

**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. **[Executive Body for Dispute Settlement<sup>1</sup>:** 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 .]

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

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<sup>1</sup> The term “Executive Body for Dispute Settlement” is used throughout the draft chapter without prejudice to the NGDS adopting another term, such as “Institutional Body” or “Monitoring Body” or “Dispute Settlement Body” as the Group advances in its discussion, particularly on the functions to be carried by such a body.

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

19. [Except as otherwise provided in this Agreement,] 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 [and] [or]
- (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).]

20. [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.]

**21. Article 3. Cooperation**

22. 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.

**23. Article 4. General Provisions**

24. [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.]

25. [The rulings of the neutral panels<sup>2</sup> [or the appellate body] cannot add to or diminish the rights and obligations provided in this Agreement.]

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

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

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

29. [Before bringing a case, a Party shall exercise its judgment as to whether action under these procedures would be fruitful.]

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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.

**30. Article 5. [Differential treatment]**

31. [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.
- (c) guarantee, at all stages of the procedure, its right to communicate in any of the FTAA languages.]

**32. Article 6. Choice of Forum**

33. Any dispute arising between Parties under the FTAA Agreement [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>3</sup>

34. [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.]

35. 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.]

36. 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, [involving a matter which could also be filed in accordance with the FTAA's dispute settlement procedure,] 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 there are multiple complainants regarding the same matter, they shall endeavor to agree on a single forum]

37. 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 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 establishment of a neutral panel under Article XX (Establishment of a neutral panel) has been requested. [Finally, dispute settlement proceedings under a regional agreement are deemed to be initiated when the requirements provided for under such agreement are met.]

38. [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.]

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<sup>3</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.]

**39. Article 7. Consultations**

40. 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 or application of the FTAA Agreement

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

42. A Party other than the consulting Parties may join consultations, provided that, within ten days of the date on which the request for consultations was received, it notifies the consulting Parties [and the Executive Body for Dispute Settlement] of its interest in doing so and that none of the consulting Parties [the Party to which the request for consultations was made] objects. If the request to join consultations is not accepted, the applicant Party may request consultations.”<sup>4</sup>

43. The Party to which the request is made shall respond to it within [ten (10)] days, and shall enter into consultations within a period of [14] [30] days of the date on which the Party to which the request is made receives it. If the Party does not respond within [10] days, or does not enter into consultations within a period of no more than [30] days, 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.]

44. During the consultations, the Parties shall:

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

45. The consultations shall be [confidential, and] without prejudice to the rights of any Party in any further proceedings.

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

47. [Consultations shall take place at a venue agreed by the parties, or in the absence thereof, at a venue chosen by the party with the lower level of development.]

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<sup>4</sup> The time periods and when such time periods are deemed to begin shall be determined once the structure of the mechanism has been decided.

**48. Article 8. Cases Involving Perishable [and Seasonal] Goods**

49. In cases of urgency including those involving perishable [and seasonal] goods:

(a) 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 request the establishment of a neutral group.

(b) the Parties [and the neutral panels] shall endeavor to accelerate the proceedings to the greatest extent possible.

**50. [Article 9. Consolidation of Procedures]**

**51. [Article 10. Good Offices, Conciliation and Mediation]**

52. 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.

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

54. Proceedings involving good offices, conciliation and mediation, 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.]

55. [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

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

**56. Article 11. Establishment of a Neutral Panel**

57. [The Party that requested consultations] [Any of the consulting Parties] may request in writing the establishment of a neutral panel [to the Executive Body for Dispute Settlement]. 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 xx days, or when the matter has not been resolved within:

(a) xx days after the delivery of the request for [consultations]; or

(b) [xx (15) days provided for perishable [or seasonal] goods.]

58. The request for the establishment of the neutral panel shall be made in writing, [and shall indicate whether consultations were held], identify [the specific measures in dispute ] [ or other matter complained of] and provide a brief summary of the legal and factual 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. [The other Party may not object to the establishment of the neutral panel.]

59. [The Party that requests the establishment of the neutral panel shall notify the request to the [Parties to the FTAA Agreement] [Executive Body for Dispute Settlement] [Secretariat]] [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 [or as Third Party].]

60. [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 (Composition of the Neutral Panel). This meeting shall be held with the Party or Parties that are present.[The meeting shall take place at a venue chosen by the party with the lower level of development.] ]

61. [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.]

## **62. Article 12. Roster of Panelists<sup>5</sup>**

63. [To assist in the selection of members of neutral panels the Secretariat shall maintain an indicative list of up to xx governmental and non-governmental individuals, from which members of the neutral panels may be drawn.]

64. [To establish the Roster and for its future modifications, the Parties may forward to the Secretariat the names of xx candidates, whether nationals or not, providing information on their qualifications according to Article xx, within xx months after the entry into force of this Agreement. The Parties shall have a maximum period of xx 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 duly challenged for failing to meet the qualifications of Article XX (Roster of Panelists). These Parties shall have xx days to present their new candidates, without prejudice to the Roster, containing the candidates who have not been challenged pursuant to this paragraph, shall be considered approved.]

65. Roster members shall possess the following qualifications:

(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;

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

66. [The roster members shall be appointed for terms of xx years, and may be re-appointed.]

## **67. Article 13. Composition of the Neutral Panel**

68. [Unless the consulting Parties decide otherwise, [the neutral panel shall be established within [ten (10)] [fifteen (15)] days] [ [the Executive Body for Dispute Settlement] shall establish a neutral panel]of the [delivery of the] request.

69. The members of the neutral panel shall possess the qualifications stipulated in Article XX (Roster of Panelists) as well as the following requirements:

(a) be independent [in the exercise of their functions], [not be affiliated with any of the Parties [to the dispute] [third parties] or take instructions from any Party] and shall abstain from any action incompatible with the character of their position.

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<sup>5</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.

[(b)Persons who have participated in any capacity previously in the case may not act as members of the neutral panel.]

70. The following procedures shall apply to the composition of the neutral panel:

[(a) The neutral panel shall comprise three members, one member of whom shall act as Chair. [The number of members can be modified by agreement of the Parties.]

[(b) The FTAA Secretariat shall propose nominations [from the indicative list] for the Chair and the members of the neutral panel to the Parties to the dispute within a period of ten days following the establishment of the neutral panel. The Parties to the dispute shall not oppose nominations except for duly founded reasons.]

[(c) The members of the neutral panel shall be selected by mutual agreement by the Parties to the dispute.] [Each Party to the dispute shall select a member of the neutral panel from the indicative list. The members selected by the Parties to the dispute shall select the Chair of the neutral panel. Nevertheless, the Parties to the dispute may select a member not included in the list.]

[(d) If there is no agreement on the members, including the Chair, or if there is partial agreement, within fifteen days from the date on which the Secretariat submitted the roster referred to in sub-paragraph (b), or before the expiration of this period, by mutual agreement between the Parties, the following procedure shall be followed:

At the request of any Party to the dispute, [the Director General], in consultation with [the Chair of the Executive Body for Dispute Settlement], [after consulting with the Parties to the dispute] shall appoint the members of the neutral panel required [by lot]. [The Director General] shall inform the Parties of the composition of the neutral panel thus formed no later than ten days after the date on which such request was made.

This procedure shall also apply in cases of multiple complaining Parties and multiple parties complained against, as well as in cases of withdrawal of, and vacancies for, members of the neutral panel.]

[(e) The person appointed as Chair of the neutral panel must not be a national of any of the Parties to the dispute or Third Parties.]

[(f) Parties shall permit, as a general rule, their officials to serve on neutral panels.] ]

71. [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.]

72. [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.]

**73. [Article 14. Challenge and Removal**

74. In the event that the members of a neutral panel were appointed in accordance with the provisions of Article xx (Composition of the Neutral Panel). sub-paragraph (d), the Parties to the dispute may challenge the member or members of the neutral panel on well-founded grounds within xx days of their appointment.

75. [The Director General, in consultation with the Chair of of the Executive Body for Dispute Settlement] shall make the relevant decision and shall replace –if need be- the member or members of the neutral panel within the xx-day period following the motion for challenge.

76. 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 Article xx (Composition of the Neutral Panel).

**77. Article 15. Terms of Reference of the Neutral Panel**

78. Unless the disputing Parties within [15] [20] days after the establishment of the neutral panel otherwise agree, the terms of reference of the neutral panel shall be:

78. "To examine, in the light of the relevant provisions of the FTAA Agreement, the matter submitted for its consideration, under the terms set forth in the request for [consultations] [the establishment of the neutral panel] and [issue its decision] [make findings, determinations and recommendations as provided in Article XX (Initial Report) and Article XX (Final Report)]."

80. [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.]

81. [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.]

**82. Article 16. Model Rules of Procedure**

83. [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.

**84. [Article 17. Procedures for Multiple Complainants**

85. 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.

86. If one of the disputing parties so requests, the neutral panel shall submit separate reports<sup>6</sup> on the dispute concerned.

87. [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.] ]

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<sup>6</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.

88. [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.]

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

(a) a dispute settlement procedure under this Chapter [or the FTAA Agreement]; or

(b) 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].

**90. [Article 18. Multiple Parties Complained Against]**

**91. [Article 19. Third Parties]**

92. If a Party that is not a Party to the dispute [that has a substantial [trade] interest in the matter] and so notifies, that Party shall be entitled to participate as a Third party, to attend [any] hearings of the meetings of the neutral panel with the Parties to the dispute, to make written and oral submissions to the neutral panel, and to receive any written [submissions], [communications] [to and from] [the neutral panel] [the Parties to the dispute or Third Parties] [, except certain confidential factual information] [designated as such by the Party that has submitted it].

93. The submissions of third Parties shall be reflected in the [initial and] final report of the neutral panel.

94. [If a Third Party considers that a measure already the subject of a 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.]]

**95. Article 20. Expert Advice**

96. 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] [international organization] that it deems appropriate [subject to such terms and conditions as the Parties may agree].

**97. [Article 21. Provisional Measures]**

98. [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.]

99. [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.]

100.[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.]

101.[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.]

102.[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.]

103.[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.

104.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.]]

**105.[Article 22. Initial Report**

106.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.

107.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.

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

109.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.

110.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.]

**111.[Article 23. Jurisdiction of the Neutral Panel**

112. [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.]

113. [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.

114. 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.

115. 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.

116.The provisions of paragraph XX 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.] ]

**117. [Article 24. Withdrawal or Settlement]**

118. [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. [Moreover, the complaining Party may withdraw its claim at any stage of the procedure before the issuance of the final report.] Such withdrawal or settlement shall be communicated to the [Executive Body for Dispute Settlement] or to the neutral panel, as appropriate, so that the necessary corresponding measures may be adopted.]

**119. [Article 25. Final Report**

120.[The neutral panel shall communicate to [the Secretariat, which shall communicate to] the Parties to the dispute and Third Parties, its final report in writing , including any opinions explained 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.]

121.No neutral panel may disclose which members are associated with majority or minority opinions.

122.[Unless otherwise agreed by the Parties to the dispute,] the final report shall be published within xx days of the notification.

123. [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.]

124. [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.]

125.[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 to the dispute, submissions by Third Parties and the report of the Group of Experts;

(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] explicit indication of the way in which the relevant provisions on the treatment of differences in the level of development and size of economies that have been raised by the developing country Party during the dispute settlement proceedings, have been taken into account;]

i) the date and location it was issued; and

j) the signature of all members of the neutral panel.]

126. [Decisions of the neutral panel shall be taken by a majority vote of its members and shall be final and binding on the Parties to the dispute, [unless it is appealed].]

#### **127. [Article 26. Recourse to Clarification [or Interpretation]]**

128. [Any of the Parties to the dispute may request respectively the [original] neutral panel or the Appellate Body, within [5] days after notification of the decision, a clarification of the conclusions thereof [or an interpretation on the manner in which implementation is to be carried out]. The neutral panel or the Appellate Body, respectively shall make its ruling on the request within 15 days of its receipt.]

129. [The filing of the Recourse to Clarification shall suspend [enforcement of] [compliance with] the final decision until there is a ruling on such recourse.]

130. [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.]

131. [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.]

#### **132. [ Article 27. Implementation of the Final Report]**

133. [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.]

134. [ [Where a neutral panel or the Appellate Body concludes] [When the final report determines] that the measure is inconsistent with the FTAA Agreement or causes nullification or impairment, [it shall recommend that the Party complained against bring the measure into conformity with the FTAA Agreement and shall suggest ways in which the Party could do so, giving special consideration to lower levels of development.] the Party complained against [wherever possible] shall refrain from applying the measure or shall remove it, unless the Parties to the dispute agree otherwise. failing such a resolution, compensation.]

135. [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 the FTAA 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).] ]

136. [Unless they agree otherwise, the final decision of the neutral panel or Appellate Body shall be binding on the Parties to the dispute in the terms and time periods that the neutral panel orders [, may not be appealed] [, shall have the force of res judicata] and be complied with within a maximum period of [90] days [from the time of notification] [calculated from the date on which the last of the Parties to the dispute has been notified about the final report]. In the case of perishable or seasonal goods, the maximum period shall be [30] days. In a case involving a measure that requires a change in the domestic legislation of the Party complained against, the period for implementing the final ruling shall not exceed [9 months] [180 days].

[Prompt compliance with recommendations or rulings of the neutral panel is essential in order to ensure effective resolution of disputes to the benefit of both Parties.]

137. [Within 30 days after the date on which a neutral panel has issued its final report, the Party complained against shall notify the other Party of its intentions in respect of implementation of the recommendations and rulings of the neutral panel. If it is impracticable to comply immediately with the recommendations and rulings, the Party complained against shall have a reasonable period of time in which to do so. ]

138. [The reasonable period of time shall be:

- (a) a period of time mutually agreed by the Parties within 45 days after the date the final report is issued by the neutral panel; or
- (b) a period of time determined through binding arbitration within 90 days after the final report is issued.<sup>7</sup> In such arbitration a guideline for the arbitrator should be that the reasonable period of time to implement a neutral panel report should not exceed 15 months from the date of the issuance of a final report. However, that time may be shorter or longer depending upon the particular circumstances.]

139. [During the reasonable period of time, each Party shall accord sympathetic consideration to any request from the other Party for consultations with a view to reaching a mutually satisfactory solution regarding the implementation of the recommendations or rulings of the neutral panel.]

140. [ (a) The issue of implementation of the recommendations or rulings may be raised by the complaining Party at any time following the issuance of the final report.

(b) The Party complained against shall report on the status of its implementation of the recommendations or the rulings at the request of the other Party<sup>8</sup>, beginning 6 months after the date the final report is issued, until the Parties have mutually agreed that the issue is resolved or until a neutral panel finds pursuant to Article XX (Determination of Compliance) that the Party complained against has complied.

(c) (i) Upon compliance with the recommendations or rulings of the neutral panel, the Party complained against shall provide the other Party a written notification on compliance.

(ii) If the Party complained against has not provided a notification under paragraph (c)(i) by the date that is 20 days before the date of expiry of the reasonable period of time, then not later than that date the

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<sup>7</sup> If the Parties cannot agree on an arbitrator within 10 days after referring the matter to arbitration, the arbitrator shall be chosen by lot from among the panelists.

<sup>8</sup> The Party complained against shall provide a detailed written status report concerning its progress in the implementation of the recommendations or rulings.

Party complained against shall provide to the other Party a written notification on compliance, including the measures that it has taken, or the measures that it expects to have taken by the expiry of the reasonable period of time. Where the notification refers to measures that the Party complained against expects to have taken, the Party complained against shall provide to the other Party a supplementary written notification no later than the expiry of the reasonable period of time, stating that it has, or has not, taken such measures, and indicating any changes to them.

(iii) Each notification under this subparagraph shall include a detailed description as well as the text of the relevant measures the Party complained against has taken. The notification requirement of this subparagraph shall not be construed to reduce the reasonable period of time establish pursuant to paragraph (137) of this Article.]

141. [When the final decision declares that the measure is cause for nullification or impairment, without violating this Agreement, it shall determine the level of nullification or impairment and establish the adjustments it considers satisfactory for the Parties to the dispute.]

#### **142. [Article 28 Determination of Compliance**

143. Where there is disagreement between the complaining Party and the Party complained against as to the existence or consistency with this Agreement of measures taken to comply with the recommendations or rulings of a neutral panel, such disagreement shall be resolved through recourse to the dispute settlement procedures provided for in this Article.

144. The complaining Party may request the establishment of a compliance neutral panel referred to in paragraph 268 of this Article at any time after:<sup>9</sup>

- (a) the Party complained against states that it does not need a reasonable period of time for compliance pursuant to paragraph 138 of Article XX (Implementation of the Final Report);
- (b) the Party complained against has submitted a notification pursuant to paragraph 140(c) of Article XX (Implementation of the Final Report) that it has complied with the recommendations or rulings of the neutral panel; or
- (c) 10 days before the date of expiry of the reasonable period of time; whichever is the earlier. Such request shall be made in writing.

145. While consultations between the Party complained against and the complaining Party are desirable, they are not required prior to a request for a compliance neutral panel under paragraph (143).

146. When requesting the establishment of a compliance neutral panel, the complaining Party shall identify the specific measures at issue and provide a brief summary of the legal basis of the complaint, sufficient to present the problem clearly. Unless the Parties agree on special terms of reference within 5 days from the establishment of the compliance neutral panel, standard terms of reference in accordance with Article XX (Model Rules of Procedure) shall apply to the compliance neutral panel.

147. The compliance neutral panel shall be established on the date of the delivery of the request to establish such a panel.

148. The compliance neutral panel shall consist of the members of the original panel. If any member of the original panel is not available, a new member shall be appointed in accordance with the procedure established under Article XX (Establishment of the Neutral Panel).

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<sup>9</sup> A compliance panel may also be established pursuant to paragraph 177 of Article 35 Compensation and Suspension of Concessions.

149. The compliance neutral panel shall provide its report to the Parties within 90 days of the date of its establishment.

150. The complaining Party shall not suspend concessions or other obligations under paragraph 151 of this Article until the compliance neutral panel has provided its report to the Parties and the complaining Party has notified the Party complained against which particular concessions or obligations the Party intends to suspend.

151. If the compliance neutral panel report finds that the Party complained against has failed to bring the measure found to be inconsistent with this Agreement into compliance therewith or otherwise comply with the recommendations or rulings of the neutral panel in the dispute within the reasonable period of time, then:

- (a) the Party complained against shall not be entitled to any further period of time for implementation; and
- (b) after the compliance neutral panel report has been provided to the Parties, the complaining Party may suspend the application to the Party complained against of concessions or other obligations under this Agreement pursuant to Article XX (Compensation and Suspension of Concessions).

152. The compliance neutral panel shall establish its own working procedures. The provisions of Articles XX (Cooperation), XX (Expert Advice), XX (Initial Report), XX (Final Report) (paragraph 121) (paragraph 122) and XX (Implementation of Recommendations and Rulings) shall apply to compliance neutral panel proceedings except to the extent that:

- (a) such provisions are incompatible with the time frame provided in this Article; or
- (b) this Article provides more specific provisions.]

### **153.[Article 29. Appellate Body**

154. A standing Appellate Body shall be established to hear appeals filed against final decisions taken by neutral panels. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body. Members of the Appellate Body shall be convened and shall meet for every case in which their presence is required.]

### **155.[Article 30. Constitution of the Appellate Body**

156. The Executive Body for Dispute Settlement 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.

157. Members of the Appellate Body shall:

- a) be well-renowned for their accredited technical competence in law, experience in international trade, other matters covered by the FTAA Agreement, or 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 government; and
- d) comply with the Code of Conduct.

158. Members of the Appellate Body shall, in general terms, be representative of the composition of the FTAA Agreement. At least three of the members shall be from developing member countries.

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

**160.[Article 31. Appeal Procedure**

161.Only parties may appeal a final ruling by a neutral panel within 30 days following its notification.

162. Third parties which have notified the neutral panel of a substantial commercial interest in the matter pursuant to Article XX (Third Parties) may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

163. 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 ruling. When the Appellate Body considers that it cannot take its decision 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.

164.An appeal shall be limited solely to issues of law covered in the decision made by the neutral panel and legal interpretations developed by the panel.

165.The Secretariat shall provide the Appellate Body with appropriate administrative and legal support as it requires. ]

**166.[Article 32. Decisions of the Appellate Body**

167. The Appellate Body, in its decision, may uphold, modify or reverse the legal findings and conclusions of the neutral panel.

168. Decisions of the Appellate Body shall be made by a majority vote of its members serving in the case being appealed. The members of the Appellate Body shall obligatorily cast their vote. The votes of the members of the Appellate Body shall be anonymous.]

**169.[Article 33. Procedures for Appellate Review**

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

**171.[Article 34. Nature of Final Decision]**

172. [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.]

173. [The final decision [of the Appellate Body] 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. ]

174. [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 Parties, and regional integration regimes in which they may be involved, analyzing such decisions with a view to their adoption with or without alteration.]]

175. [The decisions of the Appellate Body shall be unconditionally accepted by the Parties.]

**176. [Article 35. [Non-Implementation of the Final Report,] Compensation and Suspension of Benefits**

177. [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 [solely at the level of a neutral panel] 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).]

178. [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 Executive Body for Dispute Settlement 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.]]

179. [The complaining 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 nullification or impairment of benefits [or other obligations] 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 within the period [that the neutral panel has set] [of 30 days after receiving the final report;]

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

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

- (a) [It shall take into account, when appropriate, the conclusions of the neutral panel on the adverse effects on trade of the measure adopted.]

- (b) It 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 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 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. ]

182. [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.]

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

184. with respect to goods, all goods [covered in the FTAA Agreement];

185. with respect to services...<sup>10</sup>]

186. [The level of the suspension of concessions [benefits] 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 Article XX (Damages) of the FTAA Agreement.]

187. [On the written request of a Party [a neutral panel shall be established] [the Executive Body for Dispute Settlement] [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 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.]

188.[ 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.] ]

189 . [If there is no agreement on the compensation or suspension of benefits, the complaining Party may:

- (a) Request the establishment of a neutral panel that will set the amount for the compensation; or

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<sup>10</sup> Illustrative list. The specific sectors are to be determined later on.

(b) Request the establishment of a neutral panel that will determine the amount and form of suspension of benefits.]

190. [As far as possible, this neutral panel will be comprised of the same members of the neutral panel that initially heard the case or the same members of the Appellate Body in the event there was an appeal ]

191. [In order to make a ruling on compensation or suspension of benefits, the neutral panel shall be given a maximum period of [30] days to present its ruling. In such cases, the ruling of the neutral panel is final and a consultation phase, although desirable, shall not be mandatory.]

192. [Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the [recommendations] and ruling are not implemented within [a reasonable] [an established] period of time [and shall only be applied until the party complained against complies with the final report of the neutral panel [or of the Appellate Body] or a mutually satisfactory solution is reached.]. [However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the Agreement.] [Neither compensation nor suspension of benefits relieves the country complained against, and that lost the case, of the obligation to bring the inconsistent measure into conformity with this Agreement.] [Compensation is voluntary and, if granted, shall be consistent with a Party's obligations under this Agreement]

[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, 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.]

193. [A complaining Party may suspend the application to the Party complained against of concessions or other obligations under this Agreement if :

- (a) the Party complained against does not provide notice pursuant to paragraph 137 of Article XX (Implementation of Recommendations and Rulings) that it intends to implement the recommendations or rulings of the Neutral panel;
- (b) the Party complained against does not submit within the required time period a notification pursuant to paragraph 140(c) of Article XX (Implementation of Recommendations and Rulings) stating that the Party complained against has complied; or
- (c) the compliance neutral panel report pursuant Article XX (Determination of compliance) finds that the Party complained against has failed to bring the measures found to be inconsistent with this Agreement into compliance therewith or otherwise comply with the recommendations or rulings of the neutral panel;

The Parties are encouraged to consult before concessions or other obligations are suspended to discuss a mutually satisfactory solution.]

194. [The complaining Party shall not implement any suspension of concessions or other obligations until [10] days after it has notified the Party complained against which particular concessions or obligations the Party intends to suspend.]

195. [(a) When the complaining Party has provided notice that it intends to suspend concessions or other obligations pursuant to paragraph 150 of Article XX (Determination of compliance) or paragraph (194) of this Article and the Party complained against objects to the level of suspension proposed within [10] days after the receipt of such notice, the matter shall be referred to arbitration.

(b) Such arbitration shall be carried out by the original neutral panel if its members are available. In such case, the Panel will be deemed to be established by consent of both Parties on the date the Party

complained against files the document with the objections referred to in subparagraph (a) above. If any member of the original neutral panel is not available, a new member shall be appointed in accordance with the procedure established under Article XX (Establishment of the Neutral Panel) and the date the new neutral Panel is complete shall be deemed to be the date the matter was referred.

(c) The arbitration shall be completed and the decision of the arbitral panel shall be provided to the Parties within [45] days after the referral of the matter. The complaining Party shall not suspend concessions or other obligations during the course of the arbitration.]

196. [The arbitral panel acting pursuant to paragraph (181), shall not examine the nature of the concessions or other obligations to be suspended, but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The Parties shall accept the arbitral panel's decision as final and shall not seek a second arbitration. The decision shall constitute authorization to suspend concessions or other obligations consistent with the decision of the arbitral panel.]

197.(a) After a Party has suspended concessions or other obligations pursuant with this Agreement, the Party complained against may request a termination of such suspension on the grounds that it has eliminated the inconsistency or the nullification or impairment of benefits under this Agreement identified in the recommendations or rulings of the neutral panel. The Party complained against shall include with any such request a written notice describing in detail the measures it has taken, providing the text of the relevant measures. If the Parties agree that the Party complained against has eliminated the inconsistency or the nullification or impairment of benefits, the authorization to suspend concessions or other obligations shall terminate.

(b) Where there is disagreement between the Parties as to the existence or consistency with the Agreement of measures taken to comply with the recommendations or rulings of the neutral panel in the dispute, such disagreement shall be resolved through recourse to the dispute settlement procedures provided for in Article XX (Determination of compliance). If the compliance neutral panel finds that the measures taken to comply are not inconsistent with the Agreement and comply with the recommendations or rulings of the neutral panel in the dispute, it shall withdraw the authorization to suspend concessions or other obligations.

(c) The complaining Party shall not maintain the suspension of concessions and other obligations after the neutral panel withdraws the authorization.]

198. [The dispute settlement provisions of this Agreement may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Party. When a compliance neutral panel has ruled that a provision of the Agreement has not been observed, the responsible Party shall take such reasonable measures as may be available to it to ensure its observance. The provisions of this Chapter relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.]

**199. [Article 36. Damages]**

200. [Significant injury shall be understood to exist if it is demonstrated that the violation or the nullification or impairment affects a significant 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.]

**201. [Article 37. Arbitration]**

202. [With a view to settling the dispute, the parties to the dispute, if they so agree, may submit the dispute to arbitration. The agreement to resort to arbitration shall be notified to all Parties in advance of the actual commencement of the arbitration process. Once the procedure provided for in this Article has been initiated, the Parties to the dispute may not have recourse to a neutral panel on the same matter.]

203. [Other Parties may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The arbitration award shall have the effect of res judicata and shall be final. Arbitration awards shall be notified to the Executive Body for Dispute Settlement and the technical bodies of the relevant chapters, where any Party to the Agreement may raise any point relating thereto.]

**204. [Article 38. Strengthening of the FTAA Agreement]**

205. 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.

206. Parties:

(a) shall not make a determination to the effect that a violation has occurred, or that benefits under the FTAA Agreement 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 report of the neutral panel [or the Appellate Body]. 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.]

**207. [Article 39. [Confidentiality] [Transparency]**

208. 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.] ]

209. [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.]

210. [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.]

211. [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.]

**212. Article 40. Calculation of Time Periods**

213. 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 notification of] 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<sup>11</sup>, the term shall expire on the following business day.]

214. 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.

**215. [Article 41. Special Procedures Involving Member States with Different Level of Development**

216. 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.

217. 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.]

**218. [Article 42. Effective Access**

219. 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.

220. In addition, the Secretariat shall present annually 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.]

**221. [Article 43. Interpretation of the FTAA Agreement in Judicial or Administrative Proceedings**

222. 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 Executive Body for Dispute Settlement shall endeavor to agree, [by consensus, in its next session] on an appropriate non-binding response [as expeditiously as possible].

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<sup>11</sup> The meaning of non-business day shall be determined later.

223. The Party in whose territory the judicial or administrative body is located shall submit the interpretation of the Executive Body for Dispute Settlement to the judicial or administrative body in accordance with the rules of that body.

224. If the Executive Body for Dispute Settlement 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.]

**225. Article 44. Private Rights**

226. No Party may provide for a right of action [for private persons] under its legislation against any other Party on the ground that a measure of another Party is inconsistent with the FTAA Agreement.

**227. [Article 45. Alternative Dispute Resolution Between Private Parties**

228. 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.

229. [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].]

230. The Parties 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.]

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

232. 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.

233. A Party may not invoke:

(a) ...

234. [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.]]

**235. [Annex XX. Supplementary Rules of Procedure to Article 18 (Model Rules of Procedure)]**

**GENERAL**

236. [The Chair of the neutral panel shall be authorized to make [administrative and procedural] decisions.]

237. [The [neutral panel] [Appellate Body] 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.]

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

239. [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 Executive Body for Dispute Settlement] 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 ]

240. [The [neutral panel] [Appellate Body] 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] [Appellate Body], or requiring that all submissions be made available to the public.]

241. [The Executive Body for Dispute Settlement 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.]

**NOTIFICATIONS**

242. [Notifications shall be made through [the FTAA Secretariat] in writing and shall be sent to the [representatives designated by the Parties].]

**BURDEN OF PROOF**

243. [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.]

244. [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.]

**RECOMPOSITION OF NEUTRAL PANEL**

245. [If a member of a neutral panel passes away, withdraws or is removed, a replacement shall be selected as expeditiously as possible in accordance with the selection procedure under Article 13 (Composition of the Neutral Panel) and any time period applicable to the neutral panel proceeding shall be suspended until the date the replacement is selected.]

## **CONDUCT OF NEUTRAL PANEL**

246. [The neutral panel and/or the members of the neutral panel shall not meet with a Party or Parties to the dispute in the absence of the other Part(y)(ies) to the dispute.]

247. [The neutral panel may allow assistants [or staff from the FTAA Secretariat] to be present during its internal deliberations. ]

## **HEARINGS**

248. [The hearing shall be held in the capital city of the Party complained against.]

249. [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].]

250. [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) representatives of Third Parties;]
- (c) [FTAA Secretariat] personnel and stenographers; and
- (d) assistants to the members of the neutral panel.] ]

[The absence of representatives of any of the Parties that have been duly notified shall not prevent the holding of the hearing or any other proceeding..]

251.[The neutral panel may convene additional hearings [as needed] [if the disputing Parties so agree.] ]

252. [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.]

253. [No later than five days before the date of a hearing, each Party to the dispute shall deliver to the [FTAA Secretariat] [neutral panel] 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. ]

254. [The neutral panel shall conduct the hearing in the following manner, ensuring that the complaining Party and the Party complained against are afforded equal time:

- (a) Argument -
  - (i) Argument of the complaining Party
  - (ii) Argument of the Party complained against.
  - [(iii) Argument of the Third Part (y) (ies)]
- (b) Rebuttal Argument -
  - (i) Reply of the complaining Party
  - (ii) Counter-reply of the Party complained against.]

255. [The neutral panel may direct questions to any Party to the dispute at any time during a hearing.]

256. [The neutral panel may at any time during a proceeding address questions in writing to one or more of the [Parties to the dispute.] 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 of the response. [The distribution of questions and responses shall be made through the [FTAA Secretariat]. ]

257.[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] [Third Parties] [and] the neutral panel.]

258. [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.]

### **THIRD PARTY PARTICIPATION**

#### **PUBLIC PARTICIPATION**

259. [ [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.]]

#### **EXPERTS**

260. [[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.]

261. [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. ]

262. [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.]

263. [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 Executive Body for Dispute Settlement 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.] ]

## **DECISIONS**

264. [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. ]

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

## **EXPENSES OF THE PROCEEDINGS**

### **266. [Annex XX. Remuneration and Payment of Expenses**

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

268. [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.] ]

[The expenses of the members of the neutral panel and Appellate Body, including travel expenses and fees, shall be paid from the FTAA budget.]

269. [The Executive Body for Dispute Settlement 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.]

270. [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.]

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

### **272. Annex XX. [Preliminary Proceedings]**

273. [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 propio 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.]

274. [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.]

275. [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.]