

Chapter Nineteen

Review and Dispute Settlement in Antidumping and Countervailing Duty Matters

Article 1901: General Provisions

1. The provisions of Article 1904 shall apply only with respect to goods that the competent investigating authority of the importing Party, applying the importing Party's antidumping or countervailing duty law to the facts of a specific case, determines are goods of another Party.
2. For the purposes of Articles 1903 and 1904, panels shall be established in accordance with the provisions of Annex 1901.2.
3. With the exception of Article 2203 (Entry into Force), no provision of any other chapter of this Agreement shall be construed as imposing obligations on the Parties with respect to the Parties' antidumping law or countervailing duty law.

Article 1902: Retention of Domestic Antidumping Law and Countervailing Duty Law

1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.
2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute:
 - (a) such amendment shall apply to goods from another Party only if the amending statute specifies that it applies to the Parties to this Agreement;
 - (b) the amending Party notifies any Party to which the amendment applies in writing of the amending statute as far in advance as possible of the date of enactment of such statute;
 - (c) following notification, the amending Party, upon request of any Party to which the amendment applies, consults with that Party prior to the enactment of the amending statute; and
 - (d) such amendment, as applicable to another Party, is not

inconsistent with:

(i) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code) or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), or successor agreements to which all the original signatories to this Agreement are party, or

(ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade among the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives and the practices of the Parties.

Article 1903: Review of Statutory Amendments

1. A Party to which an amendment of another Party's antidumping or countervailing duty statute applies may request in writing that such amendment be referred to a binational panel for a declaratory opinion as to whether:

(a) the amendment does not conform to the provisions of Article 1902(2)(d)(i) or (ii); or

(b) such amendment has the function and effect of overturning a prior decision of a panel made pursuant to Article 1904 and does not conform to the provisions of Article 1902(2)(d)(i) or (ii).

Such declaratory opinion shall have force or effect only as provided in this Article.

2. The panel shall conduct its review in accordance with the procedures of Annex 1903.2.

3. In the event that the panel recommends modifications to the amending statute to remedy a non-conformity that it has identified in its opinion:

(a) the two Parties shall immediately begin consultations and shall seek to achieve a mutually satisfactory solution to the matter within 90 days of the issuance of the panel's final declaratory opinion. Such solution may include seeking corrective legislation with respect to the statute of the amending Party;

(b) if corrective legislation is not enacted within nine

months from the end of the 90-day consultation period referred to in subparagraph (a) and no other mutually satisfactory solution has been reached, the Party that requested the panel may

(i) take comparable legislative or equivalent executive action, or

(ii) terminate this Agreement with regard to the amending Party upon 60-day written notice to that Party.

Article 1904: Review of Final Antidumping and Countervailing Determinations

1. As provided in this Article, the Parties shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.

2. An involved Party may request that a panel review, based upon the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of a Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into this Agreement.

3. The panel shall apply the standard of review described in Article 1909 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

4. A request for a panel shall be made in writing to the other involved Party within 30 days following the date of publication of the final determination in question in the official journal of the importing Party. In the case of final determinations that are not published in the official journal of the importing Party, the importing Party shall immediately notify the other involved Party of such final determination where it involves goods from the other involved Party, and the other involved Party may request a panel within 30 days of receipt of such notice. Where the competent investigating authority of the importing Party has imposed provisional measures in an investigation, the other involved Party may provide notice of its intention to request a panel under this Article, and the Parties shall begin to establish a panel at that time. Failure to request a panel within the time specified in this paragraph shall preclude review

by a panel.

5. An involved Party on its own initiative may request review of a final determination by a panel and shall, upon request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.

6. The panel shall conduct its review in accordance with the procedures established by the Parties pursuant to paragraph 14. Where both involved Parties request a panel to review a final determination, a single panel shall review that determination.

7. The competent investigating authority that issued the final determination in question shall have the right to appear and be represented by counsel before the panel. Each Party shall provide that other persons who, pursuant to the law of the importing Party, otherwise would have had the right to appear and be represented in a domestic judicial review proceeding concerning the determination of the competent investigating authority, shall have the right to appear and be represented by counsel before the panel.

8. The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall normally issue a final decision within 90 days of the date on which such remand action is submitted to it.

9. The decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.

10. This Agreement shall not affect:

- (a) the judicial review procedures of any Party; or
- (b) cases appealed under those procedures,

with respect to determinations other than final determinations.

11. A final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set forth in this Article. No Party shall

provide in its domestic legislation for an appeal from a panel decision to its domestic courts.

12. The provisions of this Article shall not apply where:

(a) neither involved Party seeks panel review of a final determination;

(b) a revised final determination is issued as a direct result of judicial review of the original final determination by a court of the importing Party in cases where neither involved Party sought panel review of that original final determination; or

(c) a final determination is issued as a direct result of judicial review that was commenced in a court of the importing Party before the date of entry into force of this Agreement.

13. Where within a reasonable time after the panel decision is issued, an involved Party alleges that:

(a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,

(ii) the panel seriously departed from a fundamental rule of procedure, or

(iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, for example by failing to apply the appropriate standard of review, and

(b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process,

that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.

14. To implement the provisions of this Article, the Parties shall adopt rules of procedure by January 1, 1994. Such rules shall be based, where appropriate, upon judicial rules of appellate procedure, and shall include rules concerning: the content and service of requests for panels; a requirement that the competent investigating authority transmit to the panel the administrative record of the proceeding; the protection of business proprietary, government classified, and other privileged information (including sanctions against persons participating before panels for improper release of such information); participation by private persons; limitations on panel review to errors alleged by the Parties or private persons; filing and service; computation and extensions of time; the form and content of briefs and other papers; pre- and post-hearing conferences;

motions; oral argument; requests for rehearing; and voluntary terminations of panel reviews. The rules shall be designed to result in final decisions within 315 days of the date on which a request for a panel is made, and shall allow:

- (a) 30 days for the filing of the complaint;
- (b) 30 days for designation or certification of the administrative record and its filing with the panel;
- (c) 60 days for the complainant to file its brief;
- (d) 60 days for the respondent to file its brief;
- (e) 15 days for the filing of reply briefs;
- (f) 15 to 30 days for the panel to convene and hear oral argument; and
- (g) 90 days for the panel to issue its written decision.

15. In order to achieve the objectives of this Article, the Parties shall, with respect to goods of the other Parties, amend their antidumping and countervailing duty statutes and regulations, and other statutes and regulations to the extent that they apply to the operation of the antidumping and countervailing duty laws. In particular, without limiting the generality of the foregoing:

(a) each Party shall amend its statutes or regulations to ensure that existing procedures concerning the refund, with interest, of antidumping or countervailing duties operate to give effect to a final panel decision that a refund is due;

(b) each Party shall amend its statutes or regulations to ensure that its courts shall give full force and effect, with respect to any person within its jurisdiction, to all sanctions imposed pursuant to the laws of the other Parties to enforce provisions of any protective order or undertaking that such other Party has promulgated or accepted in order to permit access for purposes of panel review or of the extraordinary challenge procedure to confidential, personal, business proprietary or other privileged information;

(c) each Party shall amend its statutes or regulations to ensure that

(i) domestic procedures for judicial review of a final determination may not be commenced until the time for requesting a panel under paragraph 4 has expired, and

(ii) as a prerequisite to commencing domestic judicial review procedures to review a final determination,

a Party or other person intending to commence such procedures shall provide notice of such intent to the Parties concerned and to other persons entitled to commence such review procedures of the same final determination no later than 10 days prior to the latest date on which a panel may be requested; and

(d) Each Party shall make the further amendments set forth in Annex 1904.15(d).

Article 1905: Safeguarding the Panel Review System

1. Where a Party alleges that the application of another Party's domestic law,

(a) has prevented the establishment of a panel requested by the complaining Party;

(b) has prevented a panel requested by the complaining Party from rendering a final decision;

(c) has prevented the implementation of the decision of a panel requested by the complaining Party or denied it binding force and effect with respect to the particular matter that was before the panel; or

(d) has resulted in a failure to provide opportunity for review of a final determination by a court or panel of competent jurisdiction that is independent of the competent investigating authorities, that examines the basis for the investigating authorities' determination and whether the investigating authority properly applied domestic antidumping and countervailing duty law in reaching the challenged determination, and that employs the relevant standard of review identified in Article 1911,

that Party may request in writing consultations with the other Party regarding the allegations. The consultations shall begin within 15 days of the date of the request.

2. If the matter has not been resolved within 45 days of the request for consultations or such other period as the consulting Parties may agree, the complaining Party may request the establishment of a special committee.

3. Unless otherwise agreed by the disputing Parties, the special committee shall be established within 15 days of a request and perform its functions in a manner consistent with the provisions of this Chapter.

4. The roster for special committees shall be that established pursuant to Annex 1904.13.1.

5. The special committee shall comprise three members selected in accordance with the procedures set out in Annex 1904.13.1.

6. The Parties shall establish rules of procedure in accordance with the principles set out in Annex 1905.7.

7. If the special committee makes an affirmative finding in respect of one of the grounds specified in paragraph 1, the complaining Party and the Party complained against shall begin consultations within 10 days, and shall seek to achieve a mutually satisfactory solution within 60 days of the issuance of the committee's report.

8. If, within the 60-day period, the Parties are unable to reach a mutually satisfactory solution to the matter, or the Party complained against has not demonstrated to the satisfaction of the special committee that it has corrected the problem or problems with respect to which the committee has made an affirmative finding, the complaining Party may:

(a) suspend the operation of Article 1904 with respect to the Party complained against; or

(b) suspend the application to the Party complained against of such benefits under this Agreement as may be appropriate under the circumstances.

9. In the event that a complaining Party suspends the operation of Article 1904 with respect to the Party complained against, the latter Party may reciprocally suspend the operation of Article 1904. If either Party decides to suspend the operation of Article 1904, it shall provide written notice of such suspension to the other Party.

10. The special committee may reconvene at any time, at the request of the Party complained against, to determine:

(a) whether the suspension of benefits by the complaining Party pursuant to subparagraph 8(b) is manifestly excessive; or

(b) whether the Party complained against has corrected the problem or problems with respect to which the committee has made an affirmative finding.

The special committee shall, within 45 days of the request, present a report to both Parties containing its determination. Where the special committee determines that the Party complained against has corrected the problem or problems, any suspension effected by the complaining Party or the Party complained against, or both, pursuant to paragraphs 8 or 9 shall be terminated.

11. If the special committee makes an affirmative finding with respect to one of the grounds specified in paragraph 1, then effective as of the day following the date of issuance of the

special committee's decision:

(a) binational panel or extraordinary challenge committee review under Article 1904 shall be stayed

(i) with respect to review of any final determination of the complaining Party requested by the Party complained against, if such review was requested after the date on which consultations were requested pursuant to paragraph 1 of this Article and in no case later than 150 days prior to an affirmative finding by the special committee, or

(ii) with respect to review of any final determination of the Party complained against requested by the complaining Party, at the request of the complaining Party; and

(b) the time for requesting panel or committee review under Article 1904 shall be tolled.

12. If either Party suspends the operation of Article 1904 pursuant to paragraph 8(a), the panel or committee review stayed under paragraph 11(a) shall be terminated and the challenge to the final determination shall be irrevocably referred to the appropriate domestic court for decision, as provided below:

(a) with respect to review of any final determination of the complaining Party requested by the Party complained against, at the request of either Party, or of a party to the panel review under Article 1904; or

(b) with respect to review of any final determination of the Party complained against requested by the complaining Party, at the request of the complaining Party, or of a party of the complaining Party that is a party to the panel review under Article 1904.

If either Party suspends the operation of Article 1904 pursuant to paragraph 8(a), any time period tolled under Paragraph 11(b) of this Article shall resume.

If such suspension does not become effective, panel or committee review stayed under paragraph 11(a), and any time period tolled under paragraph 8(b), shall resume.

Article 1906: Prospective Application

The provisions of this Chapter shall apply only prospectively to:

(a) final determinations of a competent investigating authority made after the date of entry into force of this Agreement; and

(b) with respect to declaratory opinions under Article 1903, amendments to antidumping or countervailing duty statutes enacted after the date of entry into force of this Agreement.

Article 1907: Consultations

1. The Parties shall consult annually, or on the request of any Party, to consider any problems that may arise with respect to the implementation or operation of this Chapter and recommend solutions, where appropriate. The Parties shall each designate one or more officials, including officials of the competent investigating authorities, to be responsible for ensuring that consultations occur, when required, so that the provisions of this Chapter are carried out expeditiously.

2. The Parties further agree to consult on:

(a) the potential to develop more effective rules and disciplines concerning the use of government subsidies; and

(b) the potential for reliance on a substitute system of rules for dealing with unfair transborder pricing practices and government subsidization.

3. The competent investigating authorities of the Parties shall consult annually or on the request of any Party and may submit reports to the Commission, if appropriate. In the context of these consultations, the Parties agree that it is desirable in the administration of anti-dumping and countervailing duty laws to:

(a) publish notice of initiation of investigations in the importing country's official journal, setting forth the nature of the proceeding, the legal authority under which the proceeding is initiated, and a description of the product at issue;

(b) provide notice of the times for submissions of information and for decisions that the competent investigating authorities are expressly required by statute or regulations to make;

(c) provide explicit written notice and instructions as to the information required from interested parties, including foreign interests, and reasonable time to respond to requests for information;

(d) accord reasonable access to information

(i) "reasonable access" in this context means access during the course of the investigation, to the extent practicable, so as to permit an opportunity to present facts and arguments as set forth in

paragraph (e); when it is not practicable to provide access to information during the investigation in such time as to permit an opportunity to present facts and arguments, reasonable access shall mean in time to permit the adversely affected party to make an informed decision as to whether to seek judicial or panel review,

(ii) "access to information" in this context means access to representatives determined by the competent investigating authority to be qualified to have access to information received by that competent investigating authority, including access to confidential (business proprietary) information, but does not include information of such high degree of sensitivity that its release would lead to substantial and irreversible harm to the owner or which is required to be kept confidential in accordance with domestic legislation of a Party; any privileges arising under domestic law of the importing Party relating to communications between the competent investigating authorities and a lawyer in the employ of, or providing advice to, those authorities may be maintained;

(e) provide the opportunity for interested parties, including foreign interests, to present facts and arguments, to the extent time permits, including an opportunity to comment on the preliminary determination of dumping or of subsidization;

(f) protect confidential (business proprietary) information, received by the competent investigating authority, to ensure that there is no disclosure except to representatives determined by the competent investigating authorities to be qualified;

(g) prepare administrative records, including recommendations of official advisory bodies that may be required to be kept, and any record of ex parte meetings that may be required to be kept;

(h) provide disclosure of relevant information upon which any preliminary or final determination of dumping or of subsidization is based, within a reasonable time after a request by interested parties, including foreign interests. Such information shall include an explanation of the calculation or the methodology used to determine the margin of dumping or the amount of subsidy;

(i) provide a statement of reasons concerning the final determination of dumping or subsidization; and

(j) provide a statement of reasons for final determinations concerning material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

Inclusion of an item in paragraphs (a) through (j) is not intended to serve as guidance to a binational panel reviewing a final antidumping or countervailing duty determination pursuant to Article 1904 in determining whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party.

Article 1908: Special Secretariat Provisions

1. The Parties shall establish a section within the Secretariat established pursuant to Article 2002 to facilitate the operation of this Chapter and the work of panels or committees that may be convened pursuant to this Chapter.

2. The secretaries of the Secretariat established pursuant to Article 2002 shall act jointly to service all meetings of panels or committees established pursuant to this Chapter. The secretary of the Party in which a panel or committee proceeding is held shall prepare a record thereof and shall preserve an authentic copy of the same in the permanent offices. Such secretary shall upon request provide to the secretary of any other Party a copy of such portion of the record as is requested, except that only public portions of the record shall be provided to the secretary of the Party that is not an involved Party.

3. Each secretary shall receive and file all requests, briefs and other papers properly presented to a panel or committee in any proceeding before it that is instituted pursuant to this Chapter and shall number in numerical order all requests for a panel or committee. The number given to a request shall be the file number for briefs and other papers relating to such request.

4. Each secretary shall forward to the secretary of the other involved Party copies of all official letters, documents or other papers received or filed with the Secretariat office pertaining to any proceeding before a panel or committee, except for the administrative record, which shall be handled in accordance with paragraph 1. The secretary of an involved Party shall provide upon request to the secretary of the Party that is not an involved Party in the proceeding a copy of such public documents as are requested.

5. The remuneration of panelists or committee members, their travel and lodging expenses, and all general expenses of the panels or committees shall be borne equally by the involved Parties. Each panelist or committee member shall keep a record and render a final account of the person's time and expenses, and the panel or committee shall keep a record and render a final account of all general expenses. The Commission shall establish

amounts of remuneration and expenses that will be paid to the panelists and committee members.

Article 1909: Code of Conduct

The Parties shall, by the date of entry into force of this Agreement, exchange letters establishing a code of conduct for panelists and members of committees established pursuant to Articles 1903, 1904 and 1905.

Article 1910: Miscellaneous

Upon request, the competent investigating authority of a Party shall provide the other Party or Parties with copies of all public information submitted to it for the purposes of an investigation with respect to goods of that other Party or Parties.