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European Union

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LIMITE

WTO 196

'I/A' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: WTO Appellate Body - interim arrangement
- Endorsement

1. The Trade Policy Committee (Full Members), at its meeting on 17 May 2019, discussed the approach to be taken by the EU to preserve the essential principles and features of WTO dispute settlement, including its binding character and two levels of adjudication through an independent and impartial appeal review of panel reports.
2. The Committee agreed that the EU should seek to enter into appropriate arrangements with other WTO Members as an interim solution to preserve the above-mentioned principles and features. These arrangements would provide for arbitration on the basis of Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to decide on appeals from panel reports in disputes between the EU and other WTO Members as long as the Appellate Body remains non-operational.
3. The Permanent Representatives' Committee confirmed this position at its meeting on 22 May 2019. The Foreign Affairs Council (Trade) on 27 May 2019 subsequently endorsed this new approach.

4. At the Trade Policy Committee (Deputies) on 5 July 2019 the Commission presented a model of a joint communication relating to the interim arrangement, included in Annex to this note, which was endorsed at the same meeting.
 5. Subject to confirmation by the Permanent Representatives' Committee, the Council is therefore invited, in line with the procedure set out in doc. 15367/17¹, to authorise, as an "A" item on the agenda of one of its forthcoming meetings, the model of a joint communication, as set out in Annex to this note.
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¹ Follow up to Judgment in Case C-660/13 - Arrangements between Secretaries General on non-binding instruments.

The following communication is being circulated pursuant to the Mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO Disputes (JOB/DSB/1).

Interim Appeal Arbitration Pursuant to Article 25 of the DSU

[WTO Member] and [WTO Member],

Acknowledging the successful contribution of the WTO dispute settlement system to the security and predictability of the multilateral trading system, and re-affirming their commitment to a multilateral rules-based trading system,

Recognizing the essential role of the Appellate Body within the WTO dispute settlement system,

Underlining the urgency and importance of filling the vacancies on the Appellate Body so that it can carry on its functions as envisaged by the DSU,

Noting however, with utmost concern, the enduring absence of consensus in the Dispute Settlement Body for the proposals made to fill the vacancies,

Recognizing that the Appellate Body may no longer be able to fulfil its function in the near future, should the blockage of new appointments continue,

Determined to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports.

In view of these extraordinary circumstances, envisage resorting to the following interim arrangement:

1. [WTO Member] and [WTO Member] indicate their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure (hereafter the "appeal arbitration procedure"), if the Appellate Body is not able to hear appeals of panel reports in [DS X, DS Y and] any future dispute between [WTO Member] and [WTO Member] due to an insufficient number of its members. In such cases [WTO Member] and [WTO Member] will not pursue appeals under Articles 16.4 and 17 of the DSU.
2. Under the appeal arbitration procedure [WTO Member] and [WTO Member] intend to replicate as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU including the provision of appropriate administrative and legal support to the arbitrators by the Appellate Body Secretariat.

3. In particular, [WTO Member] and [WTO Member] envisage that, under the appeal arbitration procedure, appeals will be heard by three former members of the Appellate Body, serving as arbitrators pursuant to Article 25 of the DSU. The arbitrators will be selected by the Director-General from the pool of available former members of the Appellate Body¹, based on the same principles and methods that apply to form a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review. However, two nationals of the same Member may not serve on the same case.

4. In order to render the appeal arbitration procedure operational in particular disputes, [WTO Member] and [WTO Member] indicate their intention to enter into the arbitration agreement set out in the Annex to this communication and to notify that agreement pursuant to Article 25.2 of the DSU:

- a) Within 60 days after the date of the establishment of the panel [where that occurs after the date of this communication].
- b) In DS X, DS Y where the panel has already been established but an interim report has not yet been issued: within 30 days after the date of this communication. [NB: subparagraph b) would be relevant only if pending disputes are covered].

5. If either [WTO Member] or [WTO Member] initiates an appeal under this appeal arbitration procedure in a dispute related to the same matter for which one or more other WTO Members have also initiated an appeal under a similar appeal arbitration procedure², [WTO Member] and [WTO Member] envisage that a single arbitration panel should be formed to hear the appeals together. The Members concerned envisage agreeing on reconciling any differences between the procedures, failing which the arbitration division would determine how to proceed.

6. [WTO Member] and [WTO Member] envisage that this interim arrangement will cease to apply as soon as the Appellate Body is again fully composed. However, any pending arbitration will be completed under the interim appeal arbitration procedure, unless the parties agree otherwise, including through the arbitration agreement.

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¹ For greater certainty, this means the Appellate Body members whose term of office has expired as of the date of selection by the Director General.

² As set out in those Members' respective communications on an Interim Appeal Arbitration Pursuant to DSU Article 25 pursuant to the Mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO Disputes (JOB/DSB/1).

ANNEX

AGREED PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 of the DSU in the dispute ... DS X

1. [In order to give effect to communication JOB/DSB/1/Add.11 in this dispute,] [WTO Member] and [WTO Member] (hereafter the “parties”) mutually agree pursuant to Article 25.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report³ as issued to the parties in dispute DS X. Either party to the dispute may initiate arbitration in accordance with these agreed procedures.

2. The arbitration may only be initiated if the Appellate Body is not able to hear an appeal in this dispute under Article 16.4 and 17 of the DSU. For the purposes of these agreed procedures, such situation is deemed to arise where, on the date of issuance of the final panel report to the parties, there are fewer than three Appellate Body members.

For greater certainty, if the Appellate Body is able to hear appeals, a party may not initiate an arbitration, and the parties shall be free to consider an appeal under Articles 16.4 and 17 of the DSU.

3. In order to facilitate the proper administration of arbitration under these agreed procedures, the parties hereby jointly request the panel to notify the parties of the anticipated date of circulation of the panel report within the meaning of Article 16 of the DSU, no later than 45 days in advance of that date.

4. Following the issuance of the panel report to the parties, but no later than 10 days prior to the anticipated date of circulation of the final panel report to the rest of the membership, any party may request that the panel suspend the panel proceedings with a view to initiating the arbitration under these agreed procedures. Such request by either party is deemed to constitute a joint request by the parties for suspension of the panel proceedings for 12 months pursuant to Article 12.12 of the DSU.

The parties hereby jointly request the panel to provide for:

- i. the lifting of confidentiality with respect of the final panel report under the Working Procedures of the panel;
- ii. the transmission of the panel record to the arbitrators upon the filing of the Notice of Appeal: Rule 25 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*;
- iii. the transmission of the final panel report in the official languages of the WTO to the parties and to the third parties⁴,

before the suspension takes effect.

³ For greater certainty, this includes any final panel report issued in compliance proceedings pursuant to Article 21.5 of the DSU.

⁴ The parties confirm that it is not their intention that the panel report be circulated within the meaning of Article 16 of the DSU.

Except as provided in paragraphs 6 and 14, the parties shall not request the panel to resume the panel proceedings.

5. The arbitration shall be initiated by filing of a Notice of Appeal with the WTO Secretariat no later than 10 days after the suspension of the panel proceedings referred to in paragraph 4 has taken effect. The Notice of Appeal shall include the final panel report in the official languages of the WTO. The Notice of Appeal shall be simultaneously notified to the other party and to the third parties in the panel proceedings. Rules 20-23 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.

6. Subject to paragraph 2, where the arbitration has not been initiated under these agreed procedures, the Parties shall be deemed to have agreed not to appeal the panel report pursuant to Articles 16.4 and 17 of the DSU, with a view to its adoption by the DSB. If the panel proceedings have been suspended in accordance with paragraph 4, but no Notice of Appeal has been filed in accordance with paragraph 5, the parties hereby jointly request the panel to resume the panel proceedings.

7. The arbitrators shall be three persons selected by the Director-General within 10 days from the filing of the Notice of Appeal from the pool of available former members of the Appellate Body⁵ [NB a roster of former Appellate Body members could be attached to these agreed procedures after verification of availability by the Appellate Body Secretariat], based on the same principles and methods that apply to constitute a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review. However, two nationals of the same Member may not serve on the same case. The arbitrators shall elect a Chairperson. Rule 3(2) of the Working Procedure for Appellate Review shall apply, *mutatis mutandis*, to the decision-making by the arbitrator. However, the exchange of views provided for in Rule 4(3) shall not apply.

8. Unless otherwise provided for in these agreed procedures, the arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review. This includes in particular the Working Procedures for Appellate Review and the timetable for appeals provided for therein as well as the Rules of Conduct. Except for panel findings that are deemed to form an integral part of an arbitration award pursuant to paragraph 10, awards of other arbitrators under similar appeal arbitration procedures shall be deemed to constitute Appellate Body reports adopted by the DSB for the purposes of interpretation of the covered agreements, provided that the other arbitrators were selected consistently with the provisions of paragraph 7. The arbitrator may adapt the Working Procedures for Appellate Review and the timetable for appeals provided for therein, where justified under Rule 16 of the Working Procedures for Appellate Review, after consulting the parties and taking into account the practice of the Appellate Body.

9. An appeal shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel. The arbitrators may uphold, modify or reverse the legal findings and conclusions of the panel. Where applicable, the arbitration award shall include recommendations, as envisaged in Article 19 of the DSU. The findings of the panel which have not been appealed shall be deemed to form an integral part of the arbitration award.

⁵ For greater certainty, this means the Appellate Body members whose term of office has expired as of the date of selection by the Director General.

10. The parties agree to abide by the arbitration award, which shall be final. Pursuant to Article 25.3 of the DSU, the award shall be notified to the DSB and to the Council or Committee of any relevant agreement.

11. Only parties to the dispute, not third parties, may initiate the arbitration. Third parties which have notified the DSB of a substantial interest in the matter before the panel pursuant to Article 10.2 of the DSU may make written submissions to, and shall be given an opportunity to be heard by, the arbitrator. Rule 24 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.

12. Pursuant to Article 25.4 of the DSU, Articles 21 and 22 of the DSU shall apply *mutatis mutandis* to the arbitration award issued in this dispute.

13. At any time during the arbitration, the appellant may withdraw its appeal by notifying the arbitrators. However, after the authority of the panel has lapsed pursuant to Article 12.12 of the DSU, the appellant may withdraw its appeal only with the agreement of the other party. This notification shall also be notified to the panel and third parties, at the same time as the notification to the arbitrators, and shall be deemed to constitute a joint request by the parties to resume panel proceedings under Article 12.12 of the DSU.

14. The parties shall jointly notify these agreed procedures to the panel in DS X and ask the panel to grant, where applicable, the joint requests formulated in paragraphs 3, 4, 6, and 13.
