States, particularly the organs of regional interpretation regimes, the constituent instrument of which gives such organs the competence to contract into international obligations.]

#### **40. Article 5. Choice of Forum**

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<sup>2</sup> The term “neutral panel” is used throughout the draft chapter without prejudice to the NGDS adopting another term as it advances in its discussion on a dispute settlement system, including on the establishment or not of an appellate review.

<sup>3</sup> The term “report” is used throughout this draft chapter without prejudice to the NGDS adopting another term, such as “decision” or “award,” as the Group advances in its discussion.

**41.** Any dispute arising between Parties under the FTAA Agreement [or any instruments, decisions or protocols agreed to under this framework that also constitute a violation of the obligations] [and] under the WTO Agreement [or any regional agreement to which the Parties to the dispute are party] may be settled in either forum at the discretion of the complaining Party.<sup>4</sup>

**42.** [Disputes arising between Parties to a sub-regional integration agreement on matters governed in such agreement and in this FTAA Agreement, shall be subject to the dispute settlement system of the sub-regional integration agreement to which they are party.]

**43.** Disputes arising between Parties to a sub-regional integration agreement on matters governed exclusively in this FTAA Agreement, shall be settled under the provision of this chapter.

**44.** Disputes arising between one or more Parties to a sub-regional integration agreement and any other Party or Parties not belonging to such sub-regional integration agreement, shall be settled under the provisions of this chapter.]

**45.** Once a Party has initiated dispute settlement procedures under the FTAA Agreement or the Understanding [or a regional agreement] the forum selected shall be used to the exclusion of any other. [This provision shall not apply when, in respect of the same matter, a Party bases its complaint on a different legal basis under the WTO Agreement or a regional agreement, than that available under the FTAA Agreement.]

**46.** [Before a Party initiates a dispute settlement proceeding under the WTO Agreement [or any regional agreement to which the Parties to the dispute are Party] against another Party, on grounds that are substantially equivalent to those available under the FTAA Agreement, the following rules shall apply:

a) the complaining Party shall notify the Parties to the FTAA Agreement of its intention to do so]

[b] if one or more of the Parties that received the respective notification wishes to have recourse to the dispute settlement proceedings under this chapter regarding the matter, those Parties and the complaining Party shall endeavor to agree on a single forum.]

[c] if there are no other Parties that wish to have recourse to the procedures under this chapter regarding this matter, or if there has been an agreement with them to have recourse to the dispute settlement proceedings under the WTO Agreement, the complaining Party shall notify its intention to the Party against which the procedure is being initiated]

**47.** For the purposes of this Article, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's request for a neutral panel under Article 6 of the Understanding. [Likewise, dispute settlement proceedings shall be deemed to be initiated with respect to the FTAA Agreement, when [the intervention of the Commission under Article XX (Commission-good offices, conciliation and mediation)] [the establishment of an neutral panel under Article XX (Establishment of an neutral panel)] has been requested. [Finally, dispute settlement proceedings under a regional agreement are deemed to be initiated by a Party's request for an neutral panel under such agreement.] [In any case, the complaining Party shall send a copy of the request to the Party complained against and to the Secretariat.]

**48.** [In case a complaining Party initiates dispute settlement proceedings under the WTO Agreement or a regional agreement after initiating a proceeding under the provisions of the previous paragraph, dispute settlement proceedings initiated under the FTAA Agreement shall be deemed not to be initiated.]

**49.** [If the Parties to a dispute concerning the interpretation or application of the FTAA Agreement, or any other dispute arising hereunder, have agreed, through a regional or bilateral agreement, that such a dispute shall, at the

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<sup>4</sup> [As the substantive negotiations progress, other issues concerning choice of forum will arise and should be addressed. For example, where the substantive rules of the FTAA Agreement are better developed than comparable rules in other fora, the agreement may express a preference for dispute settlement proceedings under the FTAA Agreement.]

request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedures shall be in lieu of the procedures provided for in this Chapter, unless the parties to the dispute agree otherwise.]

**50. Article 6. Request for Consultations**

51. Any Party may request in writing consultations with another Party [or other Parties] regarding any actual [or proposed] measure [or regarding any other matter that it considers might affect the [operation] [application] of the FTAA Agreement [within the terms of Article XX (Scope of Application)].]

52. [The Party initiating the procedure shall state in the request the measure or any other matter complained of, shall indicate the provisions of the FTAA Agreement that it considers relevant and shall deliver the request [to the Secretariat and] to the other Party. Such request for consultations shall be notified [by the Secretariat] to [the Commission and] the remaining FTAA Parties [within ten (10) days of the receipt of the request for consultations].]

53. [Other FTAA Parties may participate in the consultations provided that they [have a substantial [trade] interest in the matter, and] make known in writing to the [Commission] [Secretariat] their interest in participating in the consultation process within ten (10) days of submission of the request for consultations.]

54. [Whenever a Party other than the consulting parties considers that it has a [legitimate] [substantial trade] interest in consultations being held, such Party may notify the consulting Parties and the Secretariat within 10 days after the date of receipt of the request for consultations of its desire to be joined in the consultations. Such Party shall be joined in the consultations, provided that the Party to which the request for consultations was addressed agrees that the claim of [legitimate] [substantial] interest is well-founded [and based on similar facts and circumstances]. In that event the Parties shall so inform the Secretariat. If the request to be joined in the consultations is not accepted, the applicant Party shall be free to request consultations.]

**55. Article 7. Consultations**

56. When a request for consultations is made under the FTAA Agreement, the Party to which the request is made shall respond to it within [ten (10)] days [unless the Parties agree otherwise] [, and shall enter into consultations [in good faith] within a period of no more than [14] [days]. The Parties shall endeavor to reach an agreement within a period of no more than [thirty (30)] [forty-five (45)] [sixty (60)] days. [If the Party does not respond within 10 days, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of the request, then the Party that requested the holding of consultations may proceed directly to request the establishment of a neutral panel.] [When at least one of the Parties is a developing country, it may have an extension of this time period of up to thirty (30) days.] [When other Parties are joined in the consultations this time period shall be forty-five (45) days.]

57. During the consultations, the Parties:

- a) shall act in good faith and diligently with a view to arriving at a mutually satisfactory resolution;
- b) shall provide sufficient information [to enable a full examination of how the actual [or proposed] measure or any other matter, might affect the operation of the FTAA Agreement];
- c) shall treat any confidential [or proprietary] information in the consultations on the same basis as the Party providing the information;
- d) [shall seek to avoid any resolution that adversely affects the interests under the FTAA Agreement of any other Party.]

58. The consultations [shall be confidential and] shall not prejudice the rights of any of the Parties in other stages of the dispute settlement mechanism established in this chapter.

59. [In the course of the consultations, the Parties may:

- a) call on such technical advisers or create such working groups or expert groups as they deem necessary; or
- b) have recourse to good offices, conciliation, mediation or such other dispute resolution procedures

**60.** as may assist the Parties in reaching a mutually satisfactory resolution of the dispute.]

**61.** Once the Parties have arrived at a mutually satisfactory resolution in the consultations, they shall communicate the results to the [Secretariat] [Commission] for notification to the other Parties to the FTAA Agreement.

**62.** [The Parties, jointly, may request directly the Commission to convene, pursuant to Article XX (Intervention of the Commission -- Good Offices, Conciliation and Mediation), even when they have not held the consultations established in this article.<sup>5</sup>]

**63.** [The Party that has requested the initiation of consultations and that has met with the other Party, may request the establishment of the neutral panel , pursuant to Article XX (Establishment of the Group of Experts), even if the period provided for the consultations has not expired, or also if the Commission has not intervened pursuant to Article XX (Intervention of the Commission -- Good Offices, Conciliation and Mediation)<sup>6</sup>]

**64.** [If the Party to whom the request for consultations has been made does not respond to the request within the time period established or responds that it will not hold consultations [or does not enter into consultations within a period of \_\_\_ days,] the Party requesting consultations may [request the establishment of the neutral panel] [have recourse to other dispute settlement mechanisms provided in this chapter.] If there are several Parties to whom the request for consultations is made, this provision shall only have effect for those Parties that do not respond in the period indicated.]

**65. Article 8. Cases Involving Perishable [Agricultural] Goods [and Other Cases of Urgency]**

**66.** In cases [of urgency including those] involving perishable [agricultural] [fish and fishery] goods [:] [consultations shall commence within [three (3)] [fifteen (15)] days of the date of receipt of the request by the party to whom the request for consultation has been made.] [Where such consultations are not entered into, or where they fail to settle the dispute within 7 days, the requesting Party may resort to binding third party settlement.]

[a] a Party may request in writing a meeting of the Commission if a matter is not resolved pursuant to Article XX (Consultations), within \_\_\_ days, and ]

[b] the Party that has requested the intervention of the Commission, pursuant to Article XX (Intervention of the Commission -- Good Offices, Conciliation and Mediation), may request in writing the establishment of a neutral panel if the issue has not been resolved within \_\_\_ days after the meeting of the Commission or, if such meeting has not occurred, within \_\_\_ days of the date of receipt of the request for the convening of the Commission.]

**67.** [In cases of urgency distinct from those provided for in the previous paragraph] [including goods with seasonal demand,] [the Parties [and the neutral panels] shall, to the extent possible, endeavor to [accelerate the proceedings to the maximum extent possible] [reduce by half the period provided for in Articles XX (Intervention of the Commission -- Good Offices, Conciliation, and Mediation) and XX (Request to Establish the Neutral Panel).]

**68. [Article 9. Intervention of the Commission -- Good Offices, Conciliation and Mediation**

**69.** Any Party to the consultations may request in writing a meeting of the Commission provided that [a matter is not resolved pursuant to Article XX (Consultations) or Article XX (Cases Involving Perishable [Agricultural] Goods [and other Cases of Urgency)] ]

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<sup>5</sup> [Once the FTAA institutional structure is agreed upon, consideration should be given, in cases where administrative committees or sub-committees for the Agreement are established, to having their meetings constitute satisfaction of the consultation stage between the Parties.]

<sup>6</sup> *Id.*

[a) The dispute was not settled in accordance with Article XX within thirty (30) days after the initiation of consultations, or was only partially settled.

b) The Party to which the request for consultations was made did not reply within the ten- (10-) day period following the receipt of the request.]

**70.** The request referred to in the preceding paragraph shall indicate the measure or any other matter complained of and shall indicate [the factual circumstances and] [the legal basis of the complaint] [the provisions of this Agreement that it considers relevant]. This request shall be notified to the Secretariat, which in turn shall notify the other Parties and the Commission.

**71.** [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 shall convene at the headquarters of the Secretariat or at any other location agreed by the Parties.] For the purpose of reaching a mutually satisfactory settlement of the dispute, the Commission may:] [The Commission shall evaluate the situation, giving an opportunity to the Parties to the dispute to explain their respective positions, and 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.]

[At the conclusion of this proceeding, the Commission shall make proposals and recommendations to the Parties to the dispute with the aim of solving the dispute. The procedure described in this section shall not be extended for a period longer than thirty (30) days, from the date on which the dispute was submitted for the consideration by the Commission. The Parties shall have a period of fifteen (15) calendar days from the notification of the proposals and recommendations by the DSB to accept or reject them.]

**72.** If there is no consensus in the Commission regarding any of the alternatives stipulated in the preceding paragraph, a neutral panel shall be established.]

**73. [Article 10. Consolidation of Procedures**

**74.** Unless it decides otherwise, the Commission shall consolidate two or more proceedings before it regarding the same measure that it determines are appropriate to be considered jointly [by its nature or possible thematic relationship].]

**75. [Article 11. Good Offices, Conciliation and Mediation**

**76.** Good offices, conciliation and mediation are alternative methods for settling disputes and shall never be an obligatory stage of proceedings. They may be undertaken voluntarily if the parties so agree.

**77.** [Good offices, conciliation and mediation may be initiated at any time and may be terminated at any time.]

**78.** Proceedings involving mediation and, in particular, positions taken by parties during the proceedings, shall be confidential and without prejudice to the rights of the parties in any further proceedings.

**79.** In dispute settlement cases involving a developing country Party, where a satisfactory solution has not been found in the course of consultations the Secretariat shall, upon request by a developing country offer its good offices, conciliation and mediation with a view to assisting the Parties to settle the dispute, before a request for a neutral panel is made.

**80.** If the Parties agree, procedures for good offices, conciliation or mediation may continue while the neutral panel and Appellate Body process proceeds.

**81.** Moreover, in case the 30-day time period established in the previous article for good offices, mediation and conciliation expires, the neutral panel shall be constituted automatically and immediately.

**82.** In all cases the neutral panel may be constituted without the need for good offices, mediation or conciliation to be exhausted.]

**83. [Article 12. Initiation of Conciliation Proceedings**

**84.** Where Parties to a dispute have agreed to submit the dispute to conciliation under this Part, any one Party may institute proceedings by notification addressed to the other party or parties to the dispute.]

**85. [Article 13. Establishment of a List of Conciliators**

**86.** A *List of Conciliators* shall be established and maintained by the [ ]. Every Party shall be entitled to nominate two conciliators, each of whom shall be a person enjoying the highest reputation for fairness, competence and integrity. The names of the persons so nominated shall constitute the List. If at any time the number of conciliators nominated by a Party is less than two, the Party concerned shall be entitled to make such nominations as are necessary. The name of a conciliator shall remain on the List until withdrawn by the Party which made the nomination. Where a conciliator has been appointed to serve on any mediation or conciliation commission, the conciliator shall continue to serve on such Commission until the completion of the relevant proceedings.

**87.** The term of a conciliator, including that of a conciliator appointed to fill a vacancy, shall be five (5) years and may be renewed.]

**88. [Article 14. Constitution of Conciliation Commission**

**89.** A conciliation commission shall be constituted from time to time as follows:

(a) Subject to the provisions of this Article, a conciliation commission shall consist of three members;

(b) Unless the parties otherwise agree, the party instituting the proceedings shall appoint one conciliator to be chosen from the List mentioned in Article XX. The conciliator appointed may be a national of the party making the appointment. Such an appointment shall be included in the notification mentioned in Article XX;

(c) The other party to the dispute shall appoint a conciliator in the manner set forth in sub-paragraph (b) within ten days. If the appointment is not made within that period, the party instituting the proceedings may, within one week of the expiration of that period, the party initiating the procedure may either terminate it by notification addressed to the other party or request the [ ] to make the appointment in accordance with sub-paragraph (e);

(d) Within ten days after both conciliators have been appointed, they shall appoint a third conciliator chosen from the List referred to in Article XX (Establishment of the List of Conciliators). The third conciliator shall be the Chairman. If the appointment is not made within that period either party may, within one week of the expiration of that period, request the [.....] to make the appointment in accordance with sub-paragraph (e);

(e) Within ten days of the receipt of a request under sub-paragraphs (c) and (d), the [.....] shall make the necessary appointments from the List referred to in Article XX (Establishment of the List of Conciliators) in consultation with the parties to the dispute;

(f) Any vacancy on a conciliation commission shall be filled in the manner prescribed for the initial appointment;

(g) Two or more Contracting Parties to a dispute who determine by agreement that they are of the same interest shall appoint one conciliator jointly;

(h) In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply sub-paragraphs (a) to (f) in so far as may be possible.]

**90. [Article 15. Amicable Settlement**

**91.** A conciliation commission may draw to the attention of the parties to the dispute any measures which might facilitate an amicable settlement of the dispute.]

**92. [Article 16. Functions of Conciliation Commission**

**93.** A conciliation commission shall hear the parties to the dispute, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.]

**94. [Article 17. Procedure**

**95.** A conciliation commission shall, unless the parties to the dispute otherwise agree, determine its own procedure. A conciliation commission may, with the consent of the parties to the dispute, invite any Party to submit its views to the commission, orally or in writing. The report and recommendations and decisions of the commission regarding procedural matters shall be made by a majority vote of its members.

**96.** The parties to the dispute may, by agreement applicable solely to that dispute, modify the procedure referred to in the previous paragraph.]

**97. [Article 18. Report**

**98.** A conciliation commission shall report within three months of its constitution. Its report shall record any agreements reached and, failing agreement, its conclusions on all questions of law or fact relevant to the matter in dispute and such recommendations as a conciliation commission may deem appropriate for an amicable settlement.

**99.** The conclusions or recommendations of a conciliation commission shall not be binding upon the parties.]

**100.[Article 19. Termination**

**101.**The conciliation proceedings shall be deemed to be terminated when a settlement has been reached, when the parties have accepted or one party has rejected the recommendations of the report by notification addressed to the [.....], or when a period of one month has expired from the date of transmission of the report to the parties.]

**102.Article 20. Request for the Establishment of the Neutral Panel**

**103.**[The Party that has requested the intervention of the Commission] [Any Party] [The complaining party] [Any of the consulting parties] may [with the consent of the other Party] request in writing the establishment of a neutral panel, [Unless the Parties agree on another period, the neutral panel shall be established under the FTAA Agreement,] when [the Party to whom the request for consultations has been made does not respond within 10 days, or when] the matter has not been resolved [or only partially resolved] within:

- a) thirty (30) days after [the meeting of the Commission] [consultations] or, [if this has not occurred], thirty (30) days after the delivery of the request for such meeting] [consultations]; or
- b) [thirty (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 XX (Consolidation of Procedures) or] [45 days of delivery of the first such request if any other Party has subsequently requested or has participated in consultations regarding the same matter, or]
- c) [fifteen (15) days provided for perishable goods or prior to the expiration of such period by common

agreement between the Parties;]

d) [thirty (30) days established for good offices, mediation or conciliation, or prior to the expiration of such period by common agreement between the Parties].

**104.**[When good offices, conciliation or mediation are entered into within 30 days after the date of receipt of a request for consultations, the complaining party must allow a period of 30 days after the date of receipt of the request for consultations before requesting the establishment of a neutral panel. The complaining party may request the establishment of a neutral panel during the 30-day period if the parties jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute. ]

**105.**The request for the establishment of the neutral panel shall be made in writing, and shall indicate whether consultations were held [and whether the Commission has intervened], identify [the specific measures in dispute ] [ or other matter complained of] and provide a brief summary of the legal basis of the complaint, [and shall indicate the provisions of the FTAA Agreement that it considers relevant] sufficient to present the dispute clearly. In case the applicant requests the establishment of a neutral panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

**106.**[The Party that requests the establishment of the neutral panel shall [notify] [deliver] the request [to the Parties to the FTAA Agreement] [to the Party or Parties complained against, and to the other Parties, if any] [that are entitled to request the establishment of a neutral panel.] [The latter Parties shall have a period of ten (10) days to make known their interest in participating in the procedure as a complaining Party.]]

#### **107. Article 21. Establishment of a Neutral Panel**

**108.**[A Party to a dispute may, with the consent of the other party, refer the matter to a neutral panel constituted in accordance with the provisions of this Chapter.]

**109.**[The request for the establishment of a neutral panel shall be made in writing, informing about the stages gone through prior to the procedure, indicating the facts and legal basis of the dispute. The provisions of the Agreement that are considered relevant, and the specific measure at issue. The other Party may not object to the establishment of the neutral panel.]

**110.**Unless the consulting Parties decide otherwise, [the neutral panel shall be established within [ten (10)] [fifteen (15)] days] [the Commission shall establish an neutral panel] of the [delivery of the] request. [The Parties to the dispute shall meet at the headquarters of the Secretariat or at any other location upon which the Parties agree in order to establish the neutral panel pursuant to Article XX (Establishment of the Neutral Panel). This meeting shall be held with the Party or Parties that are present.] [To this effect the request shall be sent to the DSB, which within five (5) days shall notify this to the Party or Parties in dispute, as well as the other Parties to the FTAA Agreement.]

**111.**[Likewise, if the 30 day period established in Article XX (Intervention of the Commission -- good offices, mediation and conciliation) expires, the neutral panel shall be established automatically and immediately. In all cases the neutral panel shall be constituted without the need for good offices, mediation or consultations to be exhausted.]

**112.**[A Party that [has requested consultations] [may request the establishment of a neutral panel] and that decides to refrain from participating as a complaining Party, may only participate as a third Party before such neutral panel pursuant to the provisions of Article XX (Third Parties), provided that it makes known its interest in participating as such within the period of [seven (7)] [ten (10)] days, calculated from the receipt of the request for the establishment of the neutral panel.]

**113.**[A Party that considers it has a substantial [trade] interest in the matter shall be entitled to join as a complaining Party by notifying the Parties to the FTAA Agreement of its intention to participate. The notification shall be made at the earliest possible time, and in any event no later than a week after the date of delivery of a request by a Party for the establishment of a neutral panel.]

**114.**[[The neutral panel] [the Parties to the dispute] shall determine in each case if the other Party to the FTAA Agreement has a substantial [trade] interest in the dispute]

**115.**[In the absence of a significant change in the [economic or] [commercial] circumstances, if a Party decides not to join as a [complaining] [third] Party, it shall [normally] refrain thereafter from initiating [or continuing] regarding the same matter:

**116.**a dispute settlement procedure under this Chapter [or the FTAA Agreement]; and

**117.**a dispute settlement proceeding under the Understanding [on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization] [or a regional agreement] [on grounds that are substantially equivalent to those available to that Party under the FTAA Agreement].

**118.**Unless otherwise agreed by the Parties to the dispute, the neutral panel shall be established and perform its functions in a manner consistent with the provisions of this Chapter.

**119. Article 22. Roster of Panelists<sup>7</sup>**

**120.**[To assist in the selection of members of neutral panels [the [FTAA] Secretariat] [institutional body] shall maintain an indicative list of [up to thirty (30)] [governmental and non-governmental] individuals, from which members of the neutral panels may be drawn, as appropriate.]

**121.**The Parties shall establish by consensus no later than \_\_\_\_\_, a roster of up to \_\_\_ persons, [five (5) of whom must not be nationals of any of the Parties,] who are willing and able to serve as panelists.

**122.**[To approve the Roster, the Parties shall forward to the Secretariat the names of three candidates, whether nationals or not, within three months after the entry into force of this Agreement. The Parties shall have a maximum period of thirty (30) days, from the date of notification of the proposed candidates by the Secretariat, to indicate in writing via the Secretariat their reaction to the proposed candidates. The Secretariat shall communicate to the Parties whose candidates have been vetoed reasonably for failing to meet the qualifications of Article XX (Qualifications of Panelists). These Parties shall have fifteen (15) days to present their new candidates, without prejudice to the Roster, containing the candidates who have not been vetoed pursuant to this paragraph, shall be considered approved.]

**123.**Roster members shall possess the qualifications stipulated in Article XX (Qualifications of Panelists).

**124.**Parties may periodically suggest names of individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade [and of the sectors or subject matter of the covered agreements,] and those names shall be added to the list [, after approval by the institutional body]. The list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

**125.**[The roster members [including those nominated to fill a vacancy] shall be appointed for terms of [three (3)] [five (5)] years, and may be re-appointed.]

**126. Article 23. Qualifications of Panelists**

**127.**Members of neutral panels shall:

- a) have expertise or experience in law, international trade, other [matters covered by] [issues likely to arise in disputes under] the FTAA Agreement, or the resolution of disputes arising under international trade agreements;
- b) be selected strictly on the basis of their objectivity, probity, reliability, sound judgment, and honesty;

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<sup>7</sup> The term “panelist” or “panel member” is used throughout this draft chapter without prejudice to the NGDS adopting another term as it advances in its discussion.

c) be independent [in the exercise of their functions,] [not be affiliated with any of the Parties to the dispute or take instructions from any Party] and shall abstain from any action incompatible with the character of their position. [Governments shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a neutral panel.];

d) comply with the Code of Conduct [established in Annex XX (Code of Conduct).]

**128.**[Persons who have participated in any capacity in the previous stages of the procedure or who lack the necessary independence in relation to the governments of the Parties to the dispute may not act as members of the neutral panel.]

**129.**[Citizens of Parties whose governments are Parties to the dispute or third Parties shall not serve as members of the neutral panel concerned with that dispute, unless the Parties to the dispute agree otherwise.]

### **130. Article 24. Establishment of the Neutral Panel**

**131.**The following procedures shall apply to neutral panel selection:

a) The neutral panel shall comprise [three (3)] [five (5)] members [that may not be citizens of any of the Parties to the dispute] one of whom shall act as Chair.

b) The Parties shall be informed promptly of the composition of the neutral panel.

c) [[The FTAA Secretariat] shall propose nominations for the neutral panel to the Parties to the dispute. The Parties to the dispute shall not oppose nominations except for duly justified compelling reasons.]

d) The members of the neutral panel [including its Chair] shall be selected by mutual agreement by the Parties to the dispute; [of whom \_\_\_\_ must be nationals of each Party and \_\_\_\_ must not be nationals of any of the Parties] [Each Party involved in the dispute shall select a neutral panel member from the roster provided in Article XX, within [ten (10)] [fifteen (15)] days from the date on which the DSB notified the Parties. Within the same period each of the Parties shall select, moreover, a substitute member, who will replace the regular one in case of incapacity, excuse or resignation.

e) The third member of the neutral panel shall be chosen by mutual agreement of the Parties, within ten (10) calendar days of the date on which the last of the members previously appointed has been selected, who shall be the Chair of the neutral panel. Within this same period, both Parties in dispute shall appoint a substitute for the third member.]

f) The members shall be selected [preferably] from the roster.

g) If there is no agreement on the members within [ten (10)] [fifteen (15)] [twenty (20)] [thirty (30)] days [of the establishment of the neutral panel.] [established for holding consultations,] [provided for perishable goods,] [established for good offices, mediation or conciliation,] or before the expiration of this period by mutual agreement between the Parties, the following procedure shall be followed:

**132.**[At the request of either Party to the dispute, the institutional body shall compose the neutral panel by appointing the members it considers most appropriate, after consulting with the Parties to the dispute. The institutional body shall inform the Parties of the composition of the neutral panel thus formed no later than ten (10) days after the date the body received such a request.]

**133.**[Each Party shall select a member of the neutral panel from the roster referred to in article XX (Roster of Panelists); and the third member, who shall be the Chair, shall be chosen by [lot] [by one of the Parties to the dispute chosen by lot.] The person designated as Chair of the neutral panel shall be a member of the Roster referred to in Article XX (Roster of Panelists) and shall not be a national of either of the Parties [to the dispute].] [Where the members fail to appoint a Chair within the time prescribed, the [ ] shall make the appointment within ten (10) days.]

**134.**[The Parties [to the dispute] shall endeavor to agree on the Chair of the neutral panel within 15 days of the [delivery] [submission] of the request for its establishment. If the Parties [to the dispute] are unable to agree [on the Chair] within this period, the Party chosen by lot, shall select, within 5 days, an individual who is not a citizen of a Party;]

**135.**[Within [five (5)] [fifteen (15)] days of the selection of the Chair, each Party to the dispute shall choose [one] [two] member[s] who is a national of the other Party to the dispute. Notwithstanding the above, the Parties to the dispute, by mutual agreement, may provide that the neutral panel be comprised of panelists who are not nationals of one of the Parties. If a Party to the dispute fails to select a member of the neutral panel within this period, such member shall be selected by lot from among the roster members who are citizens of the other Party to the dispute.]

**136.**[Each Party shall select a member of the neutral panel from the roster referred to in Article XX (Roster of Panelists), and a third member, who shall be Chair, shall be chosen by lot and may not be a citizen of any of the Parties. If any of the Parties fails to select a member of the neutral panel within the period provided, the Secretariat shall proceed to appoint the member in a period not exceeding ten (10) days. If the Parties agreed to the composition of the neutral panel, its members shall designate the Chair. If the members of the neutral panel do not reach agreement within fifteen days of the date of the establishment of the neutral panel, the Chair shall be chosen by lot.]

**137.**[When one of the Parties involved in the dispute has not appointed a member of the neutral panel, the member shall be chosen by lot, by the DSB, within ten (10) calendar days following the time period, among the panelists on the Roster. If there is no agreement between the Parties directly involved in the dispute to select a third member of the neutral panel, or a substitute for the member within the time period established in this Article, the DSB, within five (5) calendar days following this time period, shall proceed to choose by lot from the roster provided in Article XX (Roster of Panelists).]

**138.**[The person designated as Chair of the neutral panel shall not be a national of any of the Parties.]

**139.**Parties shall permit, as a general rule, their officials to serve on neutral panels.

**140.**Any Party [to the dispute] may exercise a peremptory challenge against any individual not on the Roster who is proposed as a member of the neutral panel by the other Party [to the dispute] within 15 days after the individual has been proposed.

**141.**If [a Party to the dispute is comprised of two or more Parties] [two or more Parties decide to participate jointly,], [one of these, selected by lot, shall represent the others with respect to the procedure established in this article.] [they shall unify their representation in the neutral panel by selecting a member by mutual agreement in the time period stipulated in this Article. If there is no agreement on selecting the member, the procedure set out in this Article shall be followed.] [Where more than two Parties are parties to a dispute, the parties concerned shall agree among themselves on the two members to be appointed from the Roster within fifteen days following the decision to refer the matter to the neutral panel and the two members shall within fifteen days of their appointment appoint a third member from the Roster who shall be the Chairman. Where no agreement is reached under paragraph X, the [.....] shall make the appointment within ten days and where the members fail to appoint a Chairman within the time prescribed the [ ] shall make the appointment within ten days. ]

**142.**[If a disputing Party believes that a member is in violation of the Code of Conduct, the Parties to the dispute shall consult and if they agree, the member shall be removed and a new one shall be selected in accordance with the provisions of this Article.]

**143.**[When a dispute is between a developing country Party and a developed country Party, the neutral panel shall, if the developing country Party so requests, include at least one member from a developing country Party.]

**144.**[Notwithstanding the provisions of this Article, parties to a dispute may refer the matter to arbitration and consent to the [.....] appointing a sole arbitrator from the Roster who shall not be a national of any party to the dispute.]

**145. Article 25. Terms of Reference of the Neutral Panel**

**146.** Unless the disputing Parties within [15 days after] [20 days from the date of the delivery of the request for] the establishment of the neutral panel otherwise agree, the terms of reference of the neutral panel shall be:

**147.** "To examine, [within three months of the establishment of the neutral panel] in the light of the relevant provisions of the FTAA Agreement [invoked by the Parties to the dispute], the matter submitted for its consideration, under the terms set forth in the request for [consultations] [the Commission meeting] [the establishment of the neutral panel] and [issue [the preliminary report] the final report] [make findings, determinations and recommendations as provided in Article XX (Initial Report) and Article XX (Final Report)]."

**148.** [If a Party argues that a matter has nullified or impaired benefits in the sense of Annex XX (Nullification or Impairment) the terms of reference shall so indicate.]

**149.** [If a Party wishes the neutral panel to make findings as to the degree of adverse trade effects of any measure adopted by another Party found not to conform with the obligations of the Agreement or to have caused nullification or impairment in the sense of Annex XX (Nullification or Impairment), the terms of reference shall so indicate.]

**150.** [In case the requesting party requests the establishment of a neutral panel with other than standard terms of reference, its request shall include the proposed text of special terms of reference.]

**151. Article 26. Model Rules of Procedure**

**152.** [Unless otherwise agreed by the Parties to the dispute, the proceedings before the neutral panel shall be governed by the Model Rules of Procedure established in Annex XX.]

**153.** [Subject to the relevant provisions of this Chapter, the neutral panel shall establish its own rules of procedure.] [The Parties to the FTAA Agreement] [The Commission] shall establish [by January 1, 2005 Model Rules of Procedure.] in accordance with the following principles:

a) the procedures shall assure a right to at least one hearing before the neutral panel as well as the opportunity to provide initial and rebuttal written submission; and

[b) One week after the selection of the last member of the neutral panel, notice shall be provided to the public of the deadline established by the neutral panel for members of the public to submit views on legal or factual issues to the neutral panel. The deadline established by the neutral panel shall permit ample time for the public to prepare submissions and for disputing Parties to respond to any such submissions. The Model Rules shall establish rules concerning the length and format for the submission of such views. [In no case shall an organization, individual or groups of individuals, on their own initiative, make at any stage of the proceedings, representations or written submissions or appear at hearings before the neutral panel.]]

**154.** The neutral panel shall conduct its proceedings in accordance with the Model Rules of Procedure. The disputing Parties may modify any of the provisions of the Model Rules of Procedure by mutual agreement for a particular proceeding[, except for those provisions requiring public hearings, providing for submissions by third Parties, providing opportunities for interested persons to submit views to the neutral panel, or requiring that all submissions be made available to the public.]

**155.** [The neutral panel shall favourably consider the request of any Party to submit views orally or in writing at all stages of the proceedings. The foregoing notwithstanding, the neutral panel shall rule on requests it considers not to be in good faith, or which is otherwise intended to frustrate the procedure.]

**156.** [The Commission may amend from time to time the Model Rules of Procedure established in this Article.] [The neutral panel may modify the Model Rules of Procedures for the specific case referred to it.]

**157.** [In this Chapter, where there is a requirement for notification to be given, such notification shall be in writing.]

**158.**The reports of the neutral panel [and of the Appellate Body] shall be drafted without the presence of the Parties to the dispute and in light of the information provided and the statements made.

**159.**Opinions expressed in the neutral panel [or the Appellate Body] report by individuals serving on the neutral panel or on the Appellate Body shall be anonymous.]

**160.[Article 27. Procedures for Multiple Complainants**

**161.**Where more than one Party to this Agreement requests the establishment of neutral panels related to the same matter, a single neutral panel may be established to examine these complaints taking into account the rights of all interested Parties concerned. A single neutral panel should be established to examine such complaints whenever feasible.

**162.**The neutral panel shall ensure that the rights which the disputing parties would have enjoyed had separate neutral panels examined the complaints are in no way impaired. [If one of the disputing parties so requests, the neutral panel shall submit separate reports on the dispute concerned.] The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the neutral panel.

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

**164.[Article 28. Multiple Parties Complained Against]**

**165.[Article 29. Third Parties**

**166.**The interests of the parties to the dispute and those of other FTAA Parties shall be fully taken into account during the neutral panel process.

**167.**If a Party that is not a disputing Party [that considers it has a substantial [trade] interest in the matter] submits a notification to the disputing Parties [and to the Parties to this Agreement] [and to the Commission] [and to the institutional body], that Party shall be entitled to [participate as a complaining Party] attend the hearings [as observer to any substantive meetings of the neutral panel with the Parties] [except when confidential factual information [designated as such by the party that has submitted it] is being examined], to be heard by the neutral panel, to make written and oral submissions to the neutral panel, [and to receive written submissions of the neutral panel, except certain confidential factual information and any submission subsequent to the initial report] [and of the disputing Parties.]

**168.**[The notification shall be delivered at the earliest possible time, and in any event no later than seven days after the date of delivery of a request by a Party for the establishment of a neutral panel.]

**169.**[The [neutral panel] [disputing parties] shall define in each case if the other FTAA Party has a substantial interest in the dispute.]

**170.**The proceedings of third Parties shall be reflected in the [initial and] final report of the neutral panel.

**171.**[If a Party to the FTAA that is a third party to the dispute considers that a measure already the subject of an neutral panel proceeding nullifies or impairs benefits accruing to it under the Agreement, it may have recourse to normal dispute settlement procedures under this chapter. Such a dispute shall be referred to the original neutral panel wherever possible.] ]

**172.[Article 30. Representatives of the Parties to the dispute**

**173.**The Parties to the dispute shall designate their representatives to the neutral panel.

174. All notifications made by the neutral panel to the Parties to the dispute shall be sent to the designated representatives. ]

**175. [Article 31. Withdrawal or Settlement**

176. At any stage of the procedure, a Party may withdraw its claim, or the Parties to the dispute may reach a settlement, thus concluding the dispute in both cases. Such withdrawal or settlement shall be communicated to the Commission or to the neutral panel, as appropriate, so that the necessary corresponding measures may be adopted.]

**177. Article 32. Expert Advice**

178. On request of a Party to the dispute or on its own initiative, [unless both Parties otherwise agree] the neutral panel may seek information and technical advice from any person or body that it deems appropriate [including highly qualified, independent experts in technical or scientific matters, provided that the Parties so agree and subject to such terms and conditions as the Parties may agree].

179. [[On request of a Party to the dispute or on its own initiative, [unless both Parties otherwise agree]] [Provided that the Parties so agree] the neutral panel may request a written report from [a Scientific Review Board] [persons or institutions, including highly qualified, independent experts in technical or scientific matters] on any [technical] [factual] issue, [including concerning environmental, health, security or other scientific matters raised by a Party in a proceeding,] subject to such terms and conditions as the Parties may agree. Nothing in this article shall be construed to limit the information that a Party may choose to include in its own submissions.]

180. The persons or [groups of experts] [institutions] shall be selected by the neutral panel from among highly qualified technical personnel in their respective areas, after consultations with the Parties to the dispute and in accordance with the Model Rules of Procedure.

181. The Parties to the dispute [and third Parties] shall be provided:

- a) advance notice and a reasonable period of time to provide comments to the neutral panel on the [technical ] [factual] issues to be referred to [the experts] [the Board]; and
- b) a copy of the [experts'] [Board's] report and the opportunity to provide comments on the report to the neutral panel. These comments shall be delivered to the other Party.

182. The neutral panel shall take into account this report and the comments of the Parties in the preparation of the [initial and] final report.

**183. [Article 33. Groups of Experts**

184. Technical advisers and groups of experts established in accordance with this Chapter shall be governed by the following rules and procedures:

- a) advisers and groups of experts shall be under the authority of the Commission or of the neutral panel, as the case may be, which shall decide the terms of reference and detail the working procedures and to whom to report;
- b) only persons of professional standing and experience in the field in question may serve as technical advisers or participate in groups of experts;
- [c) Citizens of Parties to the dispute shall not serve as advisers or members of a Group of Experts without the consent of the other disputing Party;
- d) technical advisers or groups of experts may consult and seek information from any source they deem appropriate. Before obtaining such information or advice from any source within the jurisdiction of a Party, they

shall inform the government of that Party, which shall respond promptly and fully to any request addressed to it;

e) the Parties shall have access to all relevant information provided to the advisor or Group of Experts, unless it is of a confidential nature. Confidential information provided shall not be released without formal authorization from the government, organization or person providing it. Where such information is requested from an advisor or Group of Experts but release of such information by the Advisor or Group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information;

f) the report of the Group of Experts shall be advisory only; and

g) the expenses for assistance shall be borne equally by the Parties.] ]

### **185. [Article 34. Provisional Measures**

**186.**[At the request of a Party to the dispute and to the extent that there are well founded presumptions that maintaining the situation would cause serious and irreparable injury to one of the Parties, the neutral panel may issue provisional measures it considers appropriate, according to the circumstances and under the conditions that the neutral panel itself establishes, in order to prevent such injury.]

**187.**[A neutral panel having jurisdiction and to which a dispute has been duly submitted, may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties, pending a final determination of the dispute.]

**188.**[The neutral panel may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.] [Provisional measures may be modified or revoked as the circumstances justify.]

**189.**[The neutral panel shall order or recommend provisional measures, or any modification or revocation thereof, only after giving each party an opportunity of presenting its observations.] [Provisional measures may be prescribed, modified or revoked under this Article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.]

**190.**[The Party complained against shall immediately, or in the period that the neutral panel determines, comply with any provisional measure, which shall be extended until the final report is issued.] [The parties to the dispute shall comply promptly with any provisional measures prescribed under this Article.]

**191.**[The neutral panel shall forthwith give notice to the parties to the dispute, and to such other Contracting parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.]

**192.**The provisions of this Article are

a) subject to Article [ ] on preliminary proceedings, and

b) without prejudice to provisions elsewhere in this chapter and this Agreement concerning situations of urgency, including those involving perishable goods.] ]

### **193. [Article 35. Initial Report**

**194.**Unless the Parties to the dispute otherwise agree, the neutral panel shall, within 90 days [of the establishment of the neutral panel,] [after the last member is selected,] [or such other period as the Model Rules of Procedure established pursuant to Annex XX (Model Rules of Procedure) may provide,] present to the Parties to the dispute [and to the Third Parties] an initial report. This shall be based on the arguments and submissions of the Parties to the dispute and on any information before it pursuant to [Articles XX (Third Parties) and] Article XX (Expert Advice), unless the Parties to the dispute otherwise agree.

**195.** The initial report shall contain:

- a) findings of fact, including any findings pursuant to a request under Article XX (Terms of Reference of the Neutral Panel), and
- b) its determination as to whether the measure at issue is or would be inconsistent with the obligations of this Agreement, or cause nullification or impairment in the sense of Annex XX (Nullification or Impairment) or any other determination requested in the terms of reference; and
- c) its recommendations, if any, for resolution of the dispute.

**196.** The members of the neutral panel may furnish separate opinions in writing on matters not unanimously agreed.

**197.** The Parties to the dispute [and third Parties] may submit written comments to the neutral panel on its initial report, within 14 days of the presentation thereof.

**198.** In such an event, and after considering such written comments, the neutral panel, on its own initiative or at the request of any Party to the dispute, may:

- a) request the views of any participating Party;
- b) reconsider its report; and
- c) [make] [take] any further [examination] [action] that it considers appropriate.]

**199. [Article 36. Jurisdiction of the Neutral Panel]**

**200.** [The Parties hereby affirm as obligatory and without need of special agreement, the jurisdiction of the neutral panel, in each case that it is established to examine and resolve disputes referred to in this Chapter.]

**201.** [Any neutral panel established under this chapter shall have jurisdiction over any dispute concerning the interpretation in application of the FTAA Agreement, as set out in Article XX, and which is duly submitted to such neutral panel.]

**202.** Any neutral panel having jurisdiction as set out in the previous paragraph shall apply the FTAA Agreement and other rules of international law not incompatible with the FTAA Agreement.

**203.** The foregoing shall be without prejudice to the pre-existing regional or bilateral agreement already in force between the Parties to the FTAA Agreement or Parties to the FTAA Agreement, and third States or other entities, subjects of international Law.

**204.** The provisions of paragraph X does not prejudice the power of the neutral panel, mechanism or procedure having jurisdiction under this chapter to decide a dispute ex aequo et bono, if the parties so agree.] ]

**205. [Article 37. Final Report]**

**206.** The neutral panel shall communicate to [the Secretariat, which shall communicate to] the Parties to the dispute [, to third Parties,] [and to the Commission], its final report, including any opinions explained in writing on matters not unanimously agreed, within [thirty (30)] [sixty (60)] days, of [the presentation of the initial report,] [establishment of the neutral panel] unless the Parties agree otherwise. [This period may be extended one time up to thirty (30) days.]

**207** [The neutral panel, at the time it issues its final report, in addition to ruling on the matter submitted to it, shall only take into consideration the report of the scientific review board and the comments of the Parties in the preparation of this report, as well as matters related to the participation of third parties.]

**208.**[The Parties may submit to the institutional body any written comment on the final report as they may deem appropriate.]

**209.**No neutral panel may disclose in its initial or final report which members are associated with majority or minority opinions.

**210.**Unless otherwise agreed by the Parties to the dispute, the final report shall be published [within [thirty (30)] [fifteen (15)] days of] [immediately after] the notification to [the institutional body] [the Commission and to] the Parties to the dispute.

**211.**The neutral panel shall decide the dispute on the basis of the provisions of the FTAA Agreement, [the instruments signed in the framework of the FTAA Agreement,] and the principles and provisions of international law applicable to the interpretation of treaties.

**212.**[The provisions of this Article do not limit the authority of the neutral panel to decide the dispute *ex aequo et bono*, if the Parties to the dispute so agree. ]

**213.**[The final report of the neutral panel shall be confined to the subject-matter of the dispute and shall state the reasons on which it is based.]

**214.**[The final report shall necessarily contain the following elements, without prejudice to other elements that the neutral panel may deem appropriate:

- a) indication of the Parties to the dispute;
- b) the name and nationality of each of the members of the neutral panel and the date of its establishment ;
- c) the names of the Parties' representatives;
- d) the matter in dispute;
- e) a report of the implementation of the neutral panel procedure, including a summary of the acts carried out and the allegations of each of the Parties;
- f) the decision on the dispute, detailing the factual and legal basis;
- [g) the degree of adverse trade effects caused by the measure in question, when this has been so requested;]
- [h) the amount of costs of the neutral panel procedure to be covered by each Party;]
- i) the date and location it was issued; and
- j) the signature of all members of the neutral panel.]

**215.**[Decisions of the neutral panel shall be taken by a majority vote of its members and shall be final and binding on the Contracting Parties, parties to the dispute.]

**216.**[Unless the disputing Parties agree to suspend the proceeding, the final report of the neutral panel shall be published immediately after it is transmitted to them.] ]

**217. [Article 38. Clarification or Interpretation of the Final Report**

**218.**[Any of the Parties to the dispute may request, within [fifteen (15)] [twenty (20)] days after notification of the final report, a clarification thereof or an interpretation on the manner in which implementation is to be carried out.]

**219.**[Where the parties cannot agree on the interpretation or implementation of the final report, either party may apply to the neutral panel for a ruling within thirty days of the final report. The term of the neutral panel shall come to an end unless an application for a ruling has been received, in which case it shall continue for such reasonable time, not exceeding thirty days, as may be required to make the ruling.]

**220.**[The neutral panel shall make its ruling within [fifteen (15)] [thirty (30)] days after the presentation of the request.]

**221.**[If the neutral panel considers that the circumstances so require, it may suspend implementation of the final report until it makes a decision on the request.]

**222.**Wherever possible the original neutral panel shall be convened again to clarify or interpret the final report. If the neutral panel cannot be established with the same members, the procedures pursuant to Article XX (Establishment of the Neutral Panel) shall be followed.]

**223. Article 39. Implementation of the Final Report**

**224.**[ Unless they agree otherwise,] The final report of the neutral panel shall be binding on the Parties to the dispute in the terms and time periods that the neutral panel orders] [, may not be appealed] [and shall have the force of res judicata]. [Clarifications may only be sought within fifteen (15) days of the notification of the ruling, which shall be given within a maximum period of up to fifteen (15) days.]

**225.**[The time period for implementing the final report shall not exceed six (6) months, calculated from the date on which the last of the Parties to the dispute [or of the third Parties] has been notified about the final report unless [they] [the Parties to the dispute] agree on a different period. [In a case involving a measure that requires a change in domestic legislation of the Party complained against, the period for implementing the final ruling shall not exceed nine (9) months.]

**226.**[On receipt of the final report of this neutral panel, the Parties to the dispute shall agree on the resolution to the dispute, which normally shall conform with the determinations and recommendations of the neutral panel, and shall notify [ the Secretariat] [the Parties to the FTAA] of any agreed resolution of any dispute.

**227.**[Wherever possible, the resolution shall be non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of Article XX (Nullification or Impairment) or, failing such a resolution, compensation.]

**228.**When the final report determines that the measure is inconsistent with the FTAA Agreement or causes nullification or impairment, the Party complained against [wherever possible] shall refrain from applying the measure or shall remove it, unless the Parties to the dispute agree otherwise.

**229.**When the final report of the neutral panel determines that the measure is cause for nullification or impairment, it shall determine the level of nullification or impairment and may suggest [if the Parties to the dispute so request] adjustments it considers mutually satisfactory for the Parties to the dispute.

**230.**[When the final report determines that, based on a request made pursuant to Article XX (Terms of Reference of the Neutral Panel), the measure inconsistent with this Agreement or that causes nullification or impairment, adversely affects its trade interests, such party shall enter into negotiations with the other Party(ies)with a view to developing mutually acceptable compensation. If no mutually satisfactory solution is agreed, the complaining party may proceed in accordance with Article XX (Non-Implementation of the Final Report and Suspension of Benefits or Other Obligations).] ]

**231. [Article 40. Appellate Body**

**232.**A standing Appellate Body shall hear appeals to the panel rulings and shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.]

**233.[Article 41. Constitution of the Appellate Body**

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

**235.**Members of the Appellate Body shall:

- a) have expertise or experience in law, international trade, other matters covered by the FTAA Agreement, and in the resolution of disputes arising from international trade agreements.
- b) be selected strictly on the basis of their objectivity, reliability, sound judgment, honesty and probity;
- c) be independent, and not be affiliated with or take instructions from any of the Parties; and
- d) comply with the Code of Conduct established by the Commission.

**236.**Members of the Appellate Body shall, in general terms, be representative of the composition of the FTAA.

**237.**All persons serving on the Appellate Body shall stay abreast of dispute settlement activities and other relevant FTAA activities. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.]

**238.[Article 42. Appeal Procedure**

**239.**Parties may only appeal a panel report within 30 days following its adoption.

**240.**Third parties which have notified the panel of a substantial commercial interest in the matter pursuant to Article 24 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

**241.**As a general rule, the proceedings shall not exceed 60 days from the date a Party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. When the Appellate Body considers that it can not provide its report within 60 days, it shall inform the Secretariat in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

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

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

**244.**The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the budget of the FTAA Agreement in accordance with criteria adopted by the Commission.]

**245.[Article 43. Adoption of the Decision of the Appellate Body**

**246.**The Appellate Body, in its ruling, may uphold, modify or reverse the legal findings and conclusions of the panel.

**247.**Rulings of the Appellate Body shall be made by a majority vote of its members serving in the case being appealed. However, the opinions of the members of the Appellate Body shall be anonymous.

**248.**The rulings of the Appellate Body shall be unconditionally accepted by the Parties.]

**249.[Article 44. Procedures for Appellate Review**

**250.**The Appellate Body, in consultation with the Secretariat, shall establish the working procedures and shall communicate them to the members for their information.]

**251.[Article 45. Nature of Final Decision**

**252.**Where a panel or the Appellate Body concludes that a measure is inconsistent with the FTAA Agreement, it shall recommend that the Party complained against bring the measure into conformity with the FTAA Agreement within a reasonable period of time, and shall suggest ways in which the Party could do so, giving special consideration to lower levels of development.

**253.**The final ruling shall be binding on the Parties in dispute in the terms and within the time periods it mandates and, provided that it is possible, it shall consist of the non-implementation or removal of the measure that is inconsistent with this FTAA Agreement or that is the cause of nullification or impairment.

**254.**The rulings of the panel and of the Appellate Body cannot add to or diminish the rights and obligations provided in this FTAA Agreement.]

**255.**[Any decision resolved by a neutral panel having jurisdiction under this chapter shall, subject to review by an appellate body, be final, and shall be complied with promptly by all the parties to the dispute. Any such decisions shall have no binding force except between the parties to the dispute and in respect of that particular dispute. The foregoing is without prejudice to other Contracting parties, and regional integration regimes in which they may be involved, analyzing such decisions with a view to their adoption with or without alteration.]

**256.Article 46. Non-implementation of the Final Report and Suspension of Benefits or Other Obligations**

**257.**[Compensation and the suspension of concessions are temporary measures available in the event that the rulings of a neutral panel or of the Appellate Body are not applied in the reasonable period of time referred to in the preceding article, and shall only be applied until the Party complained against [complies with the final report] [eliminates the measure inconsistent with the FTAA Agreement] pursuant to the ruling of the neutral panel or of the Appellate Body or offers a solution to the nullification or impairment that is satisfactory to the complaining Party. Compensation is voluntary and, if granted, shall be consistent with the FTAA Agreement.]

**258.**[Unless the Parties to the dispute have notified] [The Parties to the dispute shall notify] the Commission that to their satisfaction there has been implementation of the final report within [thirty (30)] [ten (10)] days after the expiry of the period set in the final report, the neutral panel shall determine whether the Party complained against has implemented said report.] [Where there is disagreement as to the existence or consistency with the FTAA Agreement of measures taken to comply with the final report, such dispute shall be decided through recourse to these dispute settlement procedures. Consultations between the complaining party and the party complained against are desirable but not required to request the establishment of a neutral panel.] [If it is not possible to resort to the original neutral panel, matters will proceed pursuant to Article XX (Establishment of the Neutral Panel).]

**259.**[If [within the period established pursuant to Article XX (Implementation of the Final Report) implementation of the final report has not be effected or if there has been partial implementation,] [after 20 days from the date of expiry of the period for complying with the final report, the Parties have not agreed on any satisfactory compensation] [within 30 days following the final ruling by the neutral panel determining that a measure is inconsistent with the obligations of this Agreement or causes nullification or impairment in the sense of Annex XX (Nullification or Impairment), the Party complained against has not reached an agreement with the complaining Party on a mutually satisfactory settlement, pursuant to Article XX] the complaining Party may [request authorization from the DSB to] [suspend the application] [communicate to the responding Party in writing its decision to temporarily suspend concessions or other equivalent obligations designed to secure implementation of the final report.] [to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution to the dispute.

**260.**[The complaining Party [or a third Party] may pursuant to this article suspend the application of benefits [or other obligations] to the Party complained against arising from the FTAA Agreement of equivalent effect to the benefits [or other obligations] no longer being received if the neutral panel resolves:

- a) that a measure is inconsistent with the obligations of the FTAA Agreement and the Party complained against is not complying with the final report in the terms and within [the period that the neutral panel has set; or] [30 days after receiving the final report;] [the period agreed by the Parties to the dispute;] or
- b) that a measure causes nullification or impairment, in the sense of Annex XX (Nullification or Impairment) and the Party complained against has not reached a mutually satisfactory agreement on the dispute with the complaining Party [or with the third Party] within the period [that the neutral panel has set] [of 30 days after receiving the final report;]

**261.**[The measures for suspension of concessions may only be modified in the event that an adjustment of an entirely technical nature is required.]

**262.**The suspension of benefits [or other obligations] are temporary measures and shall last until such time as the Party complained against [, in the judgment of the neutral panel,] complies with the final report or until [this Party and the complaining Party] the Parties [to the dispute] [or the Party complained against and a third Party] reach a mutually satisfactory agreement on the dispute, as appropriate.] However, if there are two or more Parties complained against, and one or more of these has complied with the final report or reaches a mutually satisfactory agreement with the complaining Party, [or with a third Party] they shall lift the suspension of benefits [or other obligations] to those Parties that have complied. [Likewise, the complaining Party may suspend benefits of equivalent effect to the degree of adverse trade effects caused by the measure that is inconsistent with this Treaty or that has caused nullification or impairment.]

**263.**[In considering what concessions or other obligations are to be suspended, the complaining Party shall apply the following principles and procedures:

- (a) [The complaining Party shall take into account, when appropriate, the conclusions of the neutral panel on the adverse effects on trade of the measure adopted.]
- (b) the complaining Party [or a third Party] shall first attempt to suspend the concessions or other obligations with respect to the sector or sectors affected by the measure or other matter that the neutral panel [or the Appellate Body] has found to be inconsistent with the obligations of the FTAA Agreement, or to have caused nullification or impairment in the sense of Annex XX (Nullification or Impairment).
- (c) if the complaining Party [or a third Party] considers that it is not practicable or effective to suspend benefits [or other obligations] in the same sector or sectors, it may suspend benefits [or other benefits] in other sectors [within the same chapter] [and shall indicate the reasons that form the basis of the communication in which its decision to carry out the suspension is announced] [or other obligations].
- (d) if the complaining Party [or a third Party] considers that it is not practicable or effective to suspend benefits [or other obligations] with respect to other sectors within the same chapter, and that circumstances are sufficiently serious, it may suspend benefits [or other obligations] in another chapter within the FTAA Agreement.

**264.**[In applying [the above principles] [the suspension of benefits or other obligations] the complaining Party shall take into account:

- a) the trade in the sector [in which the neutral panel or Appellate Body has found a violation or other nullification or impairment,] and the importance of such trade to that Party.
- b) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;]

**265.** [For purposes of this article, "sector" means:

**266.** with respect to goods, all goods;

**267.** with respect to services...]

**268.** [If the complaining Party decides to suspend concessions or other obligations, it shall state to the neutral panel or to the Appellate Body the reasons for doing so.

**269.** The level of the suspension of concessions or other obligations shall be equivalent to the level of the nullification or impairment and may even consider the injury that would be caused by complying with the measures established in the following article of this FTAA Agreement.]

**270.** [On the written request of a Party a neutral panel shall be established [within [twenty-five (25)] [thirty (30)] days to determine whether [there is compliance with the final report or] the level of benefits suspended by the complaining Party [or a third Party] pursuant to this article is manifestly excessive [or there has been compliance with the principles for applying the suspension of benefits or other obligations contained in this Article]. Wherever possible, the original neutral panel shall be reconvened for this purpose. If it cannot be constituted with the same members, matters shall proceed pursuant to Article XX (Establishment of the Neutral Panel). [During this procedure, the complaining Party may continue with the suspension of benefits or other obligations.]

**271.** The proceedings of the neutral panel shall be conducted in accordance with the Model Rules of Procedure. The neutral panel shall present its report within [sixty (60)] [ninety (90)] days after [the last member is selected,] [meeting to establish the Group.] [or other such period as the Parties [to the dispute] may agree.] [If such neutral panel has been established with the same members who heard the dispute, it shall present its final report within thirty (30) days of the presentation of the request referred to in the previous paragraph.]

**272. [Article 47. Damages**

**273.** If in the final ruling the Appellate Body or the neutral panel also concludes that the violation or the nullification or impairment has caused material injury to the complaining Party, it shall authorize the country, if a mutually satisfactory compensation has not been agreed upon, to suspend benefits designed to balance the situation of inequality caused by the violation or by the nullification or impairment, even if the measure has been removed by the Party complained against.

**274.** Material injury shall be understood to exist if it is demonstrated that the violation or the nullification or impairment affects a material volume of trade in relation to the total exports of the complaining Party or to the effects on the economy of a country based on its special circumstances.]

**275. [Article 48. Strengthening of the FTAA Agreement**

**276.** When Parties seek the redress of a violation of obligations or other nullification or impairment of benefits under the FTAA Agreement, they shall have recourse to, and abide by, the rules and procedures of this Agreement.

**277.** In such cases, Parties:

a) shall not make a determination to the effect that a violation has occurred, or that benefits have been nullified or impaired, except through recourse to dispute settlement in accordance with the rules and procedures of this Agreement, and shall make any such determination consistent with the findings contained in the neutral panel. In this sense, prior to the conclusions of the procedures established in this Agreement, a Party may not issue a "unilateral" declaration on whether another Party has infringed its rights under the provisions of the FTAA Agreement; and

b) shall follow the procedures set forth in Article XX of this Agreement to determine the level of suspension of concessions or other obligations and before suspending concessions or other obligations under the FTAA

Agreement in response to the failure of the Party concerned to implement the recommendations and rulings within the reasonable period of time fixed in Article XX.]

**278.[Article 49. Responsibility or Compensation.]**

**279.Article 50. [Confidentiality] [Transparency]**

**280.**[All documents and actions related to the procedure established in this chapter, including the hearings before the neutral panel, deliberations [, the initial report,] and all written submissions and communications made to the group, as well as meetings of the neutral panel [and of the Appellate Body], shall be confidential, [except for the final reports].]

**281.**[In no case may an organization, individual or groups of individuals, on its/their own initiative, make during any stage of the proceeding, a presentation or written submission, or attend the hearings of the neutral panel.]

**282.**[All notifications provided for in this Chapter, all documents submitted in connection with proceedings under this Chapter, and the final reports and procedural rulings of neutral panels shall be made available to the public, except to the extent such documents contain business confidential information as defined in this Article. Moreover, public notice shall be provided immediately upon establishment of the neutral panel. The neutral panel shall conduct its internal deliberations in private. Neutral panel hearings shall be open to the public, except to the extent necessary to prevent the disclosure of confidential information as defined in this Article. The written submissions of disputing Parties and of other Parties participating in a dispute and any submissions made under paragraph XX shall be made immediately available to the public.]

**283.**[The neutral panel and the Parties shall treat as confidential the information submitted by another Party to the neutral panel that the Party has designated as confidential pursuant to this Article.]

**284.Article 51. Calculation of Time Periods**

**285.**The periods referred to in this chapter shall be understood to be in calendar days and shall be calculated starting from the day after the relevant act or occurrence. For these purposes, when the period is calculated from the delivery of a document to a Party, it shall begin the day following the date of receipt of the corresponding communication. [The communications referred to in this instrument shall be valid provided that they are issued and received by the competent bodies. If the last day of the period falls on a non-business day, the term shall expire on the following business day.]

**286.**When a Party receives a document on a date different from that on which the same document was received by another Party, the period shall begin to run as of the date of receipt of the last of said documents.

**287.[Art. 52. Special Procedures Involving Member States with Different Level of Development**

**288.**At all stages of a dispute settlement procedure in which a developing country participates as a Party, particular consideration shall be given to its level of development. In such case, the Parties shall exercise due restraint in raising the dispute.

**289.**If nullification or impairment is found to result from a measure taken by a developing country, the complaining Party shall exercise due restraint in asking for compensation from the Party complained against or in seeking to suspend the application of concessions.]

**290.[Art. 53. Effective Access**

**291.**Effective access of all Member States to the dispute settlement system set forth in this chapter shall be ensured. For such purpose, the Secretariat shall provide legal advice and assistance in respect of dispute settlement to developing country members. To this end, the Secretariat shall make available a qualified legal expert to any developing country member which so requests, that shall assist it in a manner ensuring the continued impartiality of

the Secretariat. The Secretariat shall also conduct on a permanent basis special training courses on dispute settlement, so as to enable members' experts to be better informed in this regard.

**292.**In addition, the Secretariat shall present annually to the Commission a report on the use of the dispute settlement mechanism during the previous year, as well as the budget of own resources or of technical cooperation from various sources, among which multilateral organizations could be included. Such report shall also contain the activities through which effective participation, particularly of developing countries, would be sought.]

**293.[Article 54. Interpretation of the FTAA Agreement in Judicial or Administrative Proceedings**

**294.**If an issue of interpretation or application of the FTAA Agreement arises, in a domestic judicial or administrative proceeding of a Party, that either Party considers would merit its intervention, or if a judicial or administrative body solicits the views of one of the Parties, that Party shall notify the Secretariat, which shall notify the other Parties. The Commission shall endeavor to agree, [by consensus, in its next session] on an appropriate non-binding response [as expeditiously as possible].

**295.**The Party in whose territory the judicial or administrative body is located shall submit the interpretation of the Commission to the judicial or administrative body in accordance with the rules of that body.

**296.**If the Commission is unable to agree on an interpretation any of the Parties may submit its own views to the judicial or administrative body in accordance with the rules of that body.]

**297.[Article 55. Private Rights**

**298.**No Party may provide for a right of action under its legislation against another Party on the ground that a measure of that other Party is inconsistent with the FTAA Agreement.]

**299.[Article 56. Alternative Dispute Resolution Between Private Parties**

**300.**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 [that are nationals of the Parties as well as between nationals of Parties and nationals of third States.]

**301.**[To this end, each Party shall provide for appropriate procedures to ensure observance of [international arbitration conventions] [agreements to arbitrate] [that have been ratified] and the recognition and enforcement of arbitral awards granted in those disputes. [A Party shall be deemed to be in compliance with this paragraph if it is 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] [or the Arbitration Rules of the United Nations Commission on International Trade Law].]

**302.**[The Parties [shall] [may] establish] [The Commission [shall] [may] establish] an Advisory Committee on Private Commercial Disputes, comprising persons with expertise or experience in the resolution of international private commercial disputes. The Committee shall present reports and recommendations of a general nature respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of these disputes in the FTAA.

**303.**[Contracting Parties shall refrain from taking measures of diplomatic protection in private commercial disputes arising between their nationals.] ]

**304.[Annex XX. Nullification and Impairment**

**305.**If a Party considers that any benefit it could reasonably have expected to accrue to it under the following provisions

a) ...

is being nullified or impaired or 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

**306.**A Party may not invoke:

a)...

**307.**[To determine the elements of nullification or impairment, the Parties may take into account the principles deriving from case law on paragraph 1(b) of GATT 1994 Article XXIII.]]

**308.**[Annex XX. Supplementary Rules of Procedure to Article XX (Rules of Procedure)]

**309.**The Chair of the neutral panel shall be authorized to make administrative and procedural decisions.

**310.**The neutral panel may allow assistants or staff from the FTAA Secretariat to be present during its deliberations.

**311.**If a member of a neutral panel dies, withdraws or is removed, a replacement shall be selected as expeditiously as possible in accordance with the selection procedure followed to select the member.

**312.**Any time period applicable to the neutral panel proceeding shall be suspended for a period beginning on the date the member of the neutral panel dies, withdraws or is removed and ending on the date the replacement is selected.

**313.**A neutral panel may, in consultation with the disputing Parties, modify any time period applicable in the neutral panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding.

**314.**The Chair of the neutral panel shall fix the date and time of the hearing in consultation with the disputing Parties, the other members of the neutral panel and the FTAA Secretariat.

**315.**The hearing shall be held in the capital city of the Party complained against.

**316.**The neutral panel may convene additional hearings if the disputing Parties so agree.

**317.**All members of the neutral panel shall be present at hearings. The following may also attend a hearing:

- a) representatives of the Parties to the dispute;
- b) FTAA Secretariat personnel and stenographers; and
- c) assistants to the members of the neutral panel.

**318.**No later than five days before the date of a hearing, each Party to the dispute shall deliver to the FTAA Secretariat a list of the names of those 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.

**319.**The neutral panel shall conduct the hearing in the following manner, ensuring that the Parties to the dispute and the Party complained against are afforded equal time:

- a) Argument
  - i) Argument of the complaining Party
  - ii) Argument of the Party complained against.

b) Rebuttal Argument

- i) Reply of the complaining Party
- ii) Counter-reply of the Party complained against.

**320.**The neutral panel may direct questions to any Party to the dispute at any time during a hearing.

**321.**The FTAA Secretariat shall arrange for a transcript of each hearing to be prepared and shall, as soon as possible after it is prepared, deliver a copy of the transcript to the Parties to the dispute and the neutral panel.

**322.**The neutral panel may at any time during a proceeding address questions in writing to one or more of the Parties to the dispute. The neutral panel shall deliver the written questions to the Party or Parties to whom the questions are addressed through the FTAA Secretariat.

**323.**A Party to the dispute to whom the neutral panel addresses written questions shall deliver its written reply through the FTAA Secretariat. Each Party to the dispute shall be given the opportunity to provide written comments on the reply within five days after the date of delivery.

**324.**Within 10 days after the date of the hearing, each Party to the dispute may deliver to the FTAA Secretariat a supplementary written submission responding to any matter that arose during the hearing.

**325.**A Party asserting that a measure of another Party is inconsistent with the provisions of the FTAA Agreement shall have the burden of establishing such inconsistency.

**326.**A Party asserting that a measure is subject to an exception under the FTAA Agreement shall have the burden of establishing that the exception applies.

**327.**The neutral panel shall not meet with one participating Party to the dispute in the absence of the other Parties to the dispute.

**328.**No member of a neutral panel may discuss any aspect of the subject matter of the proceeding with a Party or Parties to the dispute in the absence of the other members.

**329.**No neutral panel may decide to request a written report of a person or group of experts any later than 15 days after the date of the hearing, whether on its own initiative or at the request of a disputing Party.

**330.**Regarding procedural questions not covered in these rules, the neutral panel may adopt an appropriate procedure that is not inconsistent with the FTAA Agreement.]

**331.[Annex XX. Preliminary Proceedings**

**332.**Any neutral panel having jurisdiction under this Chapter to which a dispute has been referred in accordance with Article..., shall determine at the request of a party to the dispute, a Party with legitimate third party rights, or proprio motu, whether the claim constitutes an abuse of legal process or whether, prima facie, it is well founded. If the neutral panel determines that the claim constitutes an abuse of legal process or is prima facie, unfounded, it shall take no further action in the case.

**333.**The neutral panel shall establish reasonable time-limits within which determinations of applications shall be made, but at all events, upon receipt of an application, it shall notify the other party or parties to the dispute.

**334.**Nothing in this Article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.]

**335.[Annex XX. Remuneration and Payment of Expenses**

**336.**[The fees and expenses of a conciliation commission shall be borne by the Parties to the dispute.]

**337.**[The remuneration and expenses of the neutral panel, including the fees, travel and lodging expenses, and subsistence allowances of the members of the neutral panel, experts and assistants, engaged for the purposes of a dispute, and all general expenses of neutral panels shall be borne equally by the Parties to the dispute [, unless the neutral panel, taking into consideration the circumstances of the case, determines otherwise.] ]

**338.**[The Commission shall establish the amounts of remuneration and expenses that will be paid to the members of neutral panels, committee members and members of scientific review boards.]

**339.**[Each member of a neutral panel or committee shall keep a record and render a final account of the person's time and expenses, and the neutral panel, committee or scientific review board shall keep a record and render a final account of all general expenses.]

**340.**[Where a third party intervenes in the proceedings, the party shall bear the costs associated with the intervention.] ]