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WTO 229

PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	11 September 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the General Council of the World Trade organization on the adoption of a decision to extend a WTO waiver permitting the United States to provide preferential tariff treatment under the US Caribbean Basin Economic Recovery Act (CBERA)

Delegations will find attached document COM(2019) 409 final.

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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the General Council of the World Trade organization on the adoption of a decision to extend a WTO waiver permitting the United States to provide preferential tariff treatment under the US Caribbean Basin Economic Recovery Act (CBERA)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the General Council of the World Trade Organization (WTO) in connection with the envisaged adoption of a decision to extend a WTO waiver permitting the United States to provide preferential tariff treatment under the US Caribbean Basin Economic Recovery Act ('CBERA').

2. CONTEXT OF THE PROPOSAL

2.1. The Marrakesh Agreement establishing the World Trade Organization

The Marrakesh Agreement establishing the World Trade Organization ('WTO Agreement') entered into force on 1 January 1995.

The European Union is a party to the Agreement.

2.2. Ministerial Conference and General Council of the World Trade Organization

Pursuant to paragraph 1 of Article IV of the WTO Agreement, the Ministerial Conference has the authority to take decisions on all matters under any of the Multilateral Trade Agreements.

Pursuant to paragraph 2 of Article IV of the WTO Agreement, in the intervals between meetings of the Ministerial Conference, its functions are conducted by the General Council.

Pursuant to paragraph 1 of Article IX, the WTO usually takes the decisions by consensus.

2.3. The envisaged act of the General Council of the WTO

Pursuant to paragraph 3 of Article IX of the WTO Agreement, an obligation imposed on a member may be waived in exceptional circumstances.

Further to a request by the United States, the General Council of the WTO is to adopt a decision to extend the existing WTO waiver permitting the United States to provide preferential tariff treatment under CBERA, pursuant to paragraphs 3 and 4 of Article IX of the WTO Agreement (the 'envisaged act').

The existing waiver for CBERA expires on 31 December 2019. Therefore, the purpose of the envisaged act is to extend the waiver until 30 September 2025 as per the US request.

The envisaged act will become binding on the Members of the WTO in accordance with paragraph 3 of Article IX, as well as paragraph 2 of Article II of the WTO Agreement, which provides: 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 <...> are integral parts of this Agreement, binding on all Members'.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The United States requested to extend the existing WTO waiver of US obligations under paragraph 1 of Article I of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and paragraphs 1 and 2 of Article XIII of the GATT 1994 to permit the United States to provide duty-free treatment to eligible products originating in Central American and Caribbean countries and territories ('beneficiary countries') under CBERA, from 1 January 2020 until 30 September 2025.

The United States submitted the request pursuant to paragraphs 3 and 4 of Article IX of the WTO Agreement. It justifies the request with the high prevalence of poverty and instability in

the Caribbean Basin countries, particularly in Haiti, noting that economic prospects for these small countries are further complicated by susceptibility to natural disasters. Benefits under CBERA are intended to expand economic opportunities and contribute towards a more stable and prosperous region.

According to the United States, the duty-free treatment provided under CBERA should not prejudice the interests of other Members not benefiting from such treatment, and it is expected that the extension of such duty-free treatment will not cause a significant diversion of United States imports of products eligible under CBERA originating in Members who are not beneficiary countries.

This will be the fifth extension of the waiver for preferential tariff treatment, initially granted on 15 February 1985 for the period of 1 January 1984 until 30 September 1995¹, and currently in force until 31 December 2019².

The extension of the waiver would not affect negatively either the economy of the Union or the trade relations with the beneficiaries of this waiver. Moreover, the Union is supportive of actions against poverty and for stability. Therefore, the position to be taken by the Union within the General Council should be to support the waiver extension.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing ‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’

The concept of ‘acts having legal effects’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘capable of decisively influencing the content of the legislation adopted by the EU legislature’³.

4.1.2. Application to the present case

The General Council of the WTO is a body set up by an agreement, namely the WTO Agreement.

The act which the General Council is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with paragraph 2 of Article II and paragraph 3 of Article IX of the WTO Agreement.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

¹ (BISD 31S/20).

² WT/L/950.

³ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to the common commercial policy. Therefore, the substantive legal basis of the proposed decision is the first subparagraph of Article 207(4).

4.3. Conclusion

The legal basis of the proposed decision should be the first subparagraph of Article 207(4), in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the General Council of the WTO will implement the WTO Agreement provisions with respect to waivers, it is appropriate to publish it in the Official Journal of the European Union after its adoption.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 207(4), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Marrakesh Agreement establishing the World Trade Organization ('WTO Agreement') entered into force on 1 January 1995.
- (2) Pursuant to paragraph 2 of Article II of the WTO Agreement, 'the agreements and associated legal instruments included in Annexes 1, 2 and 3 ('Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members.'
- (3) In accordance with paragraph 3 of Article IX, in exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by the WTO Agreement or any of the Multilateral Trade Agreements.
- (4) Paragraphs 3 and 4 of Article IX of the WTO Agreement set out the procedures for the granting of waivers concerning the Multilateral Trade Agreements in Annex 1A or 1B or 1C to the WTO Agreement and their annexes.
- (5) Pursuant to paragraph 1 of Article IV of the WTO Agreement, the Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements.
- (6) Pursuant to paragraph 2 of Article IV of the WTO Agreement, in the intervals between meetings of the Ministerial Conference of the WTO ('World Trade Organization'), the General Council of the WTO shall conduct its functions.
- (7) Pursuant to paragraph 1 of Article IX, the WTO usually takes the decisions by consensus.
- (8) The United States was granted a waiver of obligations under paragraph 1 of Article I of the GATT 1994 on 15 February 1985, for the period from 1 January 1984 through 30 September 1995. On 15 November 1995, the Members of the WTO renewed the waiver through 30 September 2005, and again on 29 May 2009 through 31 December 2014. On 5 May 2015, WTO Members extended the waiver in respect of paragraph 1 of Article I of the GATT 1994 and expanded the waiver to cover paragraphs 1 and 2 of Article XIII of the GATT through 31 December 2019, to the extent necessary for the United States to provide duty-free treatment for imports of eligible products

originating in beneficiary countries designated pursuant to the provisions of the CBERA.

- (9) Pursuant to paragraphs 3 and 4 of Article IX of the WTO Agreement, the United States submitted a request for the General Council to take a decision to extend the existing WTO waiver to permit the United States to provide duty-free treatment to eligible products originating in Central American and Caribbean countries and territories under CBERA from 1 January 2020 until 30 September 2025.
- (10) The United States justifies the request with the high prevalence of poverty and instability in the Caribbean Basin countries, particularly in Haiti. Benefits under CBERA are intended to expand economic opportunities and contribute towards a more stable and prosperous region.
- (11) The extension of the waiver would not affect negatively either the economy of the Union or the Union's trade relations with the beneficiaries of this waiver. Moreover, the Union is supportive of actions against poverty and for stability.
- (12) It is appropriate to establish the position to be taken on the Union's behalf by the European Commission in the General Council of the WTO to support the United States request to extend the waiver in accordance with Article 218(9) TFEU, as the extension of the waiver will be binding on Members of the WTO,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken by the European Commission on the Union's behalf in the General Council of the World Trade Organization shall be to support the extension of a WTO waiver permitting the United States to provide preferential tariff treatment to eligible products originating in Central American and Caribbean countries and territories under the US Caribbean Basin Economic Recovery Act from 1 January 2020 until 30 September 2025.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President