

# 2019 ASEAN PROTOCOL ON ENHANCED DISPUTE SETTLEMENT MECHANISM

*Adopted in Manila, the Philippines on 20 December 2019*

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# 2019 ASEAN PROTOCOL ON ENHANCED DISPUTE SETTLEMENT MECHANISM

*Adopted in Manila, the Philippines on 20 December 2019*

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, Member States of the Association of Southeast Asian Nations (hereinafter collectively referred to as "Member States" or singularly as "Member State");

**INSPIRED** by the establishment of the ASEAN Community on 31 December 2015 and the *ASEAN Community Vision 2025. Forging Ahead Together* that charts a forward-looking course for ASEAN in the coming decade;

**REFERRING** to the ASEAN Charter signed on 20 November 2007 in Singapore that established the legal and institutional framework for ASEAN;

**REAFFIRMING** our commitments to a stronger and effective institutions of ASEAN, in particular the strengthening of the dispute settlement mechanisms to be consistent with a rules-based ASEAN Community;

**RECOGNISING** the need for special procedures for disputes involving the Least-Developed Member States;

**RECALLING** the Framework Agreement on Enhancing ASEAN Economic Cooperation signed on 28 January 1992 in Singapore (hereinafter referred to as the "Agreement"), and the ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed on 29 November 2004 in Vientiane (hereinafter referred to as the "2004 Protocol on EDSM");

**DESIRING** to improve the ASEAN Protocol on Enhanced Dispute Settlement Mechanism referred to in paragraph 3 of Article 24 of the ASEAN Charter;

**HAVE AGREED AS FOLLOWS:**

## **ARTICLE 1 COVERAGE AND APPLICATION**

1. The rules and procedures of this ASEAN Protocol on Enhanced Dispute Settlement Mechanism (hereinafter referred to as the "Protocol") shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix I and future ASEAN economic agreements (hereinafter referred to as the "covered agreements").
2. The rules and procedures of this Protocol shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements. To the extent that there is a difference between the rules and procedures of this Protocol and the special or additional rules and procedures in the covered agreements, the special or additional rules and procedures shall prevail.

3. The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting (hereinafter referred to as the "SEOM") to establish a panel pursuant to paragraph 1 of Article 6.

## **ARTICLE 2 ADMINISTRATION**

1. The SEOM shall administer this Protocol and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the SEOM shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of findings and recommendations of panel and Appellate Body reports adopted by the SEOM and authorise suspension of concessions and other obligations under the covered agreements.
2. The SEOM and other relevant ASEAN Sectoral Ministerial Bodies shall be notified of mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements.

## **ARTICLE 3 CONSULTATIONS**

1. Member States shall accord adequate opportunity for consultation<sup>1</sup> regarding any representations made by other Member States with respect to any matter affecting the implementation, interpretation or application of the Agreement or any covered agreement. Any differences shall, as far as possible, be settled amicably between the Member States.
2. Member States which consider that any benefit accruing to them directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, may, with a view to achieving satisfactory settlement of the matter, make representations or proposals to the other Member State concerned, which shall give due consideration to the representations or proposals made to it.
3. All such requests for consultations shall be notified to the SEOM. Any request for consultations shall be submitted in writing and shall give the reason for the request including identification of the measures at issue and an indication of the legal basis for the complaint.
4. If a request for consultations is made, the Member State to which the request is made shall reply to the request within 10 days after the date of its receipt and shall enter into consultations within a period of 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.
5. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

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<sup>1</sup> For greater certainty, any consultations provided for under the covered agreements shall be distinct from, and without prejudice to, the consultations provided for under this Protocol.

6. Consultations shall be confidential, and shall be without prejudice to the rights of any Member State in any future proceedings.
7. All solutions to matters formally raised under the consultations provisions of the covered agreements shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member State under those agreements, nor impede the attainment of any objective of those agreements.
8. Whenever a Member State other than the consulting Member States considers that it has a substantial trade interest in consultations being held pursuant to this Article, such Member State may notify the consulting Member States and the SEOM, within 10 days after the date of the circulation of the request for consultations under this Article, of its desire to be joined in the consultations. Such Member State shall be joined in the consultations, provided that the Member State to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event, they shall so inform the SEOM. If the request to be joined in the consultations is not accepted, the applicant Member State shall be free to request consultations under this Article, or the corresponding provisions in other covered agreements.

#### **ARTICLE 4 GOOD OFFICES, CONCILIATION OR MEDIATION**

1. Member States which are parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request to the SEOM for the establishment of a panel.
2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.
3. The Secretary-General of ASEAN may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Member States to settle a dispute.

#### **ARTICLE 5 RULES OF CONDUCT**

All covered persons as defined in the Rules of Conduct at Appendix II shall comply with the said Rules of Conduct.

#### **ARTICLE 6 ESTABLISHMENT OF PANELS**

1. If the Member State to which the request for consultations is made does not reply within 10 days after the date of receipt of the request, or does not enter into consultations within a period of 30 days after the date of receipt of the request, or the consultations fail to settle a dispute within 60 days after the date of receipt of the request, the matter shall be raised to the SEOM if the complaining party wishes to request for a panel. The panel shall be established by the SEOM, unless the SEOM decides by consensus not to establish a panel.

2. A panel shall be established at the meeting of the SEOM held immediately after the receipt of the request for a panel and accordingly the request shall be placed on the agenda of the SEOM at that meeting. In the event that no SEOM meeting is scheduled or planned within 45 days of receipt of the request, the establishment of the panel or the decision not to establish it shall be done or taken, as the case may be, by circulation. A non-reply shall be considered as agreement to the request for the establishment of a panel. The issue of the establishment of the panel shall be settled within the 45 day-period, irrespective of whether it is settled at the SEOM or by circulation.
3. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the complaining party requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of the special terms of reference.

#### **ARTICLE 7 TERMS OF REFERENCE OF PANELS**

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of a panel:

“To examine in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the SEOM by (name of party) in (document) ... and to make such findings as will assist the SEOM in the adoption of the panel report or in making its decision not to adopt the report.”
2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. Panels shall address those claims on which a finding is necessary in order to ensure effective resolution of disputes.
3. In establishing a panel, the SEOM may authorise its Chair to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions in paragraph 1. The terms of reference thus drawn up shall be circulated to all Member States. If other than standard terms of reference are agreed upon, any Member State may raise any point relating thereto in the SEOM.

#### **ARTICLE 8 COMPOSITION OF PANELS**

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served in the ASEAN Secretariat (hereinafter referred to as the “Secretariat”), taught or published on international trade law or policy, or served as a senior trade policy official of a Member State. In the nomination to the panels, preference shall be given to individuals who are nationals of Member States.
2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.
3. Nationals of Member States whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 13 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. Member States may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the SEOM. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.
5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Member States shall be informed promptly of the composition of the panel.
6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.
7. If there is no agreement on the panelists within 20 days of the decision of the SEOM to establish a panel, at the request of either party, the Secretary-General of ASEAN, in consultation with the SEOM shall, within 10 days, determine the composition of the panel by appointing the panelists whom the Secretary-General of ASEAN considers most appropriate, and if so relevant, in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting the parties to the dispute. The Secretariat shall inform the Member States of the composition of the panel thus formed.
8. Member States shall undertake, as a general rule, to permit their officials to serve as panelists.
9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organisation. Member States shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

#### **ARTICLE 9 FUNCTION OF PANELS**

The function of panels is to make an objective assessment of the dispute before it, including an examination of the facts of the case and the applicability of and conformity with the relevant provisions of the Agreement or any covered agreements, and to make its findings and recommendations in relation to the case. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

#### **ARTICLE 10 PANEL PROCEDURES, DELIBERATIONS AND FINDINGS**

1. A panel shall, apart from the matters covered in Appendix III, regulate its own procedures in relation to the rights of parties to be heard and its deliberations.
2. A panel shall submit its findings and recommendations to the SEOM in the form of a written report within six months of its establishment. In exceptional cases, the panel may take an additional period of not more than three months to submit its findings and recommendations to the SEOM.
3. Before submitting its findings and recommendations to the SEOM, the panel shall accord adequate opportunity to the parties to the dispute to review the interim report.

4. The panel shall establish a reasonable period of time for the parties to the dispute to submit their comments in writing for the panel to review the interim report. At the request of a party to the dispute, the panel shall hold a meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and submitted to the SEOM.
5. A panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. A Member State shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.
6. Panel deliberations shall be confidential. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made. Opinions expressed in the panel report by individual panelists shall be anonymous.

#### **ARTICLE 11 TREATMENT OF PANEL REPORT**

1. In order to provide sufficient time for the Member States to consider panel reports, the reports shall not be considered for adoption by the SEOM until 20 days after the date they have been submitted to the SEOM.
2. The SEOM shall adopt the panel report within 60 days of its submission by the panel unless a party to the dispute formally notifies the SEOM of its decision to appeal or the SEOM decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the SEOM until after the completion of the appeal. SEOM representatives from Member States which are parties to a dispute can be present during the deliberations of the SEOM.
3. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the panel report, as the case may be, within the 60-day period in paragraph 2, the adoption shall be done by circulation. A non-reply shall be considered as acceptance of the decision and/or recommendation in the panel report. The adoption or non-adoption shall be completed within the 60-day period in paragraph 2, notwithstanding the resort to a circulation process.

#### **ARTICLE 12 PROCEDURES FOR MULTIPLE COMPLAINING PARTIES**

1. Where more than one Member State requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Member States concerned. A single panel should be established to examine such complaints whenever feasible.
2. The single panel shall organise its examination and present its findings and recommendations to the SEOM in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complaining parties shall be made available to the other complaining parties, and each complaining party shall have the right to be present when any one of the other complaining parties presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonised.

### **ARTICLE 13 THIRD PARTIES**

1. The interests of the parties to a dispute and those of other Member States under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member State having a substantial interest in a matter before a panel may notify the SEOM of its interest no later than 10 days after the date of the establishment of the panel. Any Member State notifying its substantial interest shall have the rights and obligations of a third party.
3. Subject to the protection of confidential information, each party to the dispute shall make available to each third party its written submissions, written versions of its oral statements to the panel and its written responses to questions made prior to the issuance of the interim report, at the time such submissions, statements and responses are submitted to the panel.
4. A third party shall have the right to:
  - (a) subject to the protection of confidential information, be present at the first and second substantive meeting of the panel with the parties to the dispute preceding the issuance of the interim report to the parties to the dispute;
  - (b) make at least one written submission prior to the first substantive meeting;
  - (c) make an oral statement to the panel, and respond to questions from the panel, at a session of the first substantive meeting set aside for that purpose; and
  - (d) respond in writing to any questions from the panel directed to the third parties.
5. Any submissions or other documents submitted by third parties to the panel shall be simultaneously provided to the parties to the dispute and other third parties.
6. A panel may, with the agreement of the parties to the dispute, grant additional or supplemental rights to any third party regarding their participation in panel proceedings.
7. If a third party considers that a measure which is already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member State may have recourse to normal dispute settlement procedures under this Protocol. Such a dispute shall be referred to the original panel wherever possible.

### **ARTICLE 14 APPELLATE REVIEW**

1. An Appellate Body shall be established by the ASEAN Economic Ministers (hereinafter referred to as the "AEM"). The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve on cases in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The AEM shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. 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.
3. The Appellate Body shall comprise persons of recognised authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of ASEAN. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.
4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties, which have notified the SEOM of a substantial interest in the matter pursuant to paragraph 2 of Article 13 may make written submissions to, and be given an opportunity to be heard by the Appellate Body.
5. As a general rule, the proceedings of the Appellate Body shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 5 of Article 3. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the SEOM 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.
6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.
7. The Appellate Body shall be provided with the appropriate administrative and legal support as it requires.
8. Working Procedures for Appellate Review is contained in Appendix IV.
9. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.
10. Opinions expressed in the Appellate Body report by the individuals serving on the Appellate Body shall be anonymous.
11. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.
12. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.
13. An Appellate Body report shall be adopted by the SEOM and unconditionally accepted by the parties to the dispute unless the SEOM decides by consensus not to adopt the Appellate Body report within 30 days following its submission to the SEOM. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the report, as the case may be, within the 30-day period, adoption shall be done by circulation. A non-reply within the said 30-day period shall be considered as an acceptance of the Appellate Body report. This adoption procedure is without prejudice to the rights of Member States to express their views on an Appellate Body report. The adoption process shall be completed within the 30-day period irrespective of whether it is settled at the SEOM or by circulation.

**ARTICLE 15**  
**COMMUNICATIONS WITH THE PANEL OR APPELLATE BODY**

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or the Appellate Body.
2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Protocol shall preclude a party to a dispute from disclosing statement of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel or the Appellate Body which that Member State has designated as confidential. A party to a dispute shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

**ARTICLE 16**  
**PANEL AND APPELLATE BODY RECOMMENDATIONS**

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member State concerned bring the measure into conformity with that agreement. In addition to its recommendations, a panel or the Appellate Body may suggest ways in which the Member State concerned could implement the recommendations.
2. In their findings and recommendations, a panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.
3. The panels and the Appellate Body shall also deal with the issue of expenses to be borne by the parties to the dispute, including third parties, to replenish the ASEAN Dispute Settlement Mechanism Fund as part of their findings and recommendations. The panels and the Appellate Body may apportion the expenses in the manner appropriate to the particular case.

**ARTICLE 17**  
**SURVEILLANCE OF IMPLEMENTATION OF FINDINGS AND RECOMMENDATIONS**

1. Since prompt compliance with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM is essential in order to ensure effective resolution of disputes to the benefit of all Member States, parties to the dispute who are required to do so shall comply with the findings and recommendations of panel reports adopted by the SEOM within 60 days from the SEOM's adoption of the same, or in the event of an appeal 60 days from the SEOM's adoption of the findings and recommendations of the Appellate Body reports, unless a longer time period is otherwise determined pursuant to paragraphs 2 and 3.
2. When a party to the dispute requests for a longer time period for compliance, the other party shall take into account the circumstances of the particular case and accord favourable consideration to the complexity of the actions required to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM. The request for a longer period of time shall not be unreasonably denied. Where it is necessary to pass national legislation to comply with the findings and recommendations of panel and Appellate Body reports, a longer period appropriate for that purpose shall be allowed. The decision of the parties on the request for a longer time period shall be made within 14 days from the SEOM's adoption of the findings and recommendations of the panel report, or in the event of an appeal 14 days from the SEOM's adoption of the findings and recommendations of the Appellate Body's reports.

3. When there is disagreement on the request for a longer time period for compliance, such period may be determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.<sup>2</sup> In such arbitration, a guideline for the arbitrator<sup>3</sup> should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.
4. Any party required to comply with the findings and recommendations shall provide the SEOM with a status report in writing of their progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.
5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM, such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 60 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the SEOM 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 for this purpose and the submission of the report exceed 90 days after the date of reference of the matter to the panel.
6. The SEOM shall keep under surveillance the implementation of the findings and recommendations of panel and Appellate Body reports adopted by it. The issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM may be raised at the SEOM by any Member State at any time following their adoption. Unless the SEOM decides otherwise, the issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM shall be placed on the agenda of the SEOM meeting and shall remain on the SEOM's agenda until the issue is resolved. At least 10 days prior to each such SEOM meeting, the party concerned shall provide the SEOM with a status report in writing of its progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.

## **ARTICLE 18 COMPENSATION AND THE SUSPENSION OF CONCESSIONS**

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the findings and recommendations of panel and Appellate Body reports adopted by the SEOM are not implemented within the period of 60 days or the longer time period as referred to in Article 17. 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 covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.
2. If the Member State concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the findings and recommendations

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<sup>2</sup> If the parties cannot agree on an arbitrator within 10 days after referring the matter to arbitration, the arbitrator shall be appointed by the Secretary-General of ASEAN within 10 days, after consulting the parties.

<sup>3</sup> The term "arbitrator" shall be interpreted as referring either to an individual or a group.

of panel and Appellate Body reports adopted by the SEOM within the period of 60 days or the longer time period as referred to in Article 17, such Member State shall, if so requested, and no later than the expiry of the period of 60 days or the longer time period referred to in Article 17, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the period of 60 days or the longer time period as referred to in Article 17, any party having invoked the dispute settlement procedures may request authorisation from the SEOM to suspend the application to the Member State concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:
  - (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
  - (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sector(s) under the same agreement;
  - (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sector(s) under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;
  - (d) in applying the above principles, that party shall take into account:
    - (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;
    - (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;
  - (e) for purposes of this paragraph, "sector" means:
    - (i) with respect to goods, all goods;
    - (ii) with respect to services, a principal sector as identified in the current schedules of commitments under the ASEAN Framework Agreement on Services (hereinafter referred to as the "AFAS") or its successor;
  - (f) for purposes of this paragraph, "agreement" means:
    - (i) with respect to goods, the agreements in relation to goods listed in Appendix I;
    - (ii) with respect to services, the AFAS or its successor;
    - (iii) any other covered agreement as defined in Article 1.

4. The level of the suspension of concessions or other obligations authorised by the SEOM shall be equivalent to the level of the nullification or impairment.
5. The SEOM shall not authorise suspension of concessions or other obligations if a covered agreement prohibits such suspension.
6. When the situation described in paragraph 2 occurs, the SEOM, upon request, shall grant authorisation to suspend concessions or other obligations within 30 days of the expiry of the 60-day period or the expiry of the longer time period as referred to in Article 17, unless the SEOM decides by consensus to reject the request. In the event that no meeting of the SEOM is scheduled or planned to enable authorisation to suspend concessions or other obligations within the 30-day period, the authorisation shall be done by circulation. A non-reply within the said 30-day period shall be considered as an acceptance of the authorisation. The authorisation process shall be completed within the 30-day period irrespective of whether it is settled at the SEOM or by circulation.
7. However, if the Member State concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorisation to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Secretary-General of ASEAN and shall be completed within 60 days after the date of expiry of the 60-day period or the expiry of the longer time period as referred to in Article 17. Concessions or other obligations shall not be suspended during the course of the arbitration.
8. The arbitrator acting pursuant to paragraph 7 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 arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties to the dispute shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The SEOM shall be informed promptly of the decision of the arbitrator and shall, upon request, grant authorisation to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the SEOM decides by consensus to reject the request.
9. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member State that must implement recommendations and findings of the panel and Appellate Body reports adopted by the SEOM provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 17, the SEOM shall continue to keep under surveillance the implementation of recommendations and findings of the panel and Appellate Body reports adopted by the SEOM, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.
10. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member State. When the SEOM has ruled that a provision of a covered agreement

has not been observed, the responsible Member State shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Protocol relating to compensation and suspension of concessions or other obligations shall apply in cases where it has not been possible to secure such observance.

#### **ARTICLE 19 ARBITRATION**

1. Expeditious arbitration within the ASEAN Economic Community as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Protocol, resort to arbitration shall be subject to mutual agreement of the parties, which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Member States sufficiently in advance of the actual commencement of the arbitration process.
3. Other Member States may become party to an arbitration proceeding only upon the agreement of the parties that have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the SEOM and other relevant ASEAN Sectoral Ministerial Bodies of the covered agreements where any Member State may raise any point relating thereto.
4. Articles 17 and 18 shall apply *mutatis mutandis* to arbitration awards.

#### **ARTICLE 20 FUND**

1. The ASEAN Dispute Settlement Mechanism Fund (hereinafter referred to as the "Fund") shall be a revolving fund, separate from the ASEAN Secretariat's operational budget. Any drawdown from the Fund shall be replenished by the parties to the dispute in line with the provision of paragraph 3 of Article 16. The Secretariat shall be responsible for administering the Fund.
2. The Fund shall be used to meet the expenses of the panels, the Appellate Body and any related administration costs of the Secretariat. All other expenses, including legal representation, incurred by any party to a dispute shall be borne by that party.
3. The operation and usage of the Fund shall apply in accordance with the Terms and Conditions as contained in Appendix V.

#### **ARTICLE 21 MAXIMUM TIME-FRAME**

1. Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the SEOM until the date the SEOM considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 2 of Article 10 or paragraph 5 of Article 14, to extend the time for providing its report, the additional time taken shall be added to the above periods.
2. Unless otherwise specified, any time periods provided for in this Protocol may be modified by mutual agreement of the parties to the dispute provided that any modification shall not prejudice the rights of the third parties pursuant to Article 13.

**ARTICLE 22**  
**RESPONSIBILITIES OF THE SECRETARIAT**

1. The Secretariat shall have the responsibility of assisting the panels and the Appellate Body, especially on the legal, historical and the procedural aspects of the matters dealt with, and of providing secretarial and technical support.
2. The Secretariat shall assist the SEOM to monitor and maintain surveillance of the implementation of the findings and recommendations of the panel and Appellate Body reports adopted by it.
3. The Secretariat shall be the focal point to receive all documentations in relation to disputes and shall deal with them as appropriate.
4. While the Secretariat assists all Member States in respect of dispute settlement at their request, additional legal advice and assistance in respect of dispute settlement may be provided upon request to Member States as appropriate, in a manner ensuring the continued impartiality of the Secretariat.

**ARTICLE 23**  
**SPECIAL PROCEDURES INVOLVING LEAST-DEVELOPED MEMBER STATES**

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a Least-Developed Member State, particular consideration shall be given to the special situation of Least-Developed Member States. In this regard, Member States shall exercise due restraint in raising matters under these procedures involving a Least-Developed Member State. If nullification or impairment is found to result from a measure taken by a Least-Developed Member State, complaining parties shall exercise due restraint in asking for compensation or seeking authorisation to suspend the application of concessions or other obligations pursuant to these procedures.
2. In dispute settlement cases involving a Least-Developed Member State, where a satisfactory solution has not been found in the course of consultations the Chair of the SEOM shall, upon request by a Least-Developed Member State offer his or her good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Chair of the SEOM, in providing the above assistance, may consult any source which he or she deems appropriate.

**ARTICLE 24**  
**VENUE FOR PROCEEDINGS**

1. The venue for proceedings of the panels and the Appellate Body shall be the ASEAN Secretariat.
2. Notwithstanding the provisions of paragraph 1, panel and Appellate Body proceedings, apart from substantive meetings, may be held at any venue which the panels and the Appellate Body consider appropriate in consultation with the parties to the dispute, having regard to the convenience and cost effectiveness of such venue.

**ARTICLE 25**  
**DEPOSITARY**

This Protocol shall be deposited with the Secretary-General of ASEAN.

**ARTICLE 26  
AMENDMENTS**

1. The provisions of this Protocol may be amended by mutual agreement of all Member States in writing.
2. Notwithstanding paragraph 1:
  - (a) Appendix I shall be administratively updated, as may be required from time to time, by the Secretariat in consultation with and endorsed by the SEOM;
  - (b) Appendices II, III and V may be amended subject to the endorsement of the SEOM; and
  - (c) Appendix IV may be amended by the Appellate Body, in consultation with the SEOM and the Secretary-General of ASEAN.
3. The Secretariat shall notify Member States whenever an amendment or update has been made to the Appendices.

**ARTICLE 27  
FINAL PROVISIONS**

1. The Appendices to this Protocol shall form an integral part of this Protocol.
2. This Protocol shall enter into force on the date on which the tenth Member State has notified the Depository of its completion of internal procedures necessary for the entry into force of this Protocol.
3. This Protocol shall replace the 2004 Protocol on EDSM and shall be applied only with respect to new requests for consultations under this Protocol made on or after the date of entry into force of this Protocol. With respect to disputes for which the request for consultations were made under the 2004 Protocol on EDSM, the 2004 Protocol on EDSM shall continue to apply.

**IN WITNESS WHEREOF**, the undersigned, being duly authorised thereto by their respective Governments, have signed this Protocol.

**DONE** at Manila, the Philippines, this Twentieth day of December in the Year Two Thousand and Nineteen, in a single copy in the English Language.

## **APPENDIX I COVERED AGREEMENTS**

1. Agreement on the ASEAN Food Security Reserve, New York, the United States of America, 4 October 1979.
2. Basic Agreement on ASEAN Industrial Projects, Kuala Lumpur, Malaysia, 6 March 1980.
3. Agreement on ASEAN Energy Cooperation, Manila, Philippines, 24 June 1986.
4. Agreement on the Preferential Shortlisting of ASEAN Contractors, Jakarta, Indonesia, 20 October 1986.
5. Framework Agreement on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992.
6. ASEAN Framework Agreement on Services, Bangkok, Thailand, 15 December 1995.
7. Protocol Amending the Agreement on ASEAN Energy Cooperation, Bangkok, Thailand, 15 December 1995.
8. Protocol Amending the Agreement on ASEAN Energy Cooperation, Kuala Lumpur, Malaysia, 23 July 1997.
9. 2<sup>nd</sup> Protocol to Amend the Agreement on the ASEAN Food Security Reserve, Subang Jaya, Malaysia, 23 July 1007.
10. Protocol to Implement the Initial Package of Commitments under the ASEAN Framework Agreement on Services, Kuala Lumpur, Malaysia, 15 December 1997.
11. Agreement on the Establishment of the ASEAN Center for Energy, Manila, Philippines, 22 May 1998.
12. ASEAN Framework Agreement on Mutual Recognition Arrangement, Ha Noi, Viet Nam, 16 December 1998.
13. Protocol to Implement the Second Package of Commitments under the ASEAN Framework Agreement on Services, Ha Noi, Viet Nam, 16 December 1998.
14. ASEAN Framework Agreement on the Facilitation of Goods in Transit, Ha Noi, Viet Nam, 16 December 1998.
15. Protocol 3 Types and Quantity of Road Vehicles, Hanoi, Viet Nam, 15 September 1999.
16. Protocol 4 Technical Requirements of Vehicles, Hanoi, Viet Nam, 15 September 1999.
17. Protocol 8 Sanitary and Phytosanitary Measures to Implement the ASEAN Framework Agreement on the Facilitation of Goods in Transit, Phnom Penh, Cambodia, 27 October 2000.
18. Protocol 5: ASEAN Scheme of Compulsory Motor Vehicle Insurance, Kuala Lumpur, Malaysia, 8 April 2001.

19. Protocol to Implement the Third Package of Commitments under the ASEAN Framework Agreement Services, Ha Noi, Viet Nam, 31 December 2001.
20. ASEAN Sectoral Mutual Recognition Arrangement for Electrical and Electronic Equipment, Bangkok, Thailand, 5 April 2002.
21. ASEAN Memorandum of Understanding on the Trans-ASEAN Gas Pipeline Project, Bali, Indonesia, 5 July 2002.
22. ASEAN Tourism Agreement, Phnom Penh, Cambodia, 4 November 2002.
23. Protocol Governing the Implementation of the ASEAN Harmonized Tariff Nomenclature, Makati, Philippines, 7 August 2003.
24. Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme, Phnom Penh, Cambodia, 2 September 2003.
25. Protocol to Amend the ASEAN Framework Agreement on Services, Phnom Penh, Cambodia, 2 September 2003.
26. Protocol to Amend the Protocol Governing the Implementation of the ASEAN Harmonised Tariff Nomenclature, Jeju Island, Korea, 15 May 2004.
27. Protocol to Implement the Fourth Package of Commitments on Air Transport Services under the ASEAN Framework Agreement on Services, Phnom Penh, Cambodia, 23 November 2004.
28. ASEAN Framework Agreement for the Integration of Priority Sectors, Vientiane, Lao PDR, 29 November 2004.
29. ASEAN Sectoral Integration Protocol for e-ASEAN, Vientiane, Lao PDR, 29 November 2004.
30. ASEAN Sectoral Integration Protocol for Tourism, Vientiane, Lao PDR, 29 November 2004.
31. ASEAN Sectoral Integration Protocol for Air Travel, Vientiane, Lao PDR, 29 November 2004.
32. ASEAN Sectoral Integration Protocol for Electronics, Vientiane, Lao PDR, 29 November 2004.
33. ASEAN Sectoral Integration Protocol for Fisheries, Vientiane, Lao PDR, 29 November 2004.
34. ASEAN Sectoral Integration Protocol for Health Care, Vientiane, Lao PDR, 29 November 2004.
35. ASEAN Sectoral Integration Protocol for Rubber-based Products, Vientiane, Lao PDR, 29 November 2004.
36. ASEAN Sectoral Integration Protocol for Wood-Based Products, Vientiane, Lao PDR, 29 November 2004.
37. ASEAN Sectoral Integration Protocol for Textiles and Apparel Products, Vientiane, Lao PDR, 29 November 2004.
38. ASEAN Sectoral Integration Protocol for Agro-Based Products, Vientiane, Lao PDR, 29 November 2004.

39. ASEAN Sectoral Integration Protocol for Automotives, Vientiane, Lao PDR, 29 November 2004.
40. Protocol to Implement the Third Package of Commitments under the ASEAN Framework Agreement on Services, Vientiane, Lao PDR, 6 April 2005.
41. ASEAN Framework Agreement on Multimodal Transport, Vientiane, Lao PDR, 17 November 2005.
42. ASEAN Mutual Recognition Arrangement on Engineering Services, Kuala Lumpur, Malaysia, 9 December 2005.
43. Agreement on the ASEAN Harmonized Electrical and Electronic Equipment (EEE) Regulatory Regime, Kuala Lumpur, Malaysia, 9 December 2005.
44. Agreement to Establish and Implement the ASEAN Single Window, Kuala Lumpur, Malaysia, 9 December 2005.
45. ASEAN Mutual Recognition Arrangement on Nursing Services, Cebu, Philippines, 8 December 2006.
46. Protocol to Implement the Fifth Package of Commitments under the ASEAN Framework Agreement on Services, Cebu, Philippines, 8 December 2006.
47. ASEAN Framework (Amendment) Agreement for the Integration of Priority Sectors, Cebu, Philippines, 8 December 2006.
48. ASEAN Sectoral Integration (Amendment) Protocol for Priority Sectors, Cebu, Philippines, 8 December 2006.
49. Protocol to Establish and Implement the ASEAN Single Window, 20 December 2006.
50. Protocol 1: Designation of Transit Transport Routes and Facilities, Bangkok, Thailand, 8 February 2007.
51. Protocol to Implement the Fifth Package of Commitments on Air Transport Services under the ASEAN Framework Agreement on Services, Bangkok, Thailand, 8 February 2007.
52. Protocol to Provide Special Consideration for Rice and Sugar, Makati, Philippines, 23 August 2007.
53. ASEAN Sectoral Integration Protocol for the Logistics Services Sector, Makati, Philippines, 24 August 2007.
54. Protocol to Amend Article 3 of the ASEAN Framework (Amendment) Agreement for the Integration of Priority Sectors, Makati, Philippines, 24 August 2007.
55. ASEAN Mutual Recognition Arrangement on Architectural Services, Singapore, 19 November 2007.
56. ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications, Singapore, 19 November 2007.

57. Protocol to Implement the Sixth Package of Commitments under the ASEAN Framework Agreement on Services, Singapore, 19 November 2007.
58. Protocol to Implement the Fourth Package of Commitments on Financial Services under the ASEAN Framework Arrangement on Services, Da Nang, Viet Nam, 4 April 2008.
59. ASEAN Mutual Recognition Arrangement on Medical Practitioners, Cha-am, Thailand, 26 February 2009.
60. ASEAN Mutual Recognition Arrangement on Dental Practitioners, Cha-am, Thailand, 26 February 2009.
61. ASEAN Mutual Recognition Arrangement on Accountancy Services, Cha-am, Thailand, 26 February 2009.
62. ASEAN Trade in Goods Agreement, Cha-am, Thailand, 26 February 2009.
63. ASEAN Comprehensive Investment Agreement, Cha-am, Thailand, 26 February 2009.
64. Protocol to Seventh Package of Commitments under the ASEAN Framework Agreement on Services, Cha-am, Thailand, 26 February 2009.
65. ASEAN Petroleum Security Agreement, Cha-am, Thailand, 1 March 2009.
66. ASEAN Sectoral Mutual Recognition Arrangement for Good Manufacturing Practice (GMP) Inspection of Manufacturers of Medicinal Products, Pattaya, Thailand, 10 April 2009.
67. ASEAN Multilateral Agreement on Full Liberalisation of Air Freight Services, Manila, Philippines, 20 May 2009.
68. Protocol 1 on Unlimited Third, Fourth and Fifth Freedom Traffic Rights among Designated Points in ASEAN, Manila, Philippines, 20 May 2009.
69. Protocol 2 on Unlimited Third, Fourth and Fifth Freedom Traffic Rights among All Points with International Airports in ASEAN, Manila, Philippines, 20 May 2009.
70. ASEAN Multilateral Agreement on Air Services, Manila, Philippines, 20 May 2009.
71. Protocol 1 on Unlimited Third, Fourth and Fifth Freedom Traffic Rights within the ASEAN Sub-Region, Manila, Philippines, 20 May 2009.
72. Protocol 2 on Unlimited Fifth Freedom Traffic Rights within the ASEAN Sub-Region, Manila, Philippines, 20 May 2009.
73. Protocol 3 on Unlimited Third and Fourth Freedom Traffic Rights between the ASEAN Sub-Regions, Manila, Philippines, 20 May 2009.
74. Protocol 4 on Unlimited Fifth Freedom Traffic Rights between the ASEAN Sub-Regions, Manila, Philippines, 20 May 2009.
75. Protocol 5 on Unlimited Third and Fourth Freedom Traffic Rights between ASEAN Capital Cities, Manila, Philippines, 20 May 2009.

76. Protocol 6 on Unlimited Fifth Freedom Traffic Rights between ASEAN Capital Cities, Manila, Philippines, 20 May 2009.
77. Protocol to Implement the Sixth Package of Commitments on Air Transport Services under the ASEAN Framework Agreement on Services, Ha Noi, Viet Nam, 10 December 2009.
78. ASEAN Framework Agreement on the Facilitation of Inter-State Transport, Manila, Philippines, 10 December 2009.
79. Second Protocol to Amend the Protocol Governing the Implementation of the ASEAN Harmonised Tariff Nomenclature, Nha Trang, Viet Nam, 8 April 2010.
80. Protocol to Implement the Eighth Package of Commitments under the ASEAN Framework Agreement on Services, Ha Noi, Viet Nam, 28 October 2010.
81. Protocol to Amend the Protocol to Provide Special Consideration for Rice and Sugar, Ha Noi, Viet Nam, 28 October 2010.
82. Protocol 1 on Unlimited Third and Fourth Freedom Traffic Rights between any ASEAN Cities, Bandar Seri Begawan, Brunei Darussalam, 12 November 2010.
83. ASEAN Multilateral Agreement on Full Liberalisation of Passengers Air Services, Bandar Seri Begawan, Brunei Darussalam, 12 November 2010.
84. Protocol 2 on Unlimited Fifth Freedom Traffic Rights between any ASEAN Cities, Bandar Seri Begawan, Brunei Darussalam, 12 November 2010.
85. Protocol to Implement the Fifth Package of Commitments on Financial Services under the ASEAN Framework Agreement on Services, Ha Noi, Viet Nam, 4 May 2011.
86. Protocol to Implement the Seventh Package of Commitments on Air Transport Services under the ASEAN Framework Agreement on Services, Phnom Penh, Cambodia, 10 December 2011.
87. ASEAN Agreement on Customs, Phnom Penh, Cambodia, 30 March 2012.
88. ASEAN Agreement on the Movement of Natural Persons, Phnom Penh, Cambodia, 19 November 2012.
89. ASEAN Mutual Recognition Arrangement on Tourism Professionals, Bangkok, Thailand, 9 November 2012.
90. Protocol to Amend Certain ASEAN Economic Agreements related to Trade in Goods, Ha Noi, Viet Nam, 8 March 2013.
91. Instrument of Extension of the ASEAN Memorandum of Understanding on the Trans-ASEAN Gas Pipeline Project, Bali, Indonesia, 25 September 2013.
92. Protocol to Amend the Agreement on the Establishment of the ASEAN Centre for Energy, Bali, Indonesia, 25 September 2013.

93. Protocol to Implement the Eighth Package of Commitments on Air Transport Services under the ASEAN Framework Agreement on Services, Pakse, Lao PDR, 20 December 2013.
94. Protocol to Amend the ASEAN Comprehensive Investment Agreement, Nay Pyi Taw, Myanmar, 26 August 2014.
95. ASEAN Mutual Recognition Arrangement on Accountancy Services, Nay Pyi Taw, 13 November 2014.
96. ASEAN Agreement on Medical Device Directive, Bangkok, Thailand, 21 November 2014.
97. Protocol 7 Customs Transit System, Bangkok, Thailand, 24 February 2015.
98. Protocol to Implement the Sixth Package of Commitments on Financial Services under the ASEAN Framework Agreement on Services, Kuala Lumpur, Malaysia, 20 March 2015.
99. Protocol on the Legal Framework to Implement the ASEAN Single Window, Ha Noi, Viet Nam, 4 September 2015.
100. Protocol to Implement the Ninth Package of Commitments under the ASEAN Framework Agreement on Services, Makati, Philippines, 27 November 2015.
101. Protocol to Implement the Seventh Package of Commitments on Financial Services under the ASEAN Framework Agreement on Services, Ha Noi, Viet Nam, 23 June 2016.
102. Protocol 3 on Domestic Code-Share Rights between Points Within the Territory of any ASEAN Member States, Singapore, 13 October 2017.
103. ASEAN Mutual Recognition Arrangement for Bioequivalence Study Reports of Generic Medicinal Products, Manila, Philippines, 2 November 2017.
104. ASEAN Sectoral Mutual Recognition Arrangement for Inspection and Certification Systems on Food Hygiene for Prepared Foodstuff Products, Singapore, 27 April 2018.
105. Protocol to Implement the Tenth Package of Commitments under the ASEAN Framework Agreement on Services, Singapore, 11 November 2018.

## **APPENDIX II RULES OF CONDUCT**

These rules of conduct are designed to maintain the integrity, impartiality and confidentiality of proceedings conducted under the Protocol thereby enhancing confidence under the Protocol.

### **I. GOVERNING PRINCIPLE**

Each person covered by these Rules (as defined in paragraph 111:1 and hereinafter called "covered person") shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved. These Rules shall in no way modify the rights and obligations of Member States under the Protocol nor the rules and procedures therein.

### **II. OBSERVANCE OF THE GOVERNING PRINCIPLE**

1. To ensure the observance of the Governing Principle, each covered person is expected to:
  - (a) adhere strictly to the provisions of the Protocol;
  - (b) disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality; and
  - (c) take due care in the performance of their duties to fulfil these expectations, including through avoidance of any direct or indirect conflicts of interest in respect of the subject matter of the proceedings.
2. Pursuant to the Governing Principle, each covered person, shall be independent and impartial, and shall maintain confidentiality. Moreover, such persons shall consider only issues raised in, and necessary to fulfil their responsibilities within, the dispute settlement proceeding and shall not delegate this responsibility to any other person. Such person shall not incur any obligation or accept any benefit that would in any way interfere with, or which could give rise to, justifiable doubts as to the proper performance of that person's dispute settlement duties.

### **III. SCOPE**

1. These Rules shall apply, as specified in the text, to each person serving:
  - (a) on a panel;
  - (b) on the Appellate Body;
  - (c) as an arbitrator pursuant to the provisions mentioned in paragraphs 7 and 8 of Article 18 of the Protocol; or
  - (d) as an expert participating in the dispute settlement mechanism pursuant to paragraph 5 of Article 10 of the Protocol.

These Rules shall also apply, as specified in this text, to those members of the Secretariat called upon to assist the panel and the Appellate Body in accordance with Article 22 of the Protocol or to assist in formal arbitration proceedings pursuant to paragraphs 7 and 8 of Article 18 of the Protocol.

2. The application of these Rules shall not in any way impede the Secretariat's discharge of its responsibility to continue to respond to Member States' requests for assistance and information.

### **IV. SELF-DISCLOSURE REQUIREMENTS BY COVERED PERSONS**

1. (a) Each person requested to serve on a panel, on the Appellate Body, as an arbitrator, or as an expert shall, at the time of the request, receive from the Secretariat these Rules, which include an Illustrative List at Annex 1 of examples of the matters subject to disclosure.

- (b) Any member of the Secretariat described in paragraph 111:1, who may expect to be called upon to assist in a dispute shall be familiar with these Rules.
2. As set out in paragraph IV:4, all covered persons described in paragraph IV:1 shall disclose any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principle, is likely to affect or give rise to justifiable doubts as to their independence or impartiality. These disclosures include the type of information described in the Illustrative List at Annex 1, if relevant.
  3. These disclosure requirements shall not extend to the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant. They shall take into account the need to respect the personal privacy of those to whom these Rules apply and shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve on panels, the Appellate Body, or in other dispute settlement roles.
  4. (a) All panelists, arbitrators and experts, prior to confirmation of their appointment, shall complete the form at Annex 2. Such information would be disclosed to the SEOM for consideration by the parties to the dispute.  
  
(b) (i) Persons serving on the Appellate Body who, through rotation, are selected to hear the appeal of a particular panel case, shall review the factual portion of the panel report and complete the form at Annex 2. Such information would be disclosed to the Appellate Body for its consideration whether the member concerned should hear a particular appeal.  
  
(ii) The staff members of the Secretariat shall disclose any relevant matter to the Appellate Body, for its consideration in deciding on the assignment of staff to assist in a particular appeal.  
  
(c) When considered to assist in a dispute, members of the Secretariat shall disclose to the Secretary-General of ASEAN the information required under paragraph IV:2 and any other relevant information required under the ASEAN Secretariat Staff Regulations.
  5. During a dispute, each covered person shall also disclose any new information relevant to paragraph IV:2 at the earliest time they become aware of it.
  6. The SEOM, Appellate Body, the Secretariat, parties to the dispute, and other individuals involved in the dispute settlement mechanism shall maintain the confidentiality of any information revealed through this disclosure process, even after the panel or appellate review process and its enforcement procedures, if any, are completed.

## **V. CONFIDENTIALITY**

1. Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential. No covered person shall at any time use such information acquired during such deliberations and proceedings to gain personal advantage or advantage for others.
2. During the proceedings, no covered person shall engage in *ex parte* contacts concerning matters under consideration. Subject to paragraph V:1, no covered person shall make any statements on such proceedings or the issues in dispute in which that person is participating, until the report of the panel or the Appellate Body has been declassified.

## **VI. PROCEDURES CONCERNING SUBSEQUENT DISCLOSURE AND POSSIBLE MATERIAL VIOLATIONS**

1. Any party to a dispute, conducted pursuant to the Protocol, who possesses or comes into possession of evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest by covered persons which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism, shall at the earliest possible time and on a confidential basis, submit such evidence to the SEOM, the Secretary-General of ASEAN or the Appellate Body, as appropriate according to the respective procedures detailed in paragraphs VI :5 to VI: 17, in a written statement specifying the relevant

facts and circumstances. Other Member States who possess or come into possession of such evidence, may provide such evidence to the parties to the dispute in the interest of maintaining the integrity and impartiality of the dispute settlement mechanism.

2. When evidence as described in paragraph VI:1 is based on an alleged failure of a covered person to disclose a relevant interest, relationship or matter, that failure to disclose, as such, shall not be a sufficient ground for disqualification unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.
3. When such evidence is not provided at the earliest practicable time, the party submitting the evidence shall explain why it did not do so earlier and this explanation shall be taken into account in the procedures initiated in paragraph VI:1.
4. Following the submission of such evidence to the SEOM, the Secretary-General of ASEAN or the Appellate Body, as specified below, the procedures outlined in paragraphs VI:5 to VI:17 shall be completed within 15 working days.

#### Panellists, Arbitrators, Experts

5. If the covered person who is the subject of the evidence is a panelist, an arbitrator or an expert, the party shall provide such evidence to the SEOM.
6. Upon receipt of the evidence referred to in paragraphs VI:1 and VI:2, the SEOM shall forthwith provide the evidence to the person who is the subject of such evidence, for consideration by the latter.
7. If, after having consulted with the person concerned, the matter is not resolved, the SEOM shall forthwith provide all the evidence, and any additional information from the person concerned, to the parties to the dispute. If the person concerned resigns, the SEOM shall inform the parties to the dispute and, as the case may be, the panelists, the arbitrator(s) or experts.
8. In all cases, the SEOM, in consultation with the Secretary-General of ASEAN and after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard, would decide whether a material violation of these Rules as referred to in paragraphs VI:1 and VI:2 has occurred. Where the parties to the dispute agree that a material violation of these Rules has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person concerned would be confirmed.
9. The person who is the subject of the evidence shall continue to participate in the consideration of the dispute unless it is decided that a material violation of these Rules has occurred.
10. The SEOM shall thereafter take the necessary steps for the appointment of the person who is the subject of the evidence to be formally revoked, or excused from the dispute as the case may be, as of that time.

#### Secretariat

11. If the covered person who is the subject of the evidence is a staff member of the Secretariat, the party shall only provide the evidence to the Secretary-General of ASEAN, who shall forthwith provide the evidence to the person who is the subject of such evidence and shall further inform the other party or parties to the dispute, and the panel or the Appellate Body, as appropriate.
12. It shall be for the Secretary-General of ASEAN to take any appropriate action in accordance with the ASEAN Secretariat Staff Regulations.
13. The Secretary-General of ASEAN shall inform the parties to the dispute, the panel and the SEOM of his decision, together with relevant supporting information.

### Appellate Body

14. If the covered person who is the subject of the evidence is a member of the Appellate Body, the party shall provide the evidence to the other party to the dispute and the evidence shall thereafter be provided to the Appellate Body.
15. Upon receipt of the evidence referred to in paragraphs VI:1 and VI:2, the Appellate Body shall forthwith provide it to the person who is the subject of such evidence, for consideration by the latter.
16. It shall be for the Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard.
17. The Appellate Body shall inform the parties to the dispute and the SEOM of its decision, together with relevant supporting information.
18. Following completion of the procedures in paragraphs VI:5 to VI:17, if the appointment of a covered person, other than a member of the Appellate Body, is revoked or that person is excused or resigns, the procedures specified in the Protocol for initial appointment shall be followed for appointment of a replacement, but the time-periods shall not exceed half those specified in the Protocol, and the timelines in relation to panel and Appellate Body proceedings are maintained. The member of the Appellate Body who, under that Body's rules, would next be selected through rotation to consider the dispute, would automatically be assigned to the appeal. The panel, members of the Appellate Body hearing the appeal, or the arbitrator, as the case may be, may then decide after consulting with the parties to the dispute, on any necessary modifications to their working procedures or proposed timetable.
19. All covered persons and Member States concerned shall resolve matters involving possible material violations of these Rules as expeditiously as possible so as not to delay the completion of proceedings, as provided in the Protocol.
20. Except to the extent strictly necessary to carry out this decision, all information concerning possible or actual material violations of these Rules shall be kept confidential.

### **VII. REVIEW**

These Rules may be reviewed, if necessary.

**ANNEX 1**  
**ILLUSTRATIVE LIST OF INFORMATION TO BE DISCLOSED**

*This list contains examples of information of the type that a person called upon to service in a dispute should disclose pursuant to the Rules of Conduct for the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.*

Each covered person, as defined in paragraph III:1 of these Rules has a continuing duty to disclose the information described in paragraph IV:2 of these Rules which may include the following:

- (a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
- (b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
- (c) other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);
- (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements); and
- (e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).

**ANNEX 2**

Dispute Number: \_\_\_\_\_

**ASSOCIATION OF SOUTHEAST ASIAN NATIONS  
DISCLOSURE FORM**

I have read the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Protocol) and the Rules of Conduct in Appendix II of the Protocol. I understand my continuing duty, while participating in the dispute settlement mechanism, and until such time as the ASEAN Senior Economic Officials Meeting (SEM) makes a decision on adoption of a report relating to the proceeding or notes its settlement, to disclose herewith and in future any information likely to affect my independence or impartiality, or which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism; and to respect my obligations regarding the confidentiality of dispute settlement proceedings.

Signed:

Dated:

## **APPENDIX III WORKING PROCEDURES OF THE PANEL**

### **PANEL PROCEEDINGS**

In its proceedings the panel shall follow the relevant provisions of the Protocol. In addition, the following working procedures shall apply.

1. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.
2. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in the Protocol shall preclude a party to a dispute from disclosing statements of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel which that member State has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall, upon request of a Member State, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.
3. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.
4. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.
5. All third parties which have notified their interest in the dispute to the SEOM shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.
6. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.
7. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.
8. The parties to the dispute and any third party invited to present its views in accordance with Article 13 shall make available to the panel a written version of their oral statements.
9. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 4 to 7 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.
10. Any additional procedures specific to the panel.

## **APPENDIX IV WORKING PROCEDURES FOR APPELLATE REVIEW**

### **DEFINITIONS**

1. *In these Working Procedures for Appellate Review,*

"appellant" means any party to the dispute that has filed a Notice of Appeal pursuant to Rule 20;

"appellate report" means an Appellate Body report as described in Article 14 of the Protocol;

"appellee" means any party to the dispute that has filed a submission pursuant to Rule 22 or paragraph 4 of Rule 23;

"consensus" a decision is deemed to be made by consensus if no Member formally objects to it;

"division" means the three Members who are selected to serve on any one appeal in accordance with paragraph 1 of Article 14 of the Protocol and paragraph 2 of Rule 6;

"documents" means the Notice of Appeal, any Notice of Other Appeal and the submissions and other written statements presented by the participants or third participants;

"Member" means a Member of the Appellate Body who has been appointed by the AEM in accordance with Article 14 of the Protocol;

"other appellant" means any party to the dispute that has filed a Notice of Other Appeal pursuant to paragraph 1 of Rule 23;

"participant" means any party to the dispute that has filed a Notice of Appeal pursuant to Rule 20, a Notice of Other Appeal pursuant to Rule 23 or a submission pursuant to Rule 22 or paragraph 4 of Rule 23;

"party to the dispute" means any Member State who was a complaining or defending party in the panel dispute, but does not include a third party;

"proof of service" means a letter or other written acknowledgement that a document has been delivered, as required, to the parties to the dispute, participants, third parties or third participants, as the case may be;

"Rules" means these Working Procedures for Appellate Review;

"Rules of Conduct" means the Rules of Conduct in Appendix II of the Protocol;

"Secretariat" means the ASEAN Secretariat;

"Secretary-General" means the Secretary-General of ASEAN;

"service address" means the address of the party to the dispute, participant, third party or third participant notified to the Secretariat and to all Member States for the purposes of these Working Procedures;

"third participant" means any third party that has filed a written submission pursuant to paragraph 1 of Rule 25; or any third party that appears at the oral hearing, whether or not it makes an oral statement at that hearing;

"third party" means any Member State who has notified the SEOM of its substantial interest in the matter before the panel pursuant to paragraph 2 of Article 13 of the Protocol;

"WTO" means the World Trade Organization.

## **PART 1 MEMBERS**

### Duties and Responsibilities

2. (1) A Member shall abide by the terms and conditions of the Protocol, these Rules and any decisions of the SEOM affecting the Appellate Body.  
  
(2) During his/her term, a Member shall not:
  - (a) accept any employment; or
  - (b) pursue any professional activitythat is inconsistent with his/her duties and responsibilities.  
  
(3) A Member shall exercise his/her office without accepting or seeking instructions from any international, governmental, or non-governmental organisation or any private source.  
  
(4) A Member shall be available at all times and on short notice.

### Decision-Making

3. (1) In accordance with paragraph 1 of Article 14 of the Protocol, decisions relating to an appeal shall be taken solely by the division assigned to that appeal. Other decisions shall be taken by the Appellate Body as a whole.  
  
(2) The Appellate Body and its divisions shall make every effort to take their decisions by consensus. Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by a majority vote.

### Collegiality

4. (1) To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene once a year to discuss matters of policy, practice and procedure.  
  
(2) The Members shall stay abreast of dispute settlement activities and other relevant activities of the WTO and ASEAN and, in particular, each Member shall receive all documents filed in an appeal.  
  
(3) In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalises the appellate report for circulation to the Member States. This paragraph is subject to paragraphs 2 and 3 of Rule 11.  
  
(4) Nothing in these Rules shall be interpreted as interfering with a division's full authority and freedom to hear and decide an appeal assigned to it in accordance with paragraph 1 of Article 14 of the Protocol.

### Chair

5. (1) There shall be a Chair of the Appellate Body who shall be elected by the Members through Correspondence.  
  
(2) The term of office of the Chair of the Appellate Body shall be one year. The Appellate Body Members may decide to extend the term of office for an additional period of up to one year. However, in order to ensure rotation of the Chair, no Member shall serve as Chair for more than two consecutive terms.

(3) The Chair shall be responsible for the overall direction of the Appellate Body business, such as:

- (a) the supervision of the internal functioning of the Appellate Body; and
- (b) any such other duties as the Members may agree to entrust to him/her.

(4) Where the office of the Chair becomes vacant due to permanent incapacity as a result of illness or death or by resignation or expiration of his/her term, the Members shall elect a new Chair who shall serve a full term in accordance with paragraph 2.

(5) In the event of a temporary absence or incapacity of the Chair, the Appellate Body shall authorise another Member to act as Chair ad interim, and the Member so authorised shall temporarily exercise all the powers, duties and functions of the Chair until the Chair is capable of resuming his/her functions.

#### Divisions

6. (1) In accordance with paragraph 1 of Article 14 of the Protocol, a division consisting of three Members shall be established to hear and decide an appeal.

(2) The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.

(3) A Member selected pursuant to paragraph 2 to serve on a division shall serve on that division, unless:

- (a) he/she is excused from that division pursuant to Rules 9 or 10;
- (b) he/she has notified the Chair and the Presiding Member that he/she is prevented from serving on the division because of illness or other serious reasons pursuant to Rule 12; or
- (c) he/she has notified his/her intentions to resign pursuant to Rule 14.

#### Presiding Member of the Division

7. (1) Each division shall have a Presiding Member, who shall be elected by the Members of that division.

(2) The responsibilities of the Presiding Member shall include:

- (a) coordinating the overall conduct of the appeal proceeding;
- (b) chairing all oral hearings and meetings related to that appeal; and
- (c) coordinating the drafting of the appellate report.

(3) In the event that a Presiding Member becomes incapable of performing his/her duties, the other Members serving on that division and the Member selected as a replacement pursuant to Rule 13 shall elect one of their number to act as the Presiding Member.

#### Rules of Conduct

8. The Rules of Conduct shall be deemed to have been adopted by the Appellate Body once it is established.

9. (1) Upon the filing of a Notice of Appeal, each Member shall take the steps set out in paragraph IV:4(b)(i) of the Rules of Conduct, and a Member may consult with the other Members prior to completing the disclosure form.

(2) Upon the filing of a Notice of Appeal, the staff of the Secretariat assigned to that appeal shall take the steps set out in paragraph IV:4(b)(ii) of the Rules of Conduct.

- (3) Where information has been submitted pursuant to paragraph IV:4(b)(i) or (ii) of the Rules of Conduct, the Appellate Body shall consider whether further action is necessary.
- (4) As a result of the Appellate Body's consideration of the matter pursuant to paragraph IV:3 of the Rules of Conduct, the Member or the staff member concerned may continue to be assigned to the division or may be excused from the division.
10. (1) Where evidence of a material violation is filed by a participant pursuant to paragraph VI of the Rules of Conduct, such evidence shall be confidential and shall be supported by affidavits made by persons having actual knowledge or a reasonable belief as to the truth of the facts stated.
- (2) Any evidence filed pursuant to paragraph VI:1 of the Rules of Conduct shall be filed at the earliest practicable time: that is, forthwith after the participant submitting it knew or reasonably could have known of the facts supporting it. In no case shall such evidence be filed after the appellate report is circulated to the Member States.
- (3) Where a participant fails to submit such evidence at the earliest practicable time, it shall file an explanation in writing of the reasons why it did not do so earlier, and the Appellate Body may decide to consider or not to consider such evidence, as appropriate.
- (4) While taking fully into account paragraph 5 of Article 14 of the Protocol, where evidence has been filed pursuant to paragraph VI of the Rules of Conduct, an appeal shall be suspended for 15 days or until the procedure referred to in paragraph VI: 14-16 of the Rules of Conduct is completed, whichever is earlier.
- (5) As a result of the procedure referred to in paragraph VI:14-16 of the Rules of Conduct, the Appellate Body may decide to dismiss the allegation, to excuse the Member or the staff member concerned from being assigned to the division or make such other order as it deems necessary in accordance with paragraph VI of the Rules of Conduct.
11. (1) A Member who has submitted a disclosure form with information attached pursuant to paragraph IV:4(b)(i) of the Rules of Conduct-or is the subject of evidence of a material violation pursuant to paragraph VI:1 of the Rules of Conduct, shall not participate in any decision taken pursuant to paragraph 4 of Rule 9 or paragraph 5 of Rule 10.
- (2) A Member who is excused from a division pursuant to paragraph 4 of Rule 9 or paragraph 5 of Rule 10 shall not take part in the exchange of views conducted in that appeal pursuant to paragraph 3 of Rule 4.
- (3) A Member who, had he/she been a Member of a division, would have been excused from that division pursuant to paragraph 4 of Rule 9, shall not take part in the exchange of views conducted in that appeal pursuant to paragraph 3 of Rule 4.

#### Incapacity

12. (1) A Member who is prevented from serving on a division by illness or for other serious reasons shall give notice and duly explain such reasons to the Chair and to the Presiding Member.
- (2) Upon receiving such notice, the Chair and the Presiding Member shall forthwith inform the Appellate Body.

#### Replacement

13. Where a Member is unable to serve on a division for a reason set out in paragraph 3 of Rule 6, another Member shall be selected forthwith pursuant to paragraph 2 of Rule 6 to replace the Member originally selected for that division.

### Resignation

14. (1) A Member who intends to resign from his/her office shall notify his/her intention in writing to the Chair of the Appellate Body who shall immediately inform the AEM, the Secretary-General and the other Members of the Appellate Body.
- (2) The resignation shall take effect 90 days after the notification has been made pursuant to paragraph 1, unless the AEM, in consultation with the Appellate Body, decides otherwise.

### Transition

15. A person who ceases to be a Member of the Appellate Body may, with the authorisation of the Appellate Body and upon notification to the AEM, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.

## **PART II PROCESS**

### General Provisions

16. (1) In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the Protocol, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.
- (2) In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.
17. (1) Unless the SEOM decides otherwise, in computing any time-period stipulated in the Protocol or in the special or additional provisions of the covered agreements, or in these Rules, within which a communication must be made or an action taken by a Member State to exercise or preserve its rights, the day from which the time-period begins to run shall be excluded and, subject to paragraph 2, the last day of the time-period shall be included.
- (2) If any time period expires on a Secretariat non-working day, any communication or action to be taken before the expiration of such a time-period shall be accepted on the first subsequent Secretariat working day.

### Documents

18. (1) No document is considered filed with the Appellate Body unless the document is received by the Secretariat within the time-period set out for filing in accordance with these Rules.
- (2) Except as otherwise provided in these Rules, every document filed by a party to the dispute, a participant, a third party or a third participant shall be served on each of the other parties to the dispute, participants, third parties and third participants in the appeal.
- (3) A proof of service on the other parties to the dispute, participants, third parties and third participants shall appear on, or be affixed to, each document filed with the Secretariat under paragraph 1.
- (4) A document shall be served by the most expeditious means of delivery or communication available, including by:

- (a) delivering a copy of the document to the service address of the party to the dispute, participant, third party or third participant; or
- (b) sending a copy of the document to the service address of the party to the dispute, participant, third party or third participant by facsimile transmission, expedited delivery courier or expedited mail service.

(5) Upon authorisation by the division, a participant or a third participant may correct clerical errors in any of its documents (including typographical mistakes, errors of grammar, or words or numbers placed in the wrong order). The request to correct clerical errors shall identify the specific errors to be corrected and shall be filed with the Secretariat no later than 30 days after the date of the filing of the Notice of Appeal. A copy of the request shall be served upon the other parties to the dispute, participants, third parties and third participants, each of whom shall be given an opportunity to comment in writing on the request. The division shall notify the parties to the dispute, participants, third parties and third participants of its decision.

#### Ex Parte Communications

19. (1) Neither a division nor any of its Members shall meet with or contact one party to the dispute, participant, third party or third participant in the absence of the other parties to the dispute, participants, third parties and third participants.

(2) No Member of the division may discuss any aspect of the subject matter of an appeal with any party to the dispute, participant, third party or third participant in the absence of the other Members of the division.

(3) A Member who is not assigned to the division hearing the appeal shall not discuss any aspect of the subject matter of the appeal with any party to the dispute, participant, third party or third participant.

#### Commencement of Appeal

20. (1) An appeal shall be commenced by notification in writing to the SEOM in accordance with paragraph 2 of Article 11 of the Protocol and simultaneous filing of a Notice of Appeal with the Secretariat.

(2) A Notice of Appeal shall include the following information:

- (a) the title of the panel report under appeal;
- (b) the name of the party to the dispute filing the Notice of Appeal;
- (c) the service address, telephone and facsimile numbers of the party to the dispute; and
- (d) a brief statement of the nature of the appeal, including:
  - (i) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;
  - (ii) a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and
  - (iii) without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.

#### Appellant's Submission

21. (1) The appellant shall, within seven days after the date of the filing of the Notice of Appeal, file with the Secretariat a written submission prepared in accordance with paragraph 2 and serve a copy of the submission on the other parties to the dispute and third parties.

(2) A written submission referred to in paragraph 1 shall:

- (a) be dated and signed by the appellant; and
- (b) set out:

- (i) a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof;
- (ii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and
- (iii) the nature of the decision or ruling sought.

#### Appellee's Submission

22. (1) Any party to the dispute that wishes to respond to allegations raised in an appellant's submission filed pursuant to Rule 21 may, within 25 days after the date of the filing of the Notice of Appeal, file with the Secretariat a written submission prepared in accordance with paragraph 2 and serve a copy of the submission on the appellant, other parties to the dispute and third parties.

(2) A written submission referred to in paragraph 1 shall:

- (a) be dated and signed by the appellee; and
- (b) set out:
  - (i) a precise statement of the grounds for opposing the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel raised in the appellant's submission, and the legal arguments in support thereof;
  - (ii) an acceptance of, or opposition to, each ground set out in the appellant's submission;
  - (iii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and
  - (iv) the nature of the decision or ruling sought.

#### Multiple Appeals

23. (1) Within 12 days after the date of the filing of the Notice of Appeal, a party to the dispute other than the original appellant may join in that appeal or appeal on the basis of other alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel. That party shall notify the SEOM in writing of its appeal and shall simultaneously file a Notice of Other Appeal with the Secretariat.

(2) A Notice of Other Appeal shall include the following information:

- (a) the title of the panel report under appeal;
- (b) the name of the party to the dispute filing the Notice of Other Appeal;
- (c) the service address, telephone and facsimile numbers of the party to the dispute; and either
  - (i) a statement of the issues raised on appeal by another participant with which the party joins; or
  - (ii) a brief statement of the nature of the other appeal, including:
    - (A) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;
    - (B) a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and
    - (C) without prejudice to the ability of the other appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.

(3) The other appellant shall, within 15 days after the date of the filing of the Notice of Appeal, file with the Secretariat a written submission prepared in accordance with paragraph 2 of Rule 21 and serve a copy of the submission on the other parties to the dispute and third parties.

(4) The appellant, any appellee and any other party to the dispute that wishes to respond to a submission filed pursuant to paragraph 3 may file a written submission within 25 days after the date of the filing of the Notice of Appeal, and any such submission shall be in the format required by paragraph 2 of Rule 22.

(5) This Rule does not preclude a party to the dispute which has not filed a submission under Rule 21 or a Notice of Other Appeal under paragraph 1 from exercising its right of appeal pursuant to paragraph 2 of Article 11 of the Protocol.

(6) Where a party to the dispute which has not filed a submission under Rule 21 or a Notice of Other Appeal under paragraph 1 exercises its right to appeal as set out in paragraph 5, a single division shall examine the appeals.

#### Amending Notices of Appeal

24. (1) The division may authorise an original appellant to amend a Notice of Appeal or another appellant to amend a Notice of Other Appeal.

(2) A request to amend a Notice of Appeal or a Notice of Other Appeal shall be made as soon as possible in writing and shall state the reason(s) for the request and identify precisely the specific amendments that the appellant or other appellant wishes to make to the Notice. A copy of the request shall be served on the other parties to the dispute, participants, third participants and third parties, each of whom shall be given an opportunity to comment in writing on the request.

(3) In deciding whether to authorise, in full or in part, a request to amend a Notice of Appeal or Notice of Other Appeal, the division shall take into account:

- (a) the requirement to circulate the appellate report within the time-period set out in paragraph 5 of Article 14 of the Protocol; and
- (b) the interests of fairness and orderly procedure, including the nature and extent of the proposed amendment, the timing of the request to amend a Notice of Appeal or Notice of Other Appeal, any reasons why the proposed amended Notice of Appeal or Notice of Other Appeal was not or could not have been filed on its original date, and any other considerations that may be appropriate.

(4) The division shall notify the parties to the dispute, participants, third participants, and third parties of its decision. In the event that the division authorises an amendment to a Notice of Appeal or a Notice of Other Appeal, it shall provide an amended copy of the Notice to the SEOM.

#### Third Participants

25. (1) Any third party may file a written submission containing the grounds and legal arguments in support of its position. Such submission shall be filed within 25 days after the date of the filing of the Notice of Appeal.

(2) A third party not filing a written submission shall, within the same period of 25 days, notify the Secretariat in writing if it intends to appear at the oral hearing, and, if so, whether it intends to make an oral statement.

(3) Third participants are encouraged to file written submissions to facilitate their positions being taken fully into account by the division hearing the appeal and in order that participants and other third participants will have notice of positions to be taken at the oral hearing.

(4) Any third party that has neither filed a written submission pursuant to paragraph 1, nor notified the Secretariat pursuant to paragraph 2, may notify the Secretariat that it intends to appear at the oral hearing, and may request to make an oral statement at the hearing. Such notifications and requests should be notified to the Secretariat in writing at the earliest opportunity.

### Transmittal of Record

26. (1) Upon the filing of a Notice of Appeal, the Secretary-General shall transmit forthwith to the Appellate Body the complete record of the panel proceeding.
- (2) The complete record of the panel proceeding includes, but is not limited to:
- (a) written submissions, rebuttal submissions, and supporting evidence attached thereto by the parties to the dispute and the third parties;
  - (b) written arguments submitted at the panel meetings with the parties to the dispute and the third parties, the recordings of such panel meetings, and any written answers to questions posed at such panel meetings;
  - (c) the correspondence relating to the panel dispute between the panel or the Secretariat and the parties to the dispute or the third parties; and
  - (d) any other documentation submitted to the panel.

### Working Schedule

27. (1) Forthwith after the commencement of an appeal, the division shall draw up an appropriate working schedule for that appeal in accordance with the time-periods stipulated in these Rules.
- (2) The working schedule shall set forth precise dates for the filing of documents and a timetable for the division's work, including where possible, the date for the oral hearing.
- (3) In accordance with paragraph 5 of Article 3 of the Protocol, in appeals of urgency, including those which concern perishable goods, the Appellate Body shall make every effort to accelerate the appellate proceedings to the greatest extent possible. A division shall take this into account in drawing up its working schedule for that appeal.
- (4) The Secretariat shall serve forthwith a copy of the working schedule on the appellant, the parties to the dispute and any third parties.

### Oral Hearing

28. (1) A division shall hold an oral hearing, which shall be held, as a general rule, between 35 and 45 days after the date of the filing of a Notice of Appeal.
- (2) Where possible in the working schedule or otherwise at the earliest possible date, the Secretariat shall notify all parties to the dispute, participants, third parties and third participants of the date for the oral hearing.
- (3) Any third party that has:
- (a) filed a submission pursuant to paragraph 1 of Rule 25, or has notified the Secretariat pursuant to paragraph 2 of Rule 25 that it intends to appear at the oral hearing, may appear at the oral hearing, make an oral statement at the hearing, and respond to questions posed by the division.
  - (b) notified the Secretariat pursuant to paragraph 4 of Rule 25 that it intends to appear at the oral hearing may appear at the oral hearing.
  - (c) made a request pursuant to paragraph 4 of Rule 25 may, at the discretion of the division hearing the appeal, taking into account the requirements of due process, make an oral statement at the hearing, and respond to questions posed by the division.
- (4) The Presiding Member may set time-limits for oral arguments.

### Written Responses

29. (1) At any time during the appellate proceeding, including, in particular, during the oral hearing, the division may address questions orally or in writing to, or request additional memoranda from, any participant or third participant, and specify the time-periods by which written responses or memoranda shall be received.

(2) Any such questions, responses or memoranda shall be made available to the other participants and third participants in the appeal, who shall be given an opportunity to respond.

(3) When the questions or requests for memoranda are made prior to the oral hearing, then the questions or requests, as well as the responses or memoranda, shall also be made available to the third parties, who shall also be given an opportunity to respond.

#### Failure to Appear

30. Where a participant fails to file a submission within the required time-periods or fails to appear at the oral hearing, the division shall, after hearing the views of the participants, issue such order, including dismissal of the appeal, as it deems appropriate.

#### Withdrawal of Appeal

31. (1) At any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the SEOM.

(2) Where a mutually agreed solution to a dispute which is the subject of an appeal has been notified to the SEOM pursuant to paragraph 2 of Article 2 of the Protocol, it shall be notified to the Appellate Body.

#### Amendment

32. (1) Whenever there is an amendment to the Protocol or to the special or additional rules and procedures of the covered agreements, the Appellate Body shall examine whether update or change to these Rules are necessary.

(2) In considering update or change to these Rules, the Appellate Body shall take note of any changes in the current practices of the Appellate Body of the WTO.

**PART III**  
**TIMETABLE FOR APPEALS<sup>4</sup>**

	<u>General Appeals</u>
	Day
Notice of Appeal <sup>5</sup>	0
Appellant's Submission <sup>6</sup>	7
Notice of Other Appeal <sup>7</sup>	12
Other Appellant(s) Submission(s) <sup>8</sup>	15
Appellee(s) Submission(s) <sup>9</sup>	25
Third Participant(s) Submission(s) <sup>10</sup>	25
Third Participant(s) Notification(s) <sup>11</sup>	25
Oral Hearing <sup>12</sup>	35-45
Circulation of Appellate Report	60-90 <sup>13</sup>
Adoption by SEOM	11 <sup>14</sup>

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<sup>4</sup> Rule 17 applies to the computation of the time-periods below.

<sup>5</sup> Rule 20.

<sup>6</sup> Rule 21(1).

<sup>7</sup> Rule 23(1).

<sup>8</sup> Rule 23(3).

<sup>9</sup> Rules 22 and 23(4).

<sup>10</sup> Rule 25(1).

<sup>11</sup> Rule 25(2).

<sup>12</sup> Rule 28.

<sup>13</sup> Article 14(5), Protocol.

<sup>14</sup> Article 14(13), Protocol.

## **APPENDIX V**

### **TERMS AND CONDITIONS OF THE FUND**

#### **I. INTRODUCTION**

- 1.1 The Fund, in accordance with Article 20 of the Protocol, shall be a revolving fund separate from the ASEAN Secretariat's annual operational budget.
- 1.2 The Secretariat shall be responsible for administering the Fund. Unless otherwise specified under this Terms and Conditions, the ASEAN Secretariat Financial and Administrative Rules and Procedures shall be applied to the Fund.

#### **II. CONTRIBUTIONS**

- 2.1 Pursuant to the decision of the 361h AEM held on 3 September 2004 in Jakarta, each Member State contributed US\$33,300 to the Fund. The initial sum of the Fund totalled US\$333,000.
- 2.2 Any contribution or payment to the Fund shall be deposited in the bank account administered by the Secretariat.

#### **III. FUND USAGE**

- 3.1 The Fund shall be used to meet the expenses of the panels and Appellate Body, including traveling, allowances etc., and any related administration costs of the Secretariat, including reproductions, dispatch of documents, publications, and computer and telecommunication services.
- 3.2 The selection and appointment of member of panel and Appellate Body shall be done in accordance with the provisions of the Protocol.
- 3.3 The Secretariat shall ensure smooth operation of the dispute settlement process including undertaking any necessary legal transaction to implement paragraphs 3.1 and 3.2.
- 3.4 The rate of subsistence allowances and other expenses shall be in accordance with the list of criteria as agreed upon by the SEOM.

#### **IV. REPLENISHMENT OF FUND**

Any drawdown from the Fund shall be replenished by parties to disputes in line with paragraph 3 of Article 16 of the Protocol.

#### **V. REPORTING REQUIREMENTS**

The Secretariat shall provide a financial report to the SEOM on an annual basis, or when requested by the SEOM.