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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

1.2.1 Scope of the Arbitrators' mandate under Article 25

1. In *US – Section 110(5) Copyright Act (Article 25)*, the first time since the inception of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the DSU, the Arbitrators observed that such recourse is not subject to multilateral control and that, accordingly, "it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system":

"The Arbitrators note that this is the first time since the establishment of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the DSU. 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 *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. In the absence of a multilateral control over recourse to that provision, it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system."¹

1.2.2 Jurisdiction of the Arbitrators under Article 25

2. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators were called upon 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 Arbitrators considered that it was for them to determine whether they had jurisdiction to consider this issue; they concluded that they did have jurisdiction:

"As recalled by the Appellate Body in *United States – Anti-Dumping Act of 1916*, it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative. The Arbitrators believe that this principle applies also to arbitration bodies."²

1.2.3 Burden of proof in Article 25 arbitrations

3. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators followed the rules on burden of proof applicable in Article 22.6 arbitrations as stipulated in the agreed procedures submitted by the parties. Therefore, it was for the United States, the defendant in the original panel proceedings, to provide a *prima facie* case that the methodology and estimates proposed by the European Communities did not accurately reflect the European Communities benefits being nullified or impaired:

"The **Arbitrators** carefully examined the claims, arguments and evidence submitted by the parties in light of the rules on burden of proof applicable in the context of arbitrations under Article 22.6 of the DSU, as instructed by the parties. The Arbitrators were mindful of the fact that, in arbitration proceedings under Article 22.6, a party contests the level of countermeasures which the other intends to take under paragraphs 2, 3 and 4 of Article 22. It is therefore understandable that the burden be on the party that contests the level of countermeasures to make a *prima facie* demonstration that the methodology and the calculations submitted by the party intending to apply countermeasures are inconsistent with the requirements of Article 22 of the DSU. For instance, in the *European Communities – Hormones* cases, the initial burden was on the European Communities. The present case, however, was referred to the Arbitrators by both parties 'by mutual agreement'. It is arguable whether or not there is a complainant and a defendant. This said, we note that the agreed procedures submitted by the parties expressly instruct us to follow the allocation of the burden of proof applied in arbitrations under Article 22.6. We also

¹ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.1.

² Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.1.

note that the parties agreed that the European Communities would submit a methodology paper ahead of the first written submissions, as in proceedings under Article 22.6. As a result, the Arbitrators decided to allocate the burden of proof accordingly, as in an Article 22.6 case."³

1.2.4 Matters dealt under Article 25 arbitrations

1.2.4.1 Nullification or impairment of benefits

1.2.4.1.1 General

4. 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. As indicated in paragraph 2 above, the Arbitrators concluded that they did have jurisdiction. The first step in their reasoning was to compare the panel procedure under the DSU with the Article 25 arbitration. The Arbitrators concluded that the procedure provided for in Article 25 may be considered an alternative to a panel procedure:

"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'."⁴

5. 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 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

³ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 4.4.

⁴ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.3.

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.⁵

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.^{6,7}

1.2.4.1.2 Nature of the benefits nullified or impaired

6. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators agreed with the parties that, for the purpose of the arbitration proceeding, the relevant benefits were those which were economic in nature:

"In their submissions to the Arbitrators, the parties have focused on this type of benefit accruing to copyright holders. The Arbitrators concur with the parties that, for purposes of these arbitration proceedings, the relevant benefits are those which are economic in nature. This is consistent with previous decisions of arbitrators acting under Article 22.6 of the DSU. Moreover, like the parties to this dispute, the Arbitrators will proceed on the assumption that the licensing royalties realizable by copyright holders constitute an adequate measure of the economic benefits arising from Articles 11*bis*(1)(iii) and 11(1)(ii)."⁸

1.2.4.1.3 Benefits denied to a WTO Member

7. The Arbitrators in *US – Section 110(5) Copyright Act (Article 25)* stated that their task was to assess the level of nullification or impairment of the benefits denied to the European Communities rather than determining the benefits denied to European Communities' right holders:

"Accordingly, the Arbitrators will, in this case, assess the level of EC benefits which Section 110(5)(B) is nullifying or impairing in terms of the royalty income foregone by EC right holders. In making this observation, the Arbitrators are aware that their task in this case is to determine the benefits which are denied to the *European Communities* rather than determining the benefits which are denied to *EC right holders*. However, there can be no question that the benefits which are denied to the European Communities include the benefits which are denied to EC right holders. What is more, the European Communities has not made out a claim to the effect that Section 110(5)(B) is nullifying or impairing benefits additional to those which EC right

⁵ (footnote original) As a matter of fact, it may affect them positively, given the *erga omnes* character of compensation.

⁶ (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.

⁷ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, paras. 2.4-2.7.

⁸ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 3.18.

holders could otherwise derive from Articles 11*bis*(1)(iii) and 11(1)(ii). As a result, it is appropriate, for the purposes of these proceedings, to determine the level of EC benefits which Section 110(5)(B) is nullifying or impairing in terms of the benefits foregone by EC right holders."⁹

1.2.4.1.4 Point in time to assess the level of nullification or impairment

8. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators assumed that the parties wanted an assessment of the level of benefits nullified or impaired on the date the matter was referred to arbitration, disregarding the rules established in Article 22.6 of the DSU:

"The Arbitrators note that they have been appointed under Article 25 of the DSU. As a result, they do not feel constrained by a number of obligations imposed on arbitrators in Article 22.6 proceedings. Unlike Article 22.6, which closely relates to compliance (or absence thereof) at the end of the reasonable period of time, Article 25 is silent as to the date on which a matter referred to arbitration should be assessed. However, the Arbitrators are aware that they are not called upon to consider the level of EC benefits which may still be nullified or impaired after the end of the implementation period, but to consider the level of EC benefits which are being nullified or impaired as a result of the current application of Section 110(5)(B).¹⁰ General practice under the DSU has been to consider the facts of a case as at the date of establishment of the panel. In the absence of any specification in our mandate, we believe that it should be assumed that the parties wanted us to assess the level of benefits nullified or impaired on the date the matter was referred to us. In other words, we must determine the level of nullification or impairment of EC benefits over a one-year period ending as closely as possible to 23 July 2001."¹¹¹²

1.2.5 Right to seek and disregard information

9. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators disregarded the information they had requested from a United States' collective management organization because certain unacceptable conditions were attached to the use of such information.¹³

1.2.6 Treatment of confidential information

10. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators decided that, in the absence of specific requests from the parties as to how confidentiality of business confidential information should be preserved, they would, in general, rely on the relevant practice of the Appellate Body:

"In the absence of specific requests from the parties as to how confidentiality of business confidential information should be preserved, the Arbitrators will rely generally on the practice of the Appellate Body on this matter. To the extent that confidential information may appear as such in the award in order to support the findings of the Arbitrators, the Arbitrators decided that two versions of the award would be prepared. One, for the parties, would contain all the information used in support of the determinations of the Arbitrators. The other, which would be circulated to all Members, would be edited so as not to include the information for which, after consultation with the parties, the Arbitrators would conclude that confidentiality for

⁹ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 3.19.

¹⁰ (*footnote original*) This seems to imply that the level of nullification or impairment that the Arbitrators will assess in this case may be different from that which may exist after the end of the reasonable period of time. This implies further that the amount which will be determined by the Arbitrators may not dispense the parties from an Article 22.6 arbitration.

¹¹ (*footnote original*) The reason for the choice of a yearly basis is essentially because compensations or suspensions of concessions or other obligations have been so far calculated on a twelve-month basis.

¹² Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 4.19.

¹³ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 1.10.

business reasons was sufficiently warranted. The information which the Arbitrators would consider to be business confidential would be replaced by 'x'.¹⁴

1.3 Article 25.1

1.3.1 "expeditious arbitration ... as an alternative means of dispute settlement"

11. 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."¹⁵

12. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators noted that an Article 25 arbitration is an alternative means of dispute settlement and "[i]t may be argued that the procedure provided for in Article 25 is actually an alternative to a panel procedure."¹⁶

1.3.2 Differences compared with panel proceedings

13. 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. See paragraph 1 above.

14. 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."¹⁷

1.4 Article 25.2

1.4.1 Arbitration under Article 25 should only be excluded when expressly provided

15. In *US – Section 110(5) Copyright Act*, the Arbitrators, when deciding whether they were competent to assess the level of nullification or impairment (see paragraphs 4-8 above), noted that "none of the provisions concerned expressly excludes recourse to arbitration under Article 25

¹⁴ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 1.24.

¹⁵ 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

¹⁶ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.3.

¹⁷ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 340.

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'.¹⁸

1.5 Article 25.4

16. 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 (see paragraph 12 above), "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'.¹⁹

17. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators indicated that "they [did] not feel constrained by a number of obligations imposed on arbitrators in Article 22.6 proceedings". See paragraph 8 above.

1.6 Relationship with other provisions of the DSU

1.6.1 Article 3.3

18. In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators considered that the recourse to Article 25 arbitration in that case was fully consistent with the object and purpose of the DSU since the arbitration at issue was likely to contribute to the prompt settlement of a dispute between the European Communities and the United States, as commanded by Article 3.3 of the DSU:

"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."²⁰

Current as of: December 2020

¹⁸ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.4.

¹⁹ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.3.

²⁰ Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, para. 2.5.