

## **Annex 13**

### **Annex on the Tripartite Dispute Settlement Mechanism**

#### **Under Article 38 (3) of the Agreement**

##### **.Article 1 Objective**

This Annex provides the procedures under Article 38 (3) of the Tripartite Agreement and it aims to ensure that the dispute settlement process is transparent, accountable, fair, predictable and consistent with the provisions of the Agreement.

##### **Article 2 Interpretation**

Unless the context otherwise requires:

"**Council**" means the Tripartite Council of Ministers established under the Agreement;

"**interested party**" means a Tripartite Member State with a substantial trade interest in a dispute;

"**Panel**" means a dispute settlement Panel established under Article 4;

"**party to a dispute**" means a Tripartite Member State which is a party to a dispute;

"**Agreement**" means the Agreement establishing the Tripartite Free Trade Area;

"**Third Party**" means any state that is not a Tripartite Member State interested in a dispute under this Annex;

"**WTO Dispute Settlement Understanding**" for purposes of this Annex means the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.

##### **Article 3 Application**

1. This Annex shall apply to Member States in the implementation of the provisions of the Agreement.
2. The Bureau of the Tripartite Council shall as appropriate discharge the functions of the Council under this Annex, except the function of adopting and issuing recommendations and decisions.
3. Subject to any special or additional provisions on dispute settlement, this Annex shall apply to dispute resolution under the Agreement.
4. Where a dispute arises between a Tripartite Member State and a third country or countries, the WTO Dispute Settlement Understanding may apply as appropriate where the parties are Tripartite Members of the World Trade Organisation.

**Article 4**  
**Establishment of Dispute Settlement Mechanism**

1. Where a dispute arises between or among the Tripartite Member States, recourse shall in the first instance be had to consultations with a view to finding an amicable resolution to the dispute including, but not limited to, the use of good offices, conciliation and mediation.
2. Where an amicable resolution is not achieved, any party to the dispute shall after notifying the other parties, refer the matter to the Tripartite Council, through the Chief Executive Officers of the RECs, requesting for the establishment of a dispute settlement Panel, (hereinafter referred to as the "Panel") for purposes of settling the dispute.
3. A Panel shall set in motion the process of formal resolution of the dispute as provided in this Annex and the parties to the dispute shall in good faith observe in timely fashion any directions, rulings and stipulations that may be given to them by the Panel in relation to procedural matters and shall make their submissions, arguments and rebuttals in a format prescribed by the Panel.
4. After the parties make their submissions, arguments and rebuttals to the Panel, the Panel shall issue to the parties, a descriptive report containing a statements of the facts and arguments. The parties shall be required to make comments on the report to the Panel.
5. The Panel shall later issue an interim report to the parties containing both the facts of the case and conclusions of the Panel and the parties shall be entitled to make their comments on the interim report.
6. The Panel shall make reference to the comments of the parties on the interim report in its final report and upon completion of its work, make recommendations to the Tripartite Council. The recommendations shall be based on an impartial assessment of the facts, arguments, evidence and any other submissions made by the parties and an objective application of the facts of the law governing the dispute.
7. The Tripartite Council shall make its determinations on the matter and its decision shall be final and binding on the parties, except where a party contests the Panel recommendations on grounds of fraud, lack of jurisdiction or other illegality, in which case such party may refer the matter to the Tripartite Council for consideration and direction.
8. Where the parties to a dispute consider it expedient to take recourse to arbitration as the first dispute settlement avenue, the parties may proceed with arbitration as provided in this Annex. Resort to arbitration shall be subject to mutual agreement of the parties and the parties shall agree to abide by the arbitral award.

**Article 5**  
**Consultations**

1. Requests for consultations shall be notified to the Tripartite Council through the Chief Executive Officers (CEOs) of COMESA, EAC and SADC in writing, giving the reasons for

the request, including identification of the issues and an indication of the legal basis for the complaint.

2. Where a request for consultations is made pursuant to this Annex, the Tripartite Member State to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after the date of its receipt and shall enter into consultations in good faith within a period not exceeding thirty days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.
3. Where a Tripartite Member State does not respond within ten days after the date of receipt of the request, or does not enter into consultations within a period of thirty days, or a period otherwise mutually agreed, after the date of receipt of the request, the Tripartite Member State that requested the consultations may refer the matter to the Tripartite Council.
4. In the course of consultations and before resorting to further action under this Annex, Member States shall attempt to obtain satisfactory settlement of the dispute.
5. Consultations shall be:
  - (a) confidential; and
  - (b) without prejudice to the rights of any Tripartite Member State in any further proceedings.
6. Where parties fail to settle a dispute through consultations within sixty (60) days after the date of receipt of the request for consultations, the complaining party may refer the matter to the Tripartite Council. A complaining party may also refer the matter to the Tripartite Council during the sixty-day period where the consulting parties jointly determine that they have failed to settle the dispute through consultations.
7. In cases of urgency, including cases of perishable goods:
  - (a) the Tripartite Member States shall within ten days after the date of a request enter into consultations;
  - (b) where the parties fail to settle the dispute through consultations within twenty (20) days after the date of receipt of the request, the complaining party may refer the matter to the CEOs; and
  - (c) the parties to the dispute, the CEOs and the Panel shall make every effort to expedite the proceedings to the greatest extent possible.
8. Where a Tripartite Member State that is not a party to a dispute considers that it has substantial trade interest in any consultations, that Tripartite Member State may, within ten (10) days of the circulation of the request for consultations, request the disputing Tripartite Member States to be joined in the consultations and the disputing Tripartite Member State shall be so joined where the parties to a dispute agree that the claim of substantial interest is well founded.

## **Article 6**

### **Good Offices, Conciliation and Mediation**

1. Good offices, conciliation and mediation may be undertaken voluntarily where the parties to the dispute agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential and without prejudice to the rights of either party in any further proceedings under this Annex.
3. A party to a dispute may request for good offices, conciliation or mediation at any time. The proceedings may begin and be terminated at any time. Where proceedings for good offices, conciliation or mediation are terminated, a complaining party may request for the establishment of a Panel.
4. Where good offices, conciliation or mediation are entered into within sixty (60) days after the date of receipt of a request for consultations, the complaining party shall allow a period of sixty (60) days after the date of receipt of the request for consultations before requesting for the establishment of a Panel. The complaining party may request for the establishment of a Panel during the sixty (60)-day period where the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.
5. Where the parties to a dispute agree, proceedings for good offices, conciliation or mediation may continue.
6. The parties to a dispute may request the Chairperson of the Tripartite Council, the CEOs or any other person the parties to a dispute deem fit to offer good offices or to conciliate or mediate between or among them with a view to achieving an amicable settlement of the dispute.

**Article 7**  
**Dispute Settlement Panels**

1. Where amicable resolution is not achieved through consultations, the complaining party shall, in writing refer the matter to the Tripartite Council requesting for the establishment of a Panel. The complaining party may in any case request the establishment of a Panel at any time where it is of the view that the consultations are not productive.
2. The request referred to in paragraph 1 of this Article shall indicate whether the consultations were held, identify the specific measures at issue and provide a summary of the legal basis of the complaint sufficient to present the problem clearly. The request may include a proposed text of any special terms of reference that a party wishes the Panel to discharge.
3. A meeting of the Tripartite Council shall be convened within fifteen (15) days of the request to establish a Panel, provided that at least ten (10) days' advance notice of the meeting is given.
4. A Panel shall be constituted within seven (7) days of the meeting of the Tripartite Council referred to in paragraph 3 of this Article.
5. A Panel shall be composed of experts from the public and private sectors who are well qualified and experienced in the subject matter of the dispute and shall be of a number to be determined by the Tripartite Council on a case by case basis.

6. The members of a Panel shall be selected with a view to ensuring their independence and integrity and shall have a sufficiently diverse background and a wide spectrum of experience in the subject matter of the dispute.
7. The Tripartite Secretariat shall maintain an indicative list of individuals with the qualifications mentioned in paragraphs 5 and 6 of this Article, from which members of the Panel may be drawn. Each Tripartite Member State shall annually propose not more than two names for inclusion on the indicative list and provide relevant information on the proposed individuals' knowledge of international trade and the sector or subject matter of the Tripartite FTA. The proposed names shall be added to the list upon approval by the Tripartite Council. Nothing in this paragraph shall preclude a Tripartite Member State from nominating as a member of a Panel a person with the necessary qualifications, who is not included in the indicative list.
8. The Tripartite Member States undertake to permit their officials to serve as members of a Panel.
9. Members of a Panel shall serve in their individual capacities and not as government representatives, nor as representatives of any organization and the Tripartite Member States shall not give the members of a Panel instructions or seek to influence the members of a Panel as individuals with regard to matters before a Panel.

#### **Article 8**

##### **Terms of Reference of Panels**

1. Panels shall have the following terms of reference unless the parties to a dispute agree otherwise:
  - (a) to examine the relevant provisions of any Article cited by the parties to a dispute;
  - (b) to examine a matter referred to the Panel; and
  - (c) to make findings to assist the Tripartite Council in making recommendations to the parties to a dispute or in giving a ruling on a matter.
2. Subject to the provisions of paragraph 1 of this Article, the Tripartite Council may authorize the Chairperson of the Panel to draw up special and additional terms of reference for the Panel, in consultation with the parties to a dispute.
3. A party to a dispute with specific requirements for terms of reference different from the standard terms of reference set out in paragraph 1 of this Article shall provide to the Tripartite Council a text of the preferred terms of reference and where the Tripartite Council is satisfied that the exigencies of the case warrant such special terms of reference, the Tripartite Council shall approve the special and additional terms of reference.

#### **Article 9**

##### **Functions of a Panel**

1. The principle function of a Panel is to assist the Tripartite Council in discharging its responsibilities under the Agreement. In performing this function, a Panel shall make an objective assessment of the matter before it, facts of the case and the applicability of and conformity with the relevant Articles and make findings to assist the Tripartite Council in making recommendations and rulings.

2. Panels shall consult widely and regularly with the parties to a dispute and give the parties to a dispute adequate opportunity to develop a mutually satisfactory solution.

**Article 10**  
**Interested and Third Parties**

1. The interests of all parties to a dispute including interested and third parties shall be taken into account during the assessment of a matter by a Panel.
2. An interested party shall after notification of its interests in a dispute to the Panel, through the Tripartite Council, have an opportunity to be heard by the Panel and to make written submissions. Copies of the submissions shall be served on the parties to the dispute and shall be reflected in the report of the Panel.
3. A third party shall after notification of its interests to the Panel through the Tripartite Council, have an opportunity to be heard and to make written submissions to the Panel. Copies of the submissions shall be served on the parties to the dispute and shall be reflected in the report of the Panel.
4. Third parties shall receive the submissions of the parties to a dispute at the first meeting of the Panel.

**Article 11**  
**Procedures for a Panel**

1. The procedures of a Panel shall provide sufficient flexibility to ensure effective and timely resolution of disputes by the Panels.
2. After consulting the parties to a dispute, the members of a Panel shall, within seven (7) days after the constitution of the Panel and the determination of its terms and reference, fix the timetable for the procedures of the Panel.
3. In determining the timetable for the procedures of a Panel, the Panel shall set precise time limits for written submissions by the parties to a dispute and the parties shall comply with the set time limits.
4. The period in which the Panel shall conduct its business, from the date of composition of the Panel to the date of issuance of the final report to the parties to a dispute, shall not exceed three (3) months and in cases of urgency, including cases of perishable goods, the period shall not exceed one and a half (1.5) months.
5. Where a Panel determines that it cannot issue its report within three (3) months, or within one and a half (1.5) months in the case of urgency, the Panel shall immediately inform the Tripartite Council in writing the reasons for the delay together with an estimate of the period within which the Panel shall issue its report.
6. Where a Panel cannot issue a report within the period specified in paragraph 4 of this Article, the Panel shall issue the report within four (4) months from the date of its composition.

7. Where a Panel fails to achieve a mutually satisfactory solution, the Panel shall submit its findings to the Tripartite Council in the form of a report setting out the facts of the matter, the relevant provisions of the law applied, the reasons for the findings and any recommendations it may make.
8. Where a Panel settles a matter before it, the report of the Panel shall be a brief description of the case and shall state that a settlement has been reached.
9. The reports of the Panel shall be drafted in the absence of the parties to the dispute and shall be based on information and evidence provided by the parties and any other person or institution in accordance with this Annex.
10. Opinions expressed in a report of a Panel by the individual members of the Panel shall be anonymous, provided that dissenting opinions shall be indicated and attributed.
11. Without prejudice to the provisions of this Article, a Panel shall follow the working procedures specified in the Schedule to this Annex.

**Article 12**  
**Right to Seek Information**

1. A Panel shall have the right to seek information and technical advice from any persons or institution that it deems appropriate, after informing the relevant authorities of a Tripartite Member State.
2. A Panel shall have the right to seek information and technical advice from any Tripartite Member State provided that the Tripartite Member State is not party to the dispute.
3. Where a Panel seeks for information or technical advice from a Tripartite Member State, the Tripartite Member State shall within the time set by the Panel, respond to the request for such information.
4. Confidential information that is provided shall not be revealed without formal authorisation from the authorities of the Tripartite Member States providing the information.
5. Where a party to a dispute raises a factual issue concerning a scientific or other technical matter, the Panel may request for an advisory report in writing from an expert with relevant qualifications and experience on the issue.
6. A Panel may seek information from any relevant source and may consult experts to obtain their opinion on any matter that may be brought before the Panel.

**Article 13**  
**Confidentiality**

1. The deliberations of the members of a Panel on the submissions and other information relating to a dispute shall be confidential.



2. A party to a dispute shall treat as confidential any information submitted to a Panel and designated as such, by another party to a dispute.
3. Where a breach of confidentiality and potential or actual loss arises out of disclosure of confidential information, the Panel shall recommend remedial measures that may be undertaken in favour of the affected party to mitigate the actual or potential loss.
4. Nothing in this Annex shall preclude a party to a dispute from disclosing statements of its own positions to the public.

**Article 14**  
**Reports of a Panel**

1. A Panel shall consider the rebuttal submissions and arguments of the parties to a dispute and issue a draft report containing descriptive sections of the facts and arguments of the dispute, to the parties and any interested parties.
2. The parties to a dispute shall submit their comments on the draft report in writing to the Panel, within a period set by the Panel.
3. Taking into account any comments received under paragraph 2 of this Article, or on the expiration of the time set for the receipt of comments from the parties to a dispute, the Panel shall issue an interim report to the parties, containing descriptive sections and the findings and conclusions of the Panel.
4. Within a period set by a Panel any party to a dispute may submit a written request for review of specific aspects of the interim report prior to the issuance and circulation of the final report to the parties to a dispute.
5. At the request of any party to a dispute or an interested party, a Panel shall hold a meeting with the parties to a dispute on the review of specific aspects of the interim report.
6. Where no comments are received within the period set for the receipt of comments on the interim report, the interim report shall be deemed to be the final report of a Panel and it shall be promptly circulated to the parties to a dispute and any interested parties and shall be forwarded to the Tripartite Council for consideration.
7. The final report of the Panel shall include a discussion of the arguments made at the interim review stage.

**Article 15**  
**Adoption of Reports of a Panel**

1. In order to provide sufficient time for the parties to consider the reports of the Panels, the reports shall not be brought up for consideration by the Tripartite Council before the expiration of twenty (20) days from the date on which the Panel circulated the report.
2. Parties having objections to a Panel report shall give written reasons to the Tripartite Council, explaining their objections. Such objections must be notified to the Tripartite Council within ten (10) days prior to a meeting of the Tripartite Council at which the Panel



report will be considered. The objecting party shall serve a copy of the objection with the other parties to the dispute and to the Panel that made the report.

3. Parties shall have the right to participate fully in the consideration of the Panel reports by the Tripartite Council, and their views shall be fully recorded.
4. Within sixty (60) days from the date the final Panel report is circulated to the parties and notified to the Tripartite Council, the report shall be considered, adopted and signed at a meeting of the Tripartite Council convened for that purpose. The decision of the Tripartite Council shall be final except as provided for in Article 17 of this Annex.
5. The parties to the dispute shall be entitled to a signed copy of the adopted report within seven (7) days of the adoption.

#### **Article 16**

##### **Remedial Measures**

1. In making reports under Article 14, a Panel shall determine the appropriate remedial measures including orders for compensation and administrative costs that a party to the dispute may be required to put in place to reverse the injury or remedy the wrong the subject of the dispute may have caused.
2. Without prejudice to the generality of the provisions in paragraph 1, and the duty of Tripartite Member States to implement fully the recommendations and rulings of the Tripartite Council, compensation and the suspension of concessions or other obligations are temporary measures available to the aggrieved party in the event that the accepted recommendations and rulings of the Tripartite Council are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of accepted recommendations.
3. The suspension of concessions or other obligations shall be temporary and shall only be applied in as far as it is consistent with this Annex and shall subsist until such a time as the inconsistency with the Agreement or any other determined breach is removed, or that the Tripartite Member State implements recommendations or provides a solution to the injury caused or occasioned by the non-compliance or that a mutual satisfactory solution is reached.

#### **Article 17**

##### **Reference to the Tripartite Council**

Any party to a dispute may refer the dispute arising from or out of paragraph 1 of Article 15 of this Annex on grounds of fraud, lack of jurisdiction or other illegality, to the Tripartite Council.

#### **Article 18**

##### **Costs**

1. The Tripartite Council shall, from time to time determine the remuneration and expenses of the members of a Panel and the experts.

2. The remuneration of the members of a Panel and experts, their travel and lodging expenses shall be borne in equal parts by the parties to a dispute or in proportions determined by the Tripartite Council.
3. A defaulting party to a dispute shall bear all other costs of the process as determined by the Tripartite Council.
4. Parties to the dispute shall be required to deposit their share of the members of the Panels' expenses with the Tripartite Secretariat at the time of appointment or establishment of the Panel.

#### **Article 19 Arbitration**

1. Parties to a dispute shall resort to arbitration subject to their mutual agreement and shall agree on the procedures to be used in the arbitration proceedings. Agreement to resort to arbitration shall be notified to the Tripartite Council.
2. Interested parties may be enjoined to an arbitration proceeding only upon the agreement of the parties to the arbitration proceeding.
3. The parties to an arbitration proceeding shall abide by an arbitration award and the award shall be notified to the Tripartite Council.
4. Without prejudice to the provisions of paragraph 1 of this Article, the parties to an arbitration proceeding shall agree on the applicable rules of arbitration.

#### **Article 20 Compliance and Surveillance**

1. A party to a dispute shall inform the Tripartite Council of its intentions in respect of the implementation of the recommendations and rulings of the Tripartite Council, at a meeting of a Tripartite Council which shall be held within thirty (30) days after the date of adoption of the report by the Panel.
2. Where a party to a dispute finds it impracticable to comply immediately with the recommendations and rulings of the Tripartite Council, the party to a dispute shall be granted a reasonable period in which to comply basing on the following:
  - (a) a period proposed by the party concerned provided the Tripartite Council approves the proposal;
  - (b) a period mutually agreed by the parties to a dispute within forty five (45) days of the date of adoption of the report of the Panel and the recommendations and rulings of the Tripartite Council; or
  - (c) a period determined by an arbitral award, within ninety (90) days of the date of the award.
3. The Tripartite Secretariat shall keep the Tripartite Council informed of the status of the decisions made under this Annex.

4. The Tripartite Secretariat shall keep under surveillance the resolutions of the dispute and the implementation of adopted recommendations and rulings of the Tripartite Council under this Annex and shall enforce compliance with the recommendations and rulings as appropriate.

#### **Article 21**

##### **Responsibilities of the Tripartite Secretariat**

1. The Tripartite Secretariat shall facilitate the Panels in all matters dealt with under this Annex.
2. The Tripartite Secretariat shall undertake such other functions and duties as may be required under the Tripartite Agreement and in support of this Annex.

## **Schedule of Working Procedures**

### **Under Article 11 (11)**

1. The Panel proceedings shall be conducted in two parts, the first part shall be an open session at which the first substantive hearing shall be held, and the second part shall be a closed session at which the Panel shall consider the submissions of the parties and generate its reports. During the closed session, the parties shall be present at the meetings only when invited by the Panel to appear before it.
2. Before the first substantive meeting of a Panel with the parties to a dispute, the Panel shall ask the parties to a dispute to submit written submissions presenting the facts of the case and the arguments of the parties to a dispute.
3. At the first substantive meeting of the Panel, the complaining party shall present her case and immediately after, the party against which the complaint is brought shall present his or her case.
4. Interested parties and third parties who notify their interest in a dispute to the Tripartite Council, shall be invited in writing to present their views at a session of the first substantive meeting set aside for the purpose and may be present during the entire session.
5. Formal rebuttals shall be made at a second substantive meeting of the Panel. The party against which a complaint is brought shall have the right to be heard first. The parties to a dispute shall submit their written rebuttals to the Panel prior to the second substantive meeting.
6. The Panel may at anytime request the parties to a dispute for explanations, at a meeting, in which the parties to a dispute are present either in writing or orally.
7. In the interest of transparency, the presentations, rebuttals and statements including the submissions of the parties to a dispute shall be made available to the other party or parties to the dispute without undue delay.
8. Notwithstanding the provisions in paragraphs (1) to (7) of this Schedule, the Panel shall determine its own working procedures.