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*Trade Remedies and Dispute Settlement*

*Chapter*

# Chapter 6 Trade Remedies and Dispute Settlement

## Section 1 Anti-dumping

Based on the WTO rules, the RCEP provides detailed provisions on anti-dumping, countervailing and safeguard measures, and for the first time includes a "prohibition-zeroing" clause in an FTA. Meanwhile, the RCEP has drawn on high international standards to significantly improve the technical level and transparency of anti-dumping and countervailing investigations by means of a "best practice" list.

Dumping refers to the entry of imported goods into the market of an importing country at a lower (than normal) export price in the ordinary course of trade. As dumping is a means of unfair and low-price competition used by foreign producers or exporters to seize the market of the importing country, both agreements under the WTO framework and the FTAs allow parties to adopt anti-dumping measures. Anti-dumping is the process and measures taken by the relevant regulatory body of the importing country to file, investigate and process cases of foreign products sold in the importing country at a price below the normal price and harming industries producing similar products in the importing country, in accordance with certain legal procedures and on the basis of complaints from domestic industries. Undoubtedly, anti-dumping measures play a positive role in protecting domestic industries and maintaining a normal international trade order.

The RCEP's anti-dumping and countervailing provisions are found in section 2, chapter 7, regulating pre-inspection notification,

confidential filing, disclosure of essential facts, treatment of confidential information, legal procedures for notification and consultation, and the innovative concept of "prohibition of zeroing". Compared to the anti-dumping provisions under the WTO rules, the RCEP provisions are more detailed and specific, and are a continuation and improvement of the anti-dumping provisions under the WTO rules.

## I. Anti-dumping Procedures

### (A) implementation conditions

The following three conditions shall be satisfied simultaneously when anti-dumping measures are applied to imported products:

First, the existence of dumping of imported goods. The criteria for deciding if there's existence or not is that the export price is lower than the normal price, i.e. whether the export price of imported products is lower than the selling price or cost of the product in the domestic market of the exporting country. Comparability factors such as conditions of sale, physical characteristics, quantity, and comparisons at the same level of trade or pre-factory level are usually taken into account.

Second, the domestic industries are injured. The criteria for deciding if domestic industries are injured include substantial injury, the threat of substantial injury and a substantial impediment to a domestic industry that has not yet been established. The determination is made by examining the quantity of the imported products, the impact of the imported dumped products on the price of the same products in the country, and the impact on domestic producers. A cumulative assessment of the impact of the imported dumped products on the domestic industries is required when the imported dumped products come from more than two countries and regions and the statutory conditions are met at the same time.

Third, there is a causation between dumping and injury. The

criteria for deciding if there is such causation are determined by examining any known factors, other than dumped imports that are damaging the domestic industry, including the quantity and price of imported products not sold at dumped prices, changes in domestic demand, changes in consumption patterns, restrictive trade practices, competitions between foreign and domestic producers, technological developments, and the export performance and productivity of the domestic industries. The investigating authority can determine there is a causation between dumping and injury when it determines that the injury to the domestic industries is not caused by the above factors.

#### (B) investigation procedures

Anti-dumping investigation generally includes application, filing, preliminary ruling and final ruling. If the investigating authority finds that dumping does exist based on the preliminary findings and that the dumping has caused injury to the domestic industries, the investigating authority may decide to take provisional anti-dumping measures and continue the investigation; otherwise the investigation shall be terminated immediately. The investigating authority makes a final ruling based on the final results of the investigation and decides whether to take final anti-dumping measures or terminate the investigation. When the margin of dumping of the imported product is "insignificant" (less than 2%) or the market share of the imported product is "negligible" (less than 3%), the investigating authority should also be terminated immediately.

#### (C) implementation results

Generally, there are two types of anti-dumping measures: one, anti-dumping duties. According to the WTO "anti-dumping measures", the anti-dumping duties shall not be imposed at a rate

higher than the dumping rate<sup>12</sup>, and the implementation duration shall not exceed five years from the date of implementation. The duration may be extended by the anti-dumping sunset review, and may be extended for five years each time. Second, price commitment. The export operator of the dumped products makes a price commitment that is consistent with the price in the exporting country, so as to protect the interests of the importing country.

## II. Introduction to Core Rules

### (A) general provisions

The RCEP chapter on trade remedies specifies in anti-dumping rules that a "respondent" means a producer, manufacturer, exporter, importer, and, where appropriate, a government or government entity. When one Party determines to conduct an on-the-spot investigation against information provided by a respondent and the information is relevant to the calculation of the margin of anti-dumping, the investigating authority shall promptly notify the respondent of its intention of investigate in accordance with the "two '7 days', one 'document'" rule, detailing as the following:

With respect to the timing of the investigation, the investigating authority of one Party shall endeavor to provide to the respondent at least seven days advance notice of the date on which investigating authority intends to conduct any such on-the-spot investigations, and provide to the respondent a document that sets forth the topics the respondent should be prepared to address during the verification and that describes the types of supporting documentation the respondent is to make available for review.

With respect to the content of investigations, the Party's investigating authorities shall maintain a nonconfidential file for both investigation and review containing all non-confidential

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<sup>12</sup>dumping margin=(normal price-export price)/CIF price

documents which are part of the record of the investigation or review. The file shall also contain, to the extent feasible without revealing confidential information, non-confidential summaries of confidential information contained in the record of each investigation or review.

With respect to modalities of the investigation, during an investigation or review, a Party's investigating authority shall make the non-confidential file of the investigation or review available to interested parties either physically for inspection and copying during the investigation authorities' normal business hours or electronically.

(B) notification

The RCEP chapter on trade remedies requires that on receipt by a Party's competent authorities of a properly documented anti-dumping application with respect to imports from another Party, the Party shall endeavor to provide written notice to the other Party of its receipt of the application at least seven days before initiating such an anti-dumping investigation.

(C) prohibition of zeroing

Zeroing is an instrument of a trade protection nature used by countries such as the US. The RCEP chapter on trade remedies explicitly prohibits zeroing for the first time in an FTA, requiring when margins of dumping are established, assessed, or reviewed under Article 2, paragraphs 3 and 5 of Article 9, and Article 11 of the Anti Dumping Agreement, all individual margins, whether positive or negative, shall be counted for weighted average-to-weighted average and transaction-to-transaction comparison.

(D) disclosure of essential facts

The provision requires that Parties, subject to paragraph 5 of Article 6 of the Anti-dumping Agreement, to specify the content, timing and form of disclosure: first, Parties shall fully disclose all

essential facts under consideration which form the basis for the decision to apply measures. Secondly, to the extent possible, Parties shall ensure disclosure of essential facts at least 10 days before the final determination. Thirdly, disclosures shall be made in writing, and allow interested parties sufficient time to provide their comments. The investigating authority of a Party should, in their final determination, take into account such comments, if the comments have been received in the time frames established by that Party's laws and regulations or by its investigating authorities.

(E) treatment of confidential information

Based on the WTO's Anti-dumping Agreement, the RCEP chapter on trade remedies requires interested parties to provide confidential information to furnish non-confidential summaries of such information. The non-confidential summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence in order to allow other interested parties in the investigation an opportunity to respond and defend their interests.

III. Practices Related to Anti-dumping Investigations

According to the notes in Annex of the RCEP chapter on trade remedies, Parties may adopt the following practices to promote the objectives of transparent and due process in trade remedy procedures:

(1) Remedy or explain the deficiency in a request for information. The agreement provides that If a Party's investigating authority determines that an interested party's response to a request for information does not comply with the request, the investigating authorities shall inform that interested party of the issues in the response submitted, and provide that interested party with an opportunity to remedy or explain the deficiency to the extent practicable in light of the time-limits established to complete the

anti-dumping duty investigations.

(2) Undertakings. On request, the importing Party transmits to the exporting Party's embassy located in the importing Party or the exporting Party's competent authorities written information regarding the importing Party's procedures for requesting its authorities to consider a price undertaking, including the time frames for offering and concluding any such undertaking. In an anti-dumping investigation, where the importing Party's investigating authority has made a preliminary affirmative determination of dumping and injury caused by such dumping, the importing Party provides an opportunity for consultations, to exporters of the exporting Party regarding the proposed price undertaking which, if accepted, results in suspension of the investigation without the imposition of anti-dumping duties, through the means provided for in the importing Party's laws, regulations, and procedures.

(3) Public notice and explanation determination. When a public notice of final determination is given, the public notice sets forth, or otherwise makes available through a separate report, in sufficient detail, the findings and conclusions reached, as well as the rationale behind the findings and conclusions of the investigating authority. Subject to the protection of confidential information, the public notice or the separate report shall contain the margins of dumping established, an explanation of the basis upon which normal values and export prices were established, and of the methodology used in the comparison of the export prices and normal values including any adjustments. Information relevant to the injury determination includes the volume and the effect of the dumped imports on prices in the domestic market for the same goods, the detailed methodology used in the calculations of price erosion, the consequent impact of the dumped imports on the

domestic industry, and the demonstration of causation.

## **Section 2 Countervailing**

The WTO's Agreement on Subsidies and Countervailing Measures defines "subsidies" as a financial contribution or any other form of income or price support provided by a government or any public body within the territory of a Member and conferring a benefit. Subsidies are widely used around the world as an important form of state intervention in economic activities. Meanwhile, countervailing measures are used by Parties to counteract the infringement of subsidies and to maintain a fair competition order and environment for their enterprises.

RCEP's countervailing rules are based on the rules of the WTO Agreement on Subsidies and Countervailing Measures, with two main breakthroughs: one, the RCEP explicitly provides for a time limit for verification notification and a time limit for factual disclosure in countervailing investigations. Two, the RCEP explicitly excludes the application of countervailing enforcement in the dispute settlement mechanisms.

### **I. Countervailing Procedures**

#### **(A) implementation conditions**

Under the WTO Agreement on Subsidies and Countervailing Measures, the basis for a Party's determination to apply countervailing measures to imported products is subject to the following conditions:

First, the subsidies are provided by the government and public institutions;

Second, the provision of financial assistance or any form of revenue or price support measures by the government or fiscal agencies;

Third, the subsidized party benefits from the act of

subsidization;

Fourth, the subsidized party is product providers, i.e. domestic producers and sellers.

(B) investigation procedures

Anti-dumping investigations typically include consultation, application, filing, preliminary ruling and final ruling. Before initiating a countervailing investigation, the importing Party is required to consult with the government of the exporting Party that applies subsidies to the imported products. If the investigating authority determines, based on preliminary findings, that the subsidies are causing substantial injury or threatening injury to the domestic industries, the investigating authority may decide to adopt provisional countervailing measures and continue the investigation, otherwise the investigation shall be terminated immediately. Based on the final findings, the investigating authority makes a final ruling as to whether to impose final countervailing measures or terminate the investigation.

(C) implementation results

The WTO Agreement on Subsidies and Countervailing Measures specifies two types of anti-dumping measures: one, countervailing duties. The implementation duration shall not exceed five years from the date of implementation. The duration may be extended by sunset review. Second, price commitment. The export operator of the subsidized products makes a price commitment that is consistent with the price in the exporting country, so as to protect the interests of the importing country.

II. Introduction to Core Rules

(A) general provisions

The RCEP chapter on trade remedies specifies the countervailing rules that when a Party determines to conduct an on-the-spot investigation of the information provided by a

respondent, and the information is relevant to the calculation of the level of actionable subsidies, the investigating shall promptly notify the respondent based on the "two '7 days', one 'document'" principle. Specifically, the investigating authority of the Party shall endeavor to provide to the respondent at least seven days advance notice of the date on which investigating authority intends to conduct any such on-the-spot investigation, and shall provide to the respondent a document that sets forth the topics the respondent should be prepared to address during the verification and that describes the types of supporting documentation the respondent is to make available for review. Second, the investigating authority shall maintain a non-confidential file for each investigation and review containing all non-confidential documents which are part of the record of the investigation or review. To the extent feasible without revealing confidential information, it should contain non-confidential summaries of confidential information contained in the record of each investigation or review. Finally, during an investigation or review, a Party's investigating authority shall make the non-confidential file of the investigation or review available to interested parties either physically for inspection and copying during the investigation authorities' normal business hours or electronically.

(B) notification and consultations

The RCEP chapter on trade remedies specifies notification and consultation procedures for countervailing investigations. First, on receipt by a Party's competent authorities of a properly documented countervailing duty application with respect to imports from another Party, the Party shall endeavor to provide written notice to the other Party of its receipt of the application at least 20 days in advance of the date of initiation of a countervailing investigation. Second, a Party may invite the other Party for

consultations on the countervailing application. Meanwhile, upon request, that Party shall provide the other Party with a non-confidential version of the complaint prior to the initiation of the investigation. The Party intending to initiate the investigation shall endeavor to provide adequate opportunity to the other Party to comment and submit additional information or documents, as appropriate and in conformity with the procedural rules provided for in the laws and regulations of the former Party.

(C) disclosure of essential facts

The provision requires that Parties, subject to paragraph 4 of Article 12 of the Agreement on Subsidies and Countervailing Measures, to specify the content, timing and form of disclosure: first, Parties shall fully disclose all essential facts under consideration which form the basis for the decision to apply measures. Secondly, to the extent possible, Parties shall ensure disclosure of essential facts at least 10 days before the final determination. Thirdly, disclosures shall be made in writing, and allow interested parties sufficient time to provide their comments. The investigating authority of a Party should, in their final determination, take into account such comments, if the comments have been received in the time frames established by that Party's laws and regulations or by its investigating authorities.

### III. Practices Related to Countervailing Investigations

According to the notes in Annex of the RCEP chapter on trade remedies, Parties may adopt the following practices to promote the objectives of transparent and due process in trade remedy procedures:

(1) Remedy or explain the deficiency in a request for information. The agreement provides that If a Party's investigating authority determines that an interested party's response to a request for information does not comply with the request, the

investigating authorities shall inform that interested party of the issues in the response submitted, and provide that interested party with an opportunity to remedy or explain the deficiency to the extent practicable in light of the time-limits established to complete the countervailing duty investigations.

(2) Undertakings. On request, the importing Party transmits to the exporting Party's embassy located in the importing Party or the exporting Party's competent authorities written information regarding the importing Party's procedures for requesting its authorities to consider a price undertaking, including the time frames for offering and concluding any such undertaking. In a countervailing investigation, where the importing Party's investigating authority has made a preliminary affirmative determination of dumping and injury caused by such dumping, the importing Party provides an opportunity for consultations, to exporters of the exporting Party regarding the proposed price undertaking which, if accepted, results in suspension of the investigation without the imposition of countervailing duties, through the means provided for in the importing Party's laws, regulations, and procedures.

### **Section 3 Dispute Settlement**

The RCEP has a separate chapter on dispute settlement mechanisms regulating 21 specific elements such as good offices, conciliation or mediation, the establishment of expert panels, expert panel procedures, suspension of procedures, and review of implementation, etc. Taking into account the development needs of different parties, it gives special and differential treatment to LDC parties, which is extremely flexible. The dispute settlement mechanism is a ballast to ensure the Parties achieve the goal of mutual benefit and a win-win situation. It not only prevents trade

disputes, but also provides a legal foundation and regulation for the settlement of trade disputes.

### I. Content, Purpose and Scope of Application of the Dispute Settlement Mechanisms

The RCEP chapter on dispute settlement mechanisms provides an effective, efficient and transparent set of rules and procedures for disputes arising among the Parties. The parties to a dispute are encouraged to make every effort at each stage to reach a mutually satisfactory solution, premised on cooperation and consultation. All notifications, requests and responses therein are required to be in writing. This content and objective essentially continue the core principles of "equality, expeditiousness, effectiveness and mutual acceptance" of the WTO Dispute Settlement Mechanism.

With respect to the scope of application, on the one hand, the RCEP chapter on dispute settlement mechanisms deals with disputes among Parties and excludes private subjects from being directly subject to the dispute settlement mechanism. For instance, individual investors, private enterprises, and non-governmental bodies of a state nature are not subject to the RCEP chapter on dispute settlement mechanisms under any circumstance. On the other hand, the RCEP chapter on dispute settlement mechanisms does not apply to cases where a Party takes measures that do not violate the RCEP, but result in a detriment to the interests of another Party. In particular, the chapter applies to:

(1) disputes between Parties regarding the interpretation and application of the agreement;

(2) a Party considers that a measure of another Party is not in conformity with the obligations under the agreement or that another Party has otherwise failed to carry out its obligations under the agreement.

In addition, subject to the provisions of choice of forum, the RCEP chapter on dispute settlement mechanisms requires the rights of a Party to access dispute settlement procedures under other agreements not compromised. This means that a Party in dispute can choose to settle its dispute under the original FTA or the RCEP at its own discretion.

## II. Introduction to Core Rules

### (A) choice of forum

This provision is in line with the general provisions of other FTAs, which use the worldwide "jurisdictional exclusion clause". Specifically, firstly, where a dispute concerns substantially equivalent rights and obligations under this Agreement and another international trade or investment agreement to which the Parties to the dispute are parties, the complaining Party may select the forum in which to settle the dispute and that forum shall be used to the exclusion of other fora. Secondly, if the complaining Party has selected the forum in which to settle the dispute when it has requested the establishment of a panel of experts, or requested the establishment of a panel of experts or tribunal under another international trade or investment agreement. Thirdly, the Parties to the dispute may agree in writing that the clause of choice of forum does not apply to a particular dispute.

### (B) consultations

The nine paragraphs of the provisions of consultations in the RCEP chapter on dispute settlement mechanisms require the Parties to a dispute to consult in good faith and to make every effort to reach a mutually satisfactory solution through consultation. Following a request for consultation by the complaining Party, the responding Party shall give due consideration to the complaining Party and the opportunity to consult. In reality, consultations are a precursor to the establishment of a panel by the parties and the

initiation of a panel review, and a panel can and should recommend to the parties to a dispute that they amicably use consultations to resolve the dispute at any stage of the dispute resolution process before the panel issues its final report.

According to the regulation, the consultation process can be divided into the following two stages:

First, consultation requests. This is shown in Figure 5.3.1. Firstly, any complaining Party may request consultations with any responding Party. The complaining Party shall simultaneously provide a copy of the request for consultations to the other RCEP Parties. Secondly, the responding Party shall immediately acknowledge its receipt of the request for consultations by way of notification to the complaining Party, indicating the date on which the request was received, otherwise the date when the request was made shall be deemed to be the date of the responding Party's receipt of the request. Lastly, the responding Party shall reply to the request for consultations no later than seven days after the date of its receipt of the request, and simultaneously provide a copy of the reply to the other RCEP Parties.

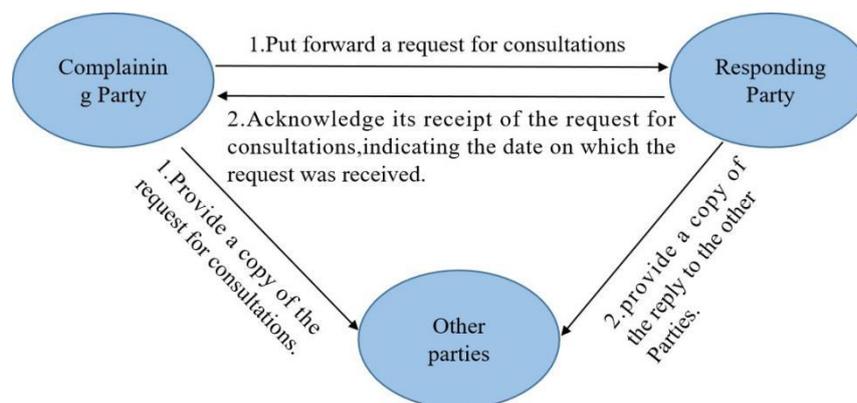


Figure 6.3.1 consultation process—request

The following two conditions should be met in relation to the request for consultation made by the complaining Party:

(1) The subject matter of the consultation request shall be in line with the framework of the two applicable elements of the

## Dispute Settlement Mechanisms;

(2) Any request for consultations shall give the reasons for the request, including identification of the measures at issue and an indication of the factual and legal basis for the complaint.

Second, consultation. This is shown in Figure 6.3.2. Within 30 days (15 days for urgent cases) of the receipt of a request for consultation, Parties to the dispute shall consult in good faith with the aim of reaching a mutually satisfactory solution. The consultations shall be confidential and without prejudice to the rights of any Party to the dispute in any further or other proceedings (i.e. the formation of a panel of experts or good offices, mediation or conciliation).

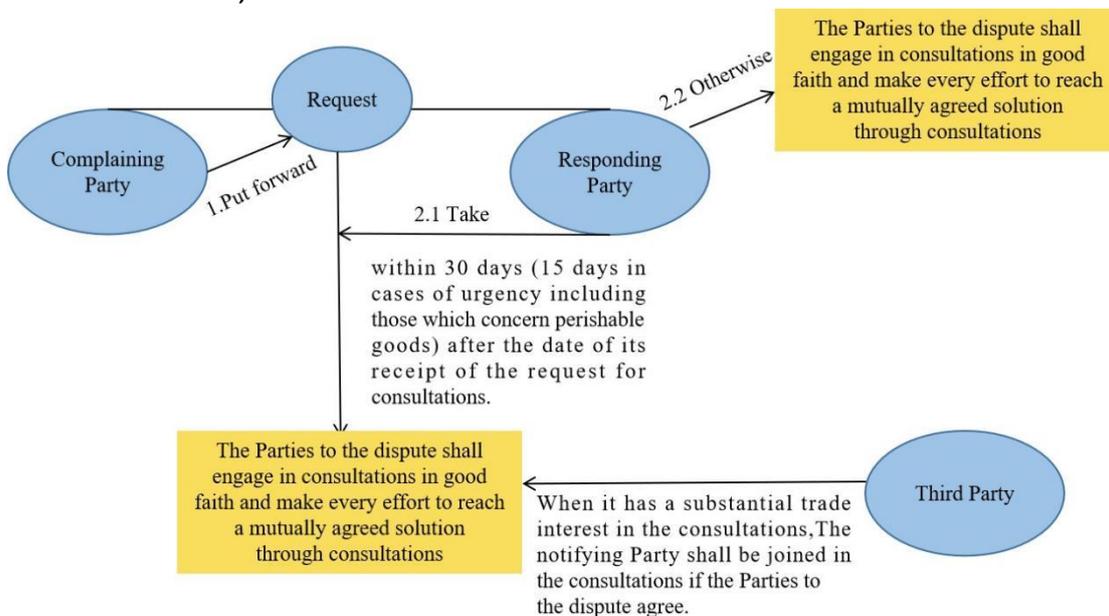


Figure 6.3.2 consultation process—consultation

During the consultation process, the Parties to the dispute are required to fulfill the following three obligations:

(1) provide sufficient information in the course of consultations to enable a full examination of the matter, including how the measures at issue might affect the implementation or application of this Agreement;

(2) treat any confidential or proprietary information exchanged

in the course of consultations on the same basis as the Party providing the information;

(3) endeavor to make available for the consultations personnel of their government agencies or other regulatory bodies who have responsibility for or expertise in the matter.

In addition to this, this clause states that if a Party other than the Parties to the dispute considers that it has a substantial trade interest in the consultations, such Party may notify the Parties to the dispute no later than seven days after the date of receipt of the copy of the request for consultations, of its desire to be joined in the consultations. The notifying Party shall be joined in the consultations if the Parties to the dispute agree.

(C) good offices, mediation or conciliation

The Parties to the dispute may agree to voluntarily undertake an alternative method of dispute resolution, including good offices, conciliation, or mediation. Procedures for such alternative methods of dispute resolution may begin at any time, and may be terminated by any Party to the dispute at any time. If the Parties to the dispute agree, such procedures may continue while the matter is being examined by a panel of experts. In the process of good offices, mediations or conciliations, proceedings and positions taken by a Party to the dispute shall be confidential and without prejudice to the rights of any Party to the dispute in any further or other proceedings.

Unlike consultations, good offices, conciliation or mediation procedures are not a basis for participation in other dispute settlement procedures, and the Agreement encourages the Parties to a dispute to be able to settle their dispute by peaceful means in a consensual, non-litigious manner, either at the consultation stage or by initiating good offices, conciliation or mediation procedures.

(D) panel of experts

Articles 7 to 16 of the RCEP chapter on dispute settlement mechanisms provide detailed provisions on request for a panel, functions of the panel, the final implementation of the panel, and third parties, ensuring that the dispute settlement process is reasonable and in compliance with the regulations, and is binding on all Parties to the dispute, so that the possibility of further appeals is precluded.

1. request for establishment of a panel

In the event that consultations fail, the complaining Party may inform the responding Party of a request for the establishment of a panel of experts to examine the matter in dispute, with copies to be provided to other RCEP Parties. The request for the establishment of a panel shall identify the specific measures at issue and provide details of the factual and legal basis for the complaint (including the relevant provisions of this Agreement), to be addressed by the panel. The conditions for requesting the establishment of a panel are divided into two categories: failure of the responding Party to respond in a timely manner, and failure to complete consultations within the deadline, as shown in Table 6.3.1.

Table 6.3.1 Conditions for the request for the establishment of a panel

Types	Conditions
The Responding Party does not reply to the request for consultation	Do not reply to the request for consultation in seven days.
	Do not enter into consultations in 30 days (15 days in cases of urgency including those which concern perishable goods) after the date of its receipt of the request for consultations.
The consultations fail to resolve a dispute	60 days after the data of the Responding Party's receipt of the request for consultations.
	20 days after the data of the Responding Party's receipt of the request for consultations in cases of urgency including those which concern perishable goods.

Upon receiving the request, the responding Party shall immediately acknowledge its receipt of the request by way of notification to the complaining Party, indicating the date on which the request was received, otherwise the date when the request was made shall be deemed to be the date of the responding Party's

receipt of the request. The complaining Party shall simultaneously provide a copy of the request to other RCEP Parties.

## 2. establishment and reconvening of the panel

The establishment and formation of the panel of experts is an important step that immediately affects the fairness and clarity of the result. The RCEP chapter on dispute settlement mechanisms provides detailed provisions on the establishment and reconvening of the panel of experts as follows:

### (1) process of establishment of the panel

In the process of establishing the panel, there are two key time points: within 10 days and within 20 days. The difference between these two time points is whether the Parties to the dispute can agree on the procedure for forming a panel. An example is shown in Table 6.3.2.

Table 6.3.2 Process and timeline for the establishment of the panel of experts

Time	States	Results
Within 10 days of the date of the receipt of the request for the establishment of a panel	The Parties to the dispute shall enter into consultations by taking into account the factual, technical, and legal aspects of the dispute.	The Parties to the dispute are able to reach agreement on the procedures for composing the panel
Within 20 days of the date of the receipt of the request for the establishment of a panel	The Parties to the dispute are unable to reach agreement on the procedures for composing the panel	Any Party to the dispute may at any time thereafter notify the other Party to the dispute that it wishes to use the procedures set out in paragraphs 5 through 7. Where such a notification is made, the panel shall be composed in accordance with paragraphs 5 through 7

If the Parties to the dispute are unable to reach an agreement, the chapter on dispute settlement mechanisms sets out that it shall be resolved in accordance with Table 6.3.3 (Procedure for the formation of the panel of experts). In this case, the subject of the notification is the responding Party.

Table 6.3.3 Procedure for the formation of the panel of experts

Time		Complaining Party	Responding Party
Within 35 days of the date of the receipt of the notification (A)	Within 10 days	The Complaining Party shall appoint one panellist and notify the appointment	-

penal is established )		of its panellist to the other Party to the dispute.	
	Within 20 days	-	The Responding Party shall appoint one panellist and notify the appointment of its panellist to the other Party to the dispute.
	After the appointment of the panellists	The Parties to the dispute shall agree on the appointment of the third panellist who shall serve as the chair of the panel.	
Beyond 35 days of the date of the receipt of the notification ( any panellist has not been appointed )	Within 30 days	Any Party to the dispute, within a further period of 25 days, may request the Director-General of the WTO to appoint the remaining panellists within 30 days of the date of such request.	
	Beyond 30 days*	Any Party to the dispute may request the Secretary-General of the Permanent Court of Arbitration to appoint the remaining panellists promptly.	

Note: \* or the Director-General of the WTO notifies the Parties to the dispute that he or she is unavailable to perform the obligation.

While the RCEP sets out the obligations that both Parties need to fulfill in order to establish a panel, it also gives both Parties the right to provide each other with a list of up to three nominees for the chairman of the panel to the other disputing Party. If any panelist has not been appointed within 35 days of the date of the receipt of the list, the list shall be provided to the Director-General of the WTO to be used in making the required appointments. If the Director-General of the WTO is unavailable, or does not appoint the remaining panelists within 30 days, any Party to the dispute may provide the list of up to three nominees for the chairman of the panel to the Secretary-General of the Permanent Court of Arbitration (PCA). The procedure for the appointment of panelists submitted to the Secretary-General of the PCA is shown in Figure 6.3.3 below.

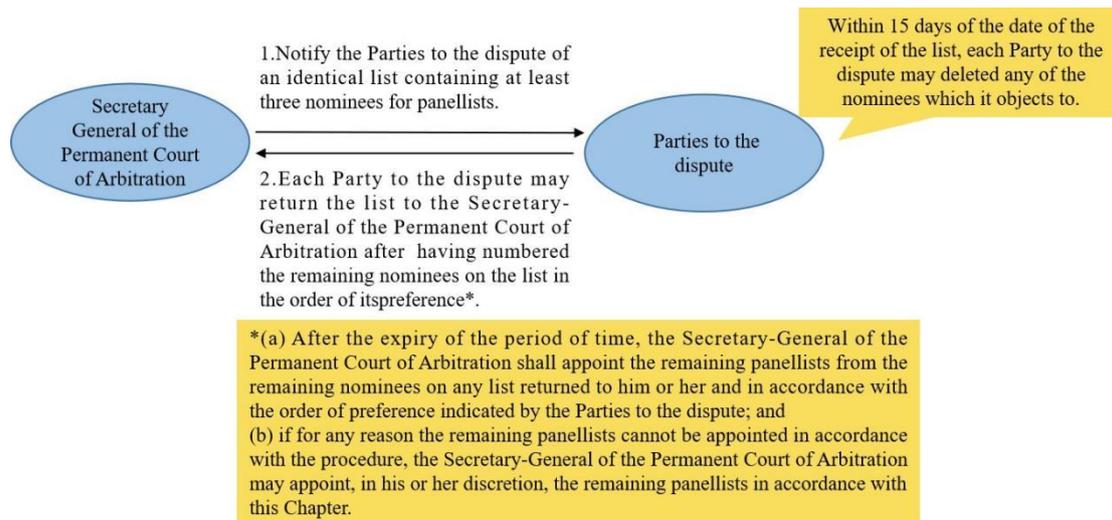


Figure 6.3.3 Procedure for the formation of the panel of experts—appointment of panellists submitted to the Secretary-General of the Permanent Court of Arbitration

## (2) time of establishment of the panel

The date of establishment of the panel shall be the date on which the last panelist is appointed.

## (3) requirements for the panelists

The RCEP chapter on dispute settlement mechanisms is flexible and inclusive in its requirements for panelists, with the details as follows:

First, panelists shall have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements;

Second, panelists shall be chosen strictly on the basis of objectivity, reliability, and sound judgment;

Third, panelists shall be independent of, and not be affiliated with or take instructions from, any Party;

Fourth, panelists shall not have dealt with the matter in any capacity;

Fifth, panelists shall disclose, to the Parties to the dispute, information which may give rise to justifiable doubts as to his or her independence or impartiality;

Sixth, panelists shall comply with the Code of Conduct as

annexed to the Rules of Procedures.

Where possible, the chairman of the panel shall have served on a WTO panel or the WTO Appellate Body, and have expertise or experience relevant to the subject matter of the dispute.

(4) changes of panelists and reconvening of the panel

Changes of panelists are times when panelists resign or are unable to perform their duties and a successor panelist needs to be appointed. The successor shall be appointed in the same manner as the original panelists were appointed, and shall have all the power and duties of the original panelists. During the period between the resignation or unavailability of the original panelists and the appointment of the successor, the work of the panel shall be suspended and any duration of the panel's proceedings shall be suspended accordingly.

Reconvening occurs in the context of implementing provisions for review, compensation and suspension of concessions or other obligations. The reconvened panel shall, where feasible, have the same panelists as the original panel. Where this is not feasible, a replacement panelist shall be appointed in the same manner as prescribed for the appointment of the original panelist, and shall have all the power and duties of the original panelist.

3. function of the panel of experts

The functions of the panel, as set out in the chapter on dispute settlement mechanisms, are as follows:

First, the panel shall make an objective assessment of the matter before it in accordance with the relevant provisions of the Agreement, including the facts of the case, a review of the applicability of the provisions of this Agreement cited by the Parties to the dispute, and whether the measure at issue is consistent with the obligations under this Agreement, and whether the responding Party has otherwise failed to carry out its obligations under this

Agreement. This article does not apply to reconvened panels.

Second, the scope of functions of the panel are matters mentioned in the "request for the establishment of the panel". In fact, a panel review is a judicial act, rather than a legislative act. Therefore, the RCEP chapter on dispute settlement mechanisms strictly requires that the panel should only make rulings, decisions and recommendations provided for in this Agreement. However, rulings and decisions of the panel cannot add to or subtract from the rights and obligations under the Agreement. This applies equally to a reconvened panel.

Finally, based on the principle of encouraging cooperative consultation and unanimity, the panel shall consult regularly with the Parties to the dispute and provide adequate opportunities for the Parties to the dispute to develop a mutually agreed solution. This applies equally to a reconvened panel.

#### 4. reports of the panel

Firstly, in terms of the content, the panel is required to set out the following four aspects in its report:

First, a descriptive section summarizing the arguments of the Parties to the dispute and third parties;

Second, its findings on the facts of the case and on the applicability of the provisions of this Agreement;

Third, its determinations as to whether the measure at issue is consistent with the obligations under this Agreement, and whether the responding Party has otherwise failed to carry out its obligations under this Agreement;

Fourth, the reasons for its findings and determinations referred to in the above two items.

Secondly, a panel shall include in its report any other findings and determinations pertaining to the dispute which have been jointly requested by the Parties to the dispute or provided for in its

terms of reference. The panel may suggest ways in which the responding Party could implement the findings and determinations. The report shall also reflect the statements of each third party.

Finally, a panel shall base its report on the relevant provisions of this Agreement, the statements and arguments of the Parties to the dispute, and any information or technical advice it has received. On request of a Party to the dispute or on its own initiative, a panel may, after consulting the Parties to the dispute, seek additional information and technical advice from any individual or agencies it considers appropriate. Once the panel has sought additional information and technical advice, the Parties to the dispute and each third party shall promptly respond to any request for such information.

#### 5. third parties

Taking into account the interests of the Parties to the dispute and other RCEP Parties, the RCEP chapter on dispute settlement mechanisms allows any Party having a substantial interest in a matter under review by a panel to participate in the dispute settlement process as a third party. This not only enhances the transparency of dispute resolution, but also facilitates the panel's consideration of the facts and legal issues of the case from all angles.

The third party shall notify the Parties to the dispute of its interest, with a copy to the other RCEP parties simultaneously, within a period of no later than 10 days after the date of the complaining Party's request for the establishment of a panel or the disputing parties' request for an enforcement review, or the disputing parties' request for compensation and suspension of concessions or other obligations. With the consent of the parties to the dispute, the panel may grant additional or supplementary rights to any third party with respect to its participation in the panel

proceedings. The specific rights and obligations incumbent upon the third party are set out in Table 6.3.4 below.

Table 6.3.4 Rights and obligations of third parties

Rights	Obligations
(a) subject to the protection of confidential information, be present at the first and second hearings of the panel with the Parties to the dispute prior to the issuance of the interim report; (b) make at least one written submission prior to the first hearing; (c) make an oral statement to the panel and respond to questions from the panel during a session of the first hearing set aside for that purpose; and (d) respond in writing to any questions from the panel directed to the Third Parties.	(a) 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, and its written responses to questions, made prior to the issuance of the interim report*; (b) If a Third Party provides any submissions or other documents to the panel, it shall simultaneously provide them to the Parties to the dispute and the other Third Parties.

Note: \* Each Party to the dispute shall make available to each third party a written statement, an oral statement in written form and written answers to questions, submitted to the panel by that Party.

## 6. panel procedures

As a general rule, unless the Parties to the dispute agree otherwise, shall follow the Rules of Procedures. The period from the date of establishment of the panel to the date of submission of the panel's final report to the parties to the dispute shall not exceed 7 months. Specific procedures are shown in Table 6.3.5. It shows that the chapter on dispute settlement mechanisms gives the panel great autonomy in the scheduling of written statements, hearings, etc.

Table 6.3.5 Hearing procedures for the panel

Procedures	Time	Contents
Timetable	As soon as practicable and whenever possible within 15 days of the date of its establishment	A panel established shall fix the timetable for the panel process.
Submissions	Precise deadlines is included in the timetable	Each Party to the dispute shall have the opportunity to set out in writing the facts of its case, its arguments and counter arguments.
Hearings	According to the timetable	The timetable fixed by the panel shall provide for at least one hearing for the Parties to the dispute to present their case to the panel.
Interim reports	Within 150 days of the date of its establishment. In cases of urgency including those which concern perishable goods, the panel shall endeavour to issue its interim report within 90 days of the date of its establishment. Any delay shall not exceed a further period of 30 days.	The interim reports of the panel shall be drafted without the presence of the Parties to the dispute.

Comments on its interim reports	Within 15 days of the date of the receipt of the interim report	A Party to the dispute may submit written comments to the panel on its interim report. After considering any written comments by the Parties to the dispute on the interim report, the panel may make any further examination it considers appropriate and modify its interim report.
Final reports	Within 30 days of the date of issuance of the interim report	The findings and determinations of the panel shall be final and binding on the Parties to the dispute. The interim reports of the panel shall be drafted without the presence of the Parties to the dispute.

The agreement makes sets out the following three requirements for the panel, Parties to the dispute, and third parties:

First, the requirements for decision-making by the panel: the panel shall make its findings and determinations by consensus. Where the panel is unable to reach a consensus, it may make its findings and determinations by majority vote. Before findings and determinations are made, a panelist may furnish dissenting or separate opinions on matters not unanimously agreed. Such opinions expressed by an individual panelist in the report shall be anonymous if they need to appear in the reports.

Second, the requirements for Parties to the dispute during panel review: due to the confidential nature of the panel's deliberations, the Parties to the dispute and third parties shall be present only when invited by the panel to appear before it. There shall be no ex parte communications with the panel concerning matters under consideration by it.

Third, requirements for confidentiality: in addition to the confidentiality of the deliberations of the panel, written submissions to the panel shall be treated as confidential. The Parties to the dispute, the third parties, and the panel shall treat as confidential, information submitted by a Party to the dispute or a third party to the panel. If it is necessary to disclose their position to the public, Parties to the dispute or third parties shall not disclose statements

or information that has been designated confidential.

#### 7. suspension and termination of proceedings

The Parties to the dispute may agree at any time that the panel suspends its work for a period not exceeding 12 months from the date of such agreement. Within this period, the suspended panel proceedings shall resume at the request of any Party to the dispute. In the event of such suspension, any relevant period of time for the panel proceedings shall be extended by the period of time that the work was suspended.

If the work of the panel has been continuously suspended for more than 12 months, the authority for the establishment of the panel shall lapse unless the Parties to the dispute agree otherwise. The Parties to the dispute may agree to terminate the panel proceedings in the event that a mutually agreed solution has been found. In such an event, the Parties to the dispute shall jointly notify the chairman of the panel. Before the panel issues its final report, it may at any stage of the proceedings propose to the Parties to the dispute that the dispute be settled amicably.

The Parties to the dispute shall jointly notify the other Parties that the panel proceedings have been suspended or terminated.

#### 8. procedures for multiple complainants

Where more than one Party requests the establishment or reconvening of a panel relating to the same matter, the RCEP allows a single panel to be established or reconvened to examine the complaints relating to that matter whenever feasible. The single panel shall organize its examination and present its findings and determinations to the Parties to the disputes in such a manner that the rights which the Parties to the disputes would have enjoyed had separate panels examined the complaints are in no way impaired. However, if more than one panel is established or reconvened to examine the complaints relating to the same matter, the Parties to

the disputes shall endeavor to ensure that the same individuals serve as panelists on each of the separate panels for the purpose of consulting with each other.

#### 9. implementation of the final report

The RCEP states that the findings and determinations of the panel shall be final and binding on the Parties to the dispute. The responding Party shall bring the measures in dispute into conformity with the RCEP and comply with the RCEP obligations. Specifically, the responding Party's solution shall be to remove the non-conformities identified by the panel as soon as possible and to the extent possible, and to notify the complaining Party of its intentions with respect to implementation, which shall be limited to 30 days from the date of issuance of the panel's final report.

However, the following two special cases need to be taken into consideration in the implementation of the final report:

First, the responding Party reserves its doubt against the content of the report. In the event that the responding Party considers it has complied with the obligations, it shall notify the complaining Party without delay. The responding Party shall include in the notification a description of any measure it considers achieves compliance, including but not limited to the date the measure comes into effect, and the text of the measure, etc.

Second, the responding Party reserves its doubt again the date of the report. In the event that the responding Party believes it is impracticable to comply immediately with the obligations and it cannot immediately remove the non-conformities identified by the panel, it shall notify the complaining Party of the reasonable period of time it considers would be needed to comply with the obligations along with an indication of possible actions it may take for such compliance.

Where the Parties to the dispute are unable to agree on the

reasonable period of time within 45 days of the date of the issuance of the panel's final report to the Parties to the dispute, the chairman of the panel shall, within 45 days of the date of receipt of the notification, submit to the Parties to the dispute a determination the reasonable period of time and the reasons for such a determination. The determination is a guideline and shall not normally exceed 15 months from the date of issuance of the final report by the panel, and may be shortened or extended in exceptional circumstances.

#### 10. compliance review

Where the Parties to the dispute disagree on the measures of compliance or the consistency of such measures with this Agreement, such dispute shall be settled through recourse to a panel reconvened for this purpose without the procedure of consultation. The requirements, content, etc. of the reconvened review panel are set out in Table 6.3.6 below. This period shall not exceed 150 days from the date of the request of the Parties to the dispute to the date of the final report of the review panel.

Table 6.3.6 Procedure for reconvening the compliance review panel

Procures	Time	Contents
Each Party to the dispute requests reconvening of a panel	The request may only be made after the earlier of either: (a) the expiry of the reasonable period of time established in accordance with the final report; (b) a notification to the Complaining Party made by the Responding Party that it has complied with the obligation	The Complaining Party may request the reconvening of a Compliance Review Panel by way of notification to the Responding Party. The Complaining Party shall simultaneously provide a copy of the request to the other Parties.
A Compliance Review Panel shall make an objective assessment	Within 15 days of the date of the reconvening request	(a) The factual aspects of any action taken by the Responding Party to comply with the obligation under the Final Report; and (b) the existence or consistency with this Agreement of any measure taken by the Responding Party to comply with the obligation under the Final Report.
A Compliance Review Panel shall issue its interim report	Within 90 days of the date of its reconvening	If the Compliance Review Panel considers that it cannot issue either report within the relevant period of time, it shall notify the Parties to the dispute of the reasons for the delay together with an estimate of the period of time within which it will issue the report. The Compliance Review Panel shall set out in its
A Compliance Review Panel shall issue its	Within 30 days of its final report	

final report		report: (a) a descriptive section summarising the arguments of the Parties to the dispute and Third Parties; (b) its findings on the facts of the case arising under this Article and on the applicability of the provisions of this Agreement; (c) its determinations on the existence or consistency with this Agreement of any measure taken to comply with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report); and (d) its reasons for its findings and determinations referred to in subparagraphs (b) and (c).
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## 11. compensation and suspension of concessions or other obligations

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the responding Party does not comply with the obligation set out by the recommendations and determinations in the final report within a reasonable period of time.

### (1) compensation procedure

The responding Party shall, on request of the complaining Party, enter into agreements of mutually acceptable compensation. The RCEP chapter on dispute settlement mechanisms sets out compensation acts as follows:

First, the responding Party has notified the complaining Party that it does not intend to comply with the obligations set out by the findings and decisions in the panel's final report;

Second, the responding Party fails to notify the complaining Party its intention to enforce within 30 days of the issuance of the final report;

Third, the responding Party fails to notify the complaining Party within the reasonable enforcement period prescribed by the chairman of the panel;

Fourth, the compliance review panel determines that the

responding Party has failed to comply with the obligations set out by the findings and decisions in the panel's final report.

(2) suspension of concessions or other obligations

The suspension of concessions or other obligations is a temporary measure that applies only in cases where the obligations subject to the final report's findings and decisions have been complied with or a satisfactory solution has been reached.

First, if the Parties to the dispute have been unable to agree on compensation within 30 days after the date of the receipt of the request from the complaining Party, or the responding Party has failed to observe the terms and conditions of that agreement, the complaining Party may at any time thereafter notify the responding Party and the other Parties that it intends to suspend the application to the responding Party of concessions or other obligations equivalent to the level of nullification or impairment, and shall have the right to begin suspending concessions or other obligations 30 days after the date of the receipt of the notification. Specific requirements are as follows:

First, the complaining Party's notification shall specify the level of the intended suspension of concessions or other obligations, and indicate the relevant sector or sectors.

Second, the application principle of suspension of concessions or other obligations. The complaining Party should first seek to suspend concessions or other obligations in the same sector or sectors in which the panel has determined that there is non-conformity with, or failure to carry out an obligation. If the complaining Party considers that it is not practicable or effective to suspend concessions or other obligations in the same sector or sectors, it may suspend concessions or other obligations in other sectors.

Third, the level of the suspension of concessions or other

obligations shall be equivalent to the level of nullification or impairment.

Fourth, the right to commence suspension of concessions or other obligations may not be exercised by the complaining Party under the following two circumstances: a reconvened panel is conducting a review of the suspension of concessions or other obligation, or the Parties to the dispute have reached a mutually agreed solution.

Finally, there are two types of reconvened panels of experts under this section. The first type of panel does not have requirements, procedure and timing, which is shown in Table 5.3.7 below. Based on the prerequisites, in the event the panel reconvened determines that the level of suspension is not equivalent to the level of nullification or impairment, it shall determine the appropriate level of suspension it considers to be of equivalent effect. In the event the panel determines that the responding Party has observed the terms and conditions of the compensation agreement, the complaining Party shall not suspend concessions or other obligations. In the event the panel determines that the complaining Party has not followed the principles of suspension of concessions or other obligations, the complaining Party shall apply them consistently with that paragraph.

Table 6.3.7 First type of panel for matters of suspension of concessions or other obligations

Procures	Time	Contents	
		Preconditions	Behaviors
The Responding Party shall make a request	Within 30 days of the date of the receipt of the notification to begin suspending concessions or other obligations	If the Responding Party: (a) objects to the level of suspension proposed; or (b) considers that it has observed the terms and conditions of the compensation agreement; or (c) considers that the principles have not been followed.	It may request the reconvening of a panel to examine the matter by way of notification to the Complaining Party. The Responding Party shall simultaneously provide a copy of the request to the other Parties.

The panel shall reconvene	Within 15 days of the date of the request	When a request is made, the panel shall reconvene.
The reconvened panel shall provide its determination	Within 45 days of the date of its reconvening	The reconvened panel shall provide its determination to the Parties to the dispute.

The second type of reconvened panel is subject to the following conditions: the right to suspend concessions or other obligations has been exercised by the complaining Party; the responding Party has made a notification that it has complied with the obligations set out by the findings and decision of the panel's final report, and the Parties to the dispute disagree on any measures taken to comply with their obligations under findings and decisions of the panel's final report. At this point, any Party to the dispute may request the reconvening of a panel. The requesting Party shall simultaneously provide a copy of the request to the other Parties. If the panel reconvened determines that the responding Party has complied with the obligations set out by the findings and decisions of the final report, the complaining Party shall promptly terminate the suspension of concessions or other obligations.

(E) expenses

Unless the Parties to the dispute agree otherwise, the RCEP chapter on dispute settlement mechanisms requires each Party to the dispute shall bear the costs of its appointed panelist and its own expenses and legal costs. The costs of the chairman of the panel and other expenses associated with the conduct of the panel proceedings shall be borne in equal parts by the Parties to the dispute.

(F) special and differential treatment involving least developed country parties

The RCEP requires that at all stages of the determination of

the causes of a dispute and of dispute settlement procedures involving an LDC Party, particular consideration shall be given to the special situation of LDC Parties.

On the one hand, Parties shall exercise due restraint in raising matters under these procedures involving an LDC Party. On the other hand, if nullification or impairment is found to result from a measure taken by an LDC Party, a complaining Party shall exercise due restraint regarding matters related to compensation and suspension of concessions or other obligations or other obligations pursuant to these procedures. The RCEP chapter on dispute settlement mechanisms sets out that (where any Party to the dispute is an LDC Party) the panel's report shall "explicitly indicate" "the form in which account has been taken of relevant provisions on special and differential treatment" which have been raised by an LDC Party.

(G) language

All proceedings under the chapter on dispute settlement mechanisms shall be conducted in the English language. If any original document is not in the English language, a Party submitting it for use in the proceedings shall submit that document together with an English translation.

III. Comparison of the RCEP chapter on dispute settlement mechanisms and the WTO chapter on dispute settlement mechanisms

Both the RCEP chapter and the WTO chapter have three parts: cooperative consultations (the precursor to the application for a panel); good offices, mediation or conciliation; and panel proceedings (the panel process). The difference is that the WTO chapter (Article 17) provides for a permanent appellate body of seven members to review appeals handled through panels. The RCEP chapter, while maintaining consistency with the WTO

chapter, eliminates the appellate review process and shortens the duration of several parts, possibly due to the consideration of increasing efficiency. For example, shortening the consultation time, increasing the duration of panel establishment and review, and granting greater autonomy to panels. The differences in procedural durations are shown in Table 6.3.8.

Table 6.3.8 differences in procedural durations between the RCEP and WTO chapters on dispute settlement mechanisms

Procedures		RCEP	World Trade Organization
Consultations	Requests and replies	No later than seven days after the date of its receipt of the request	No later than ten days after the date of its receipt of the request
	Completion	The Responding Party shall enter into consultations no later than: (a) 15 days after the date of its receipt of the request for consultations in cases of urgency including those which concern perishable goods; or (b) 30 days after the date of its receipt of the request for consultations regarding any other matter.	The Responding Party shall start the consultations no later than 30, and enter into within 60 days.
Good Offices, Conciliation, or Mediation		Almost consistent	
Panels	Establishment	The Responding Party does not reply to the request for consultations within seven days, or enter into consultations.	The Responding Party does not reply to the request for consultations within ten days, or enter into consultations.
		The consultations fail to resolve a dispute within: (a) 20 days after the date of the Responding Party's receipt of the request for consultations in cases of urgency including those which concern perishable goods; or (b) 60 days regarding any other matter after the date of the Responding Party's receipt of the request for consultations.	The consultations fail to resolve a dispute: (a) 35 days after receipt of the request for consultation by the Parties; or (b) 60 days after receipt of the request by the Responding Party.
	Examine	The panel shall issue its final report to the Parties to the dispute within 150 days of the date of a panel establishment. In cases of urgency including those which concern perishable goods, the panel shall endeavour to issue its interim report within 90 days of the date of its establishment. Any delay shall not exceed a further period of 30 days. The panel shall issue its final report to the Parties to the dispute within	The panel shall issue its final report to the Parties to the dispute within six months of the date of issuance of the interim report. In cases of urgency, the panel shall endeavour to issue its interim report within three months.

		30 days of the date of issuance of the interim report.	
	Findings	The findings and determinations of the panel shall be final and binding on the Parties to the dispute. The period of time from the date of the request until the date of issuance of the final report of the Compliance Review Panel shall not exceed 150 days.	The report shall be voted within 60 days as the final ruling or recommendation. Each party to the dispute may file an appellate review procedure of no more than 90 days against the final report.
	Compensation and Suspension of Concessions or Other Obligations	Almost consistent	