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## **1 ARTICLE 25**

### **1.1 Text of Article 25**

#### **Article 25**

##### *Arbitration*

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

### **1.2 General - Article 25 as an alternative "appeal" mechanism**

1. For a table providing information on disputes involving recourse to Article 25, see the chapter of the Analytical Index on "DS Information Tables".
2. In the *Turkey – Pharmaceutical Products (EU)* dispute, the parties notified Agreed Procedures for Arbitration under Article 25 of the DSU (Agreed Procedures) to the Panel and the DSB.<sup>1</sup> Under the Agreed Procedures, "[t]aking into account that the Appellate Body is not presently able to hear an appeal in this dispute", the parties agreed "to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report as issued to the parties in dispute DS583".<sup>2</sup> In its award, the Arbitrator reviewed the pertinent background and the relevant provisions of the Agreed Procedures, which it attached, along with additional Working Procedures that it adopted, as Annexes A-1 and A-2 to its Award.

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<sup>1</sup> WT/DS583/10.

<sup>2</sup> Agreed Procedures, para. 1. (fns omitted)

3. In *EU – Safeguard Measures on Steel (Turkey)*, the parties notified similar Agreed Procedures for Arbitration under Article 25 of the DSU (Agreed Procedures) to the Panel and the DSB.<sup>3</sup> To give effect to the parties' requests, made through the Agreed Procedures, that the Panel undertake certain steps relating to the report of the Panel and to the record of the Panel proceedings, the Panel adopted the Additional Working Procedures which it included as Annex A-4 to its Report. Ultimately, neither party initiated such arbitration, and the Panel Report was therefore circulated on 29 April 2022.

### 1.3 Article 25.1

#### 1.3.1 "as an alternative means of dispute settlement"

4. In *US – Certain EC Products*, the Panel noted that Article 25 of the DSU provides for arbitration as a means of adjudicating WTO related disputes. The Panel stated that:

"[A]lthough the panel (and Appellate Body) process is the most commonly used WTO dispute settlement procedure, Article 25 of the DSU, for example, explicitly provides for arbitration as a means of adjudicating WTO related disputes. Article 25.4 provides for the applicability of Articles 21 and 22 of the DSU to the results of such arbitration. There is no reason why the WTO assessment of the compatibility of an implementing measure could not be determined by an Article 25 arbitration, as one of the WTO dispute settlement procedures."<sup>4</sup>

5. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators were called to determine the level of nullification or impairment of benefits to the European Communities as a result of Section 110(5)B of the US Copyright Act. The United States and the European Union sought such a determination for purposes of determining the level of compensation, as envisaged in Article 22.2 of the DSU, until such time as the measure at issue was amended to be brought into conformity with the covered agreements. The parties agreed that the "legal principles developed in former arbitration proceedings under Article 22 of the DSU, such as the allocation of the burden of proof between the parties, shall apply to this arbitration".<sup>5</sup> The Arbitrators observed that, from the wording of Article 25, it might be argued that the procedure provided for in Article 25 might be intended solely as an alternative to a panel procedure, as opposed to being an alternative to any procedures provided for in Articles 21 and 22 of the DSU:

"The Arbitrators first note that, pursuant to the text of Article 25.1, arbitration under Article 25 is an '*alternative* means of dispute settlement'. The term 'dispute settlement' is generally used in the WTO Agreement to refer to the complete process of dispute resolution under the DSU, not to one aspect of it, such as the determination of the level of benefits nullified or impaired as a result of a violation. It may be argued that the procedure provided for in Article 25 is actually an alternative to a panel procedure. This would seem to be confirmed by the terms of Article 25.4, which provides that 'Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.' Article 22.2 itself, unlike Article 21.3(c), does not refer to arbitration as an alternative to the negotiation of mutually acceptable compensation. It could then be argued that arbitration under Article 25 is not intended for 'determin[ing] the level of nullification or impairment of benefits to the European Communities as a result of Section 110(5)(B) of the US Copyright Act'.<sup>6</sup>

6. Despite their acknowledgement that an argument may be made whereby arbitration pursuant to Article 25 would be considered as not being intended for determining the level of nullification or impairment of benefits, the Arbitrators in *US – Section 110(5) Copyright Act (Article 25)* considered that the elements sustaining such an argument are outweighed by other

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<sup>3</sup> WT/DS595/10.

<sup>4</sup> Panel Report, *US – Certain EC Products*, para. 6.119. The elaboration made by the Panel in this case regarding the mandate of arbitrators appointed under Article 22.6 of the DSU based upon its interpretation of Articles 21.5 and 25 of the DSU was later dismissed by the Appellate Body on the grounds that the Panel's statements relate to a measure which was outside its terms of reference. Appellate Body Report, *US – Certain EC Products*, paras. 89-90

<sup>5</sup> See WT/DS160/15, page 2.

<sup>6</sup> Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.3.

elements of interpretation. The Arbitrators therefore concluded that, "pending further interpretation by the Members", they did have jurisdiction under Article 25 to determine the level of European Communities' benefits that were nullified or impaired in this case:

"While being mindful of these elements of interpretation, the Arbitrators are of the view that they are outweighed by other elements, based on the fact that none of the provisions concerned expressly excludes recourse to arbitration under Article 25 in the particular context in which they apply. Article 25.2 itself provides that resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed 'except as otherwise provided in this Understanding'. Article 25 itself does not specify that recourse to Article 25 arbitration should be excluded when determining the level of nullification or impairment suffered by a Member. On the contrary, the terms of Article 25.1 referring to 'the solution of certain disputes that concern issues that are clearly defined by the parties' may support the view that Article 25 should be understood as an arbitration mechanism to which Members may have recourse whenever necessary within the WTO framework. We also note that Article 22.2 refers to 'negotiations [...] with a view to developing mutually acceptable compensation.' There is no language in that provision which would make it impossible to consider arbitration as a means of reaching a mutually acceptable compensation.

Moreover, recourse to Article 25 arbitration in the present situation is fully consistent with the object and purpose of the DSU. Arbitration is likely to contribute to the prompt settlement of a dispute between Members, as commanded by Article 3.3 of the DSU. Indeed, it may facilitate the resolution of a divergence in the context of a negotiation of compensations, thus paving the way to implementation without suspension of concessions or other obligations.

In general, recourse to arbitration under Article 25 strengthens the dispute resolution system by complementing negotiation under Article 22.2. The possibility for the parties to a dispute to seek arbitration in relation to the negotiation of compensation operates to increase the effectiveness of that option under Article 22.2. Incidentally, the Arbitrators note that compensation, in their opinion, is always to be preferred to countermeasures of any sort, since it enhances trade instead of restricting or diverting it. Finally, such an application of Article 25 does not, at least in the case at hand, affect the rights of other Members under the DSU.<sup>7</sup>

Having regard to the object of the arbitration requested by the parties and the fact that the rights of other Members under the DSU are not affected by the decision of the European Communities and the United States to seek arbitration under Article 25, the Arbitrators are of the view that, pending further interpretation by the Members, they should declare that they have jurisdiction under Article 25 to determine the level of EC benefits which are being nullified or impaired in this case.<sup>8</sup><sup>9</sup>

### **1.3.2 Differences compared with panel proceedings**

7. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators observed that whereas the DSB establishes panels or refers matters to other arbitration bodies, under Article 25 proceedings, the parties only had to notify the DSB of their recourse to arbitration:

"Whereas the DSB establishes panels or refers matters to other arbitration bodies, Article 25 provides for a different procedure. The parties to this dispute only had to

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<sup>7</sup> (footnote original) As a matter of fact, it may affect them positively, given the *erga omnes* character of compensation.

<sup>8</sup> (footnote original) The Arbitrators' recognition of their jurisdiction in this case is not a unilateral extension of WTO jurisdiction, since it is dependent on the agreement of the parties to a dispute to have recourse to Article 25 of the DSU. This decision is without prejudice to the DSU compatibility of the decision of the parties to accept this award as the level of nullification or impairment for the purpose of any further proceedings under Article 22 of the DSU in relation to this case. It is also without prejudice to any interpretation of the provisions of Articles 22 and 25 of the DSU by the Ministerial Conference or the General Council.

<sup>9</sup> Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, paras. 2.4-2.7.

*notify* the DSB of their recourse to arbitration. No decision is required from the DSB for a matter to be referred to arbitration under Article 25."<sup>10</sup>

8. In *US/Canada – Continued Suspension*, the Appellate Body distinguished the "consensual" or "alternative" means of dispute resolution provided for in Article 25 of the DSU (and in Article 5 of the DSU) from "adjudication" through panel proceedings:

"Certainly, parties to a dispute are not precluded from pursuing consensual or alternative means of dispute settlement foreseen in the DSU. Article 3.7 of the DSU provides that '[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.' To reach a mutually acceptable solution, Members can engage in consultations or resort to mediation and good offices. Moreover, Article 25 provides for arbitration as an alternative to panel proceedings for dispute resolution. Consultations, mediation, good offices, and arbitration are, however, alternatives to compulsory adjudication and require the consent of the parties. In the absence of such consent, they cannot lead to a binding decision. Thus, it is important to distinguish between these consensual means of dispute resolution, which are always at the Members' disposal, and adjudication through panel proceedings, which are compulsory."<sup>11</sup>

## **1.4 Article 25.2**

### **1.4.1 "Except as otherwise provided"**

9. In *US – Section 110(5) Copyright Act*, the Arbitrators, when deciding whether they were competent to assess the level of nullification or impairment, noted that "none of the provisions concerned expressly excludes recourse to arbitration under Article 25 in the particular context in which they apply. Article 25.2 itself provides that resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed 'except as otherwise provided in this Understanding'."<sup>12</sup>

## **1.5 Article 25.4**

10. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators noted that the nature of an Article 25 arbitration as an alternative to the panel procedure (as opposed to being an alternative to procedures provided for in Article 21 and/or 22) "would seem to be confirmed by the terms of Article 25.4, which provides that 'Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards'."<sup>13</sup>

## **1.6 Disputes in which parties resorted to arbitration for appeal purposes**

11. In *Turkey – Pharmaceutical Products (EU)*, the parties agreed on *ad hoc* arbitration under Article 25 of the DSU as a method for appeal in their dispute, and asked the Panel to suspend its work:

"At the request of the parties, the Panel suspended its work before the circulation of the Panel Report to Members."<sup>14</sup>

On 22 March 2022, Türkiye and the European Union notified Agreed Procedures for Arbitration under Article 25 of the DSU (Agreed Procedures) to the Dispute Settlement

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<sup>10</sup> Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.1.

<sup>11</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 340.

<sup>12</sup> Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.4.

<sup>13</sup> Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.3.

<sup>14</sup> (footnote original) On 22 December 2021, the Panel informed the parties that it had granted the European Union's request that the Panel suspend its work, pursuant to Article 12.12 of the DSU, for a period of one month. (WT/DS583/6) On 21 January 2022, 10 February 2022, and 24 February 2022, the Panel informed the parties that it had agreed to the European Union's requests for extensions of the suspension of the Panel's work. (WT/DS583/7, WT/DS583/8, and WT/DS583/9) On 24 March 2022, the Panel agreed to the parties' joint request for a further indefinite suspension of the panel proceedings, and extended the suspension of the Panel's work indefinitely. (WT/DS583/11)

Body (DSB). Under the Agreed Procedures, '[t]aking into account that the Appellate Body is not presently able to hear an appeal in this dispute', the parties agreed 'to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report as issued to the parties in dispute DS583'. The parties further agreed to 'abide by the arbitration award, which shall be final', with the understanding that 'un-appealed' panel findings would form an integral part of such an award."<sup>15</sup>

12. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Turkey – Pharmaceutical Products (EU)*, the Arbitrator adopted certain measures, including page limits in written submissions and time limits for oral statements, to streamline the proceedings:

"In accordance with paragraph 12 of the Agreed Procedures, we adopted organizational measures to streamline the proceedings. These organizational measures included setting up an organizational meeting with the parties to consider a draft set of Working Procedures at the outset of the Arbitration, decisions on page limits for submissions, decisions on time limits for opening and closing statements at the hearing, sending questions to parties and third parties in advance of the hearing to facilitate the conduct of the hearing, and adopting a tight hearing schedule. We also took internal organizational steps to streamline our work and ensure that our Award could be issued within 90 days of the commencement of the Arbitration.

Moreover, at the organizational meeting with the parties as well as at the hearing, we consulted with the parties about the possibility of excluding Türkiye's claims raised under Article 11 of the DSU from the scope of the Arbitration. We eventually did not consider it necessary to propose formally that these claims be excluded from the scope of the Arbitration for the purpose of issuing our Award within 90 days."<sup>16</sup>

13. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Turkey – Pharmaceutical Products (EU)*, the Arbitrator described its task as follows:

"We are mindful that our task as Arbitrators under Article 25 of the DSU is to facilitate the solution of the dispute that has been submitted to arbitration by the parties. Our Award, to which the parties agreed to abide, will not go through the process of being adopted by the DSB. We are also mindful that the Agreed Procedures mandate us to address only those issues raised by the parties that are necessary for the resolution of the dispute.

...

It is within these parameters that we issue our Award. In reaching our conclusions, we thoroughly considered all the arguments made by the parties and third parties. Not all these arguments are explicitly discussed in this Award and issues are addressed only to the extent necessary for the resolution of the dispute before us."<sup>17</sup>

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<sup>15</sup> Award of the Arbitrators, *Turkey – Pharmaceutical Products (EU)*, paras. 1.6-1.7.

<sup>16</sup> Award of the Arbitrators, *Turkey – Pharmaceutical Products (EU)*, paras. 2.2-2.3.

<sup>17</sup> Award of the Arbitrators, *Turkey – Pharmaceutical Products (EU)*, paras. 3.3 and 3.5.