

## ANNEX II

### MEDIATION PROCEDURE

#### I. Objective

1. The objective of the mediation procedure under Article 21.6 of the Agreement, as provided for in this document, is to facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure with the assistance of a mediator.

#### II. Definitions

2. For the purposes of this document:
  - (a) “Agreement” means the Agreement between the European Union and Japan for an Economic Partnership;
  - (b) “Code of Conduct” means the Code of Conduct for Arbitrators referred to in Article 21.30 of the Agreement;
  - (c) “days” means calendar days;
  - (d) “Joint Committee” means the Joint Committee established pursuant to Article 22.1 of the Agreement;
  - (e) “requested Party” means the Party to which the request to enter into a mediation procedure is addressed pursuant to Article 21.6 of the Agreement;
  - (f) “requesting Party” means the Party that requests to enter into a mediation procedure pursuant to Article 21.6 of the Agreement; and
  - (g) “Rules of Procedure” means the Rules of Procedure of a Panel referred to in Article 21.30 of the Agreement.

#### III. Initiation of the mediation procedure

3. A Party may request, at any time, that the Parties enter into a mediation procedure. Such request shall be addressed to the other Party in writing. The request shall be sufficiently detailed so as for the other Party to understand clearly the concerns of the Party requesting the mediation procedure. The requesting Party shall in its request describe the matter at issue by:

- (a) identifying the specific measure;
  - (b) providing a statement of the alleged adverse effects that the requesting Party believes the measure has, or will have, on trade or investment between the Parties; and
  - (c) explaining the causal link between the measure and the adverse effects on trade and investment between the Parties.
4. A Party is normally expected to avail itself of any relevant cooperation or consultation provisions of the Agreement before addressing to the other Party a written request pursuant to paragraph 3. For greater certainty, consultations under Article 21.5 of the Agreement are not required before initiating the mediation procedure.
5. The mediation procedure may only begin by mutual agreement of the Parties in order to explore mutually agreed solutions and consider any advice and proposed solutions by the mediator. The requested Party shall give sympathetic consideration to the request and reply by accepting or rejecting it in writing within 10 days of its receipt. If the requested Party does not reply within this timeframe, the request shall be regarded as rejected. The date of receipt by the requesting Party of the requested Party's reply of acceptance shall be considered as the date of initiation of the mediation procedure.

#### **IV. Selection of the mediator**

6. The Parties shall endeavour to agree on a mediator no later than 15 days after the date of the initiation of the mediation procedure.
7. If the Parties do not reach an agreement on the mediator within the time period provided for in paragraph 6, upon request of either Party, the co-chair of the Joint Committee from the requesting Party, or its designee, shall select by lot, within five days of the request, the mediator from the sub-list of chairpersons established pursuant to paragraph 1 of Article 21.9 of the Agreement. The request shall be copied to the other Party.
8. The office designated by the requesting Party pursuant to paragraph 1 of Article 21.25 of the Agreement shall be responsible for the organisation of the lot, and shall inform the co-chairs of the Joint Committee, with due anticipation, about the date, time and venue of the lot. The co-chair from the requested Party may be present or be represented by another person when the lots are drawn.

Representatives of both Parties may also be present. In any event, the lot shall be carried out with the Party or Parties that are present.

9. Unless the Parties agree otherwise, the mediator shall not be a national of either Party nor be employed by either Party.
10. The mediator shall assist, in an impartial and transparent manner, the Parties in bringing clarity to the matter at issue, including the possible effects of the specific measure on trade or investment, and in reaching a mutually agreed solution.
11. The Code of Conduct for Arbitrators adopted by the Joint Committee pursuant to Article 21.30 of the Agreement, shall apply to the mediator *mutatis mutandis*.

#### **V. Rules of the mediation procedure**

12. Within 10 days of the date on which the mediator was agreed upon pursuant to paragraph 6 or selected pursuant to paragraph 7, the requesting Party shall submit, in writing, to the mediator and to the requested Party a detailed description of the matter at issue, including how the specific measure is or would be applied and how it affects trade or investment. Within 20 days of the date of delivery of this submission, the requested Party may provide, in writing, its comments to the description. Each Party may include in its description or comments any information that it deems relevant.
13. The mediator may decide on the most appropriate way of bringing clarity to the matter at issue, including the possible effects of the specific measure on trade or investment. In particular, the mediator may organise meetings between the Parties, consult the Parties jointly or individually, and provide any additional support requested by the Parties. The mediator may also seek the assistance of, or consult with, relevant experts and stakeholders after consultations with the Parties.
14. The mediator shall endeavour to offer advice and propose a solution for the consideration of the Parties. The Parties may accept or reject the proposed solution or may agree on a different solution. The mediator shall not give advice or comments on the consistency of the specific measure with the Agreement.
15. The procedure shall take place in the requested Party, unless the Parties agree otherwise.

16. Within 60 days of the date on which the mediator was agreed upon pursuant to paragraph 6 or selected pursuant to paragraph 7, the Parties shall endeavour to reach a mutually agreed solution. If so requested by a Party, the mutually agreed solution shall be adopted by means of a decision of the Joint Committee. The mutually agreed solutions shall be made publicly available, unless the Parties agree otherwise. The version disclosed to the public may not contain any information that a Party has designated as confidential. Pending a final mutually agreed solution, the Parties may consider possible interim solutions.

17. Upon request of either Party, the mediator shall issue to the Parties, in writing, a draft factual report, providing a brief summary of:

- (a) the matter at issue, including the possible effects of the specific measure on trade or investment;
- (b) the procedures followed;
- (c) the views expressed by the Parties, experts and stakeholders, where relevant; and
- (d) if applicable, any mutually agreed solution and interim solutions.

within 15 days of the request for this report.

The Parties may comment on the draft factual report within 15 days of its issuance. After considering the comments submitted by the Parties, the mediator shall submit, in writing, the final factual report to the Parties within 30 days of the issuance of the draft factual report. The factual report shall not include any interpretation of the Agreement by the mediator.

18. The mediation procedure shall be terminated:

- (a) by the adoption of a mutually agreed solution by the Parties, on the date of adoption;
- (b) by a written declaration of the mediator, after consultation with the Parties, that further efforts at mediation would be to no avail, on the date of that declaration;
- (c) by a mutual agreement of the Parties at any stage of the procedure, on the date of that agreement; or

- (d) by a written and substantiated declaration of a Party after exploring mutually agreed solutions under the mediation procedure, on the date of that declaration.

The termination of the mediation procedure is without prejudice to paragraph 17.

- 19. Paragraphs 5 to 9, 15 to 26, 33, 34, and 42 to 46 of the Rules of Procedure of a Panel shall apply to the mediation procedure, *mutatis mutandis*.

## **VI. Confidentiality**

- 20. Unless the Parties agree otherwise, and without prejudice to paragraph 16, all steps of the mediation procedure, including any advice or proposed solution, shall be confidential. The mediator and the Parties shall treat as confidential any information submitted to the mediator by a Party or received from any other source which has been designated as confidential. However, any Party may disclose to the public that mediation is taking place.

## **VII. Relationship to other Dispute Settlement Procedures**

- 21. The mediation procedure shall be without prejudice to the Parties' rights and obligations under Chapter 21 (Dispute Settlement) of the Agreement or under a dispute settlement procedure of any other agreement.
- 22. A Party shall not rely on or introduce as evidence in other dispute settlement procedures under this Agreement or any other agreement, nor shall it be accepted that a panel takes into consideration:
  - (a) positions taken by the other Party in the course of the mediation procedure or information gathered under paragraph 13;
  - (b) the fact that the other Party has indicated its willingness to accept a solution to the matter subject to mediation; or
  - (c) advice given or proposals made by the mediator.
- 23. Unless the Parties agree otherwise, a mediator may not serve as an arbitrator or panellist in other dispute settlement procedures under the Agreement or under any other agreement involving the same matter for which he or she has been a mediator.

### **VIII. Time period**

24. Any time period referred to in this mediation procedure may be modified by mutual agreement between the Parties.

### **IX. Costs**

25. Each Party shall bear its own expenses derived from the participation in the mediation procedure.
26. The Parties shall share jointly and equally the expenses derived from organisational matters, including the remuneration and expenses of the mediator. Remuneration of the mediator shall be equivalent to the remuneration of the arbitrators set out in paragraph 4 of the Rules of Procedure of a Panel.