

# **USING ARBITRATION UNDER ARTICLE 25 OF THE DSU TO ENSURE THE AVAILABILITY OF APPEALS**

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## USING ARBITRATION UNDER ARTICLE 25 OF THE DSU TO ENSURE THE AVAILABILITY OF APPEALS

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### **1. Introduction**

1. The expiration of the terms of several Appellate Body members (ABMs)<sup>2</sup> without an agreed process for their replacement, coupled with an increase in the Appellate Body workload,<sup>3</sup> raises concerns that it will become increasingly difficult for appeals to be handled at a rate conducive to the prompt settlement of disputes required by the Dispute Settlement Understanding (DSU).<sup>4</sup>

2. WTO Members rely on the dispute settlement system as a central element in providing security and predictability to the multilateral trading system. To ensure that the system continues to function as the drafters intended, some commentators have proposed the use of the arbitration process under Article 25 of the DSU as a temporary avenue to enable appeals of panel reports.<sup>5</sup> Article 25 could be used to allow Members, who so wished, to continue to enjoy the benefits of the WTO appellate process, while discussions continue among the Membership on the issues facing the Dispute Settlement Body (DSB).

3. Article 25 is drafted in terms that are sufficiently flexible to allow a process that replicates closely the essential features of the appellate process under Article 17 of the DSU. Article 25 decisions are binding on the parties, and would be enforceable in the same way as adopted panel and Appellate Body reports, including through recourse to Articles 21 and 22 of

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<sup>2</sup> The second four-year term of Mr. Ricardo Ramírez Hernández expired on 30 June 2017; Mr. Hyun Chong Kim resigned from the Appellate Body with effect from 1 August 2017. The second four-year term of Mr. Peter Van den Bossche will expire on 11 December 2017; the first four-year term of Mr. Shree Servansingh will expire on 30 September 2018; the second four-year terms of both Mr. Ujal Singh Bhatia and Mr. Thomas R. Graham will expire on 10 December 2019; and the first four-year term of Ms. Hong Zhao will expire on 30 November 2020. Article 17.1 provides that three of the seven ABMs “shall serve on any one case”. See also Rule 6 of the Appellate Body Working Procedures.

<sup>3</sup> In 2016, 88 percent of panel reports were appealed, a marked jump from the average of 68 percent over the 10 previous years. Address by Ujal Singh Bhatia, “*The Problems of Plenty, Challenging Times for the WTO’s Dispute Settlement System*”, (8 June 2017) available at:

[https://www.wto.org/english/news\\_e/news17\\_e/ab\\_08jun17\\_e.pdf](https://www.wto.org/english/news_e/news17_e/ab_08jun17_e.pdf).

<sup>4</sup> Article 3.3 of the DSU.

<sup>5</sup> The text of Article 25 of the DSU is annexed to this paper.

the DSU. As a practical matter, past practice in WTO dispute settlement confirms that Article 25 arbitrations could be readily serviced by the staff of the Appellate Body Secretariat.<sup>6</sup>

4. This paper sets out potential elements of an Article 25 arbitration process that would enable parties, if they wished, to replicate successfully the DSU's appellate review procedures.

## **2. Arbitrations under Article 25 of the DSU**

5. Article 25 of the DSU emerged during the Uruguay Round, with the United States proposing a system of "binding arbitration" as an "alternative to the normal dispute settlement process".<sup>7</sup> The final agreed text of Article 25 provides for "expeditious" arbitration "as an alternative means" of dispute settlement. Like the remainder of the DSU, Article 25 is designed to "facilitate the solution" of disputes.

6. Arbitration under Article 25 does not depend on any action by the DSB. Arbitration is launched through the agreement of the parties, which must be notified to other Members in advance of the start of the proceedings. The parties may also agree that other Members can participate in an arbitration, for example, as third participants.

7. Article 25 arbitration awards are automatically binding on the parties to the dispute. This binding character flows from the terms of Article 25 itself, and from the parties' agreement to engage in the proceedings. Thus, in contrast to other dispute settlement proceedings, the binding character of an arbitration award does not depend on adoption or approval by the DSB. Instead, an award must simply be notified to the DSB and the relevant WTO Councils and Committees.

8. Unlike other DSU arbitration proceedings – like those under Articles 21.3 and 22.6 of the DSU – recourse to Article 25 does not require any previous decision to have been taken by a

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<sup>6</sup> All dispute settlement proceedings conducted pursuant to the DSU are serviced by the WTO Secretariat and/or the Appellate Body Secretariat. This includes regular panel and Appellate Body proceedings; and arbitrations conducted pursuant to: Article 21.3(c) of the DSU, which are serviced by the Appellate Body Secretariat (e.g., Award of the Arbitrator, *US – Washers (Article 21.3(c))*; Award of the Arbitrator, *Colombia – Textiles (Article 21.3(c))*; and, Award of the Arbitrator, *US – Softwood Lumber V (Article 21.3(c))*); Article 22.6 of the DSU, which are serviced by the WTO Secretariat (e.g., Decisions by the Arbitrator, *US – COOL (Article 22.6)*; Decisions by the Arbitrator, *US – Gambling (Article 22.6)*; Decisions by the Arbitrator, *EC – Hormones (Article 22.6)*) Article 25 of the DSU, which was serviced by the WTO Secretariat when the subject matter of the arbitration was the quantification of the level of nullification or impairment (Award of the Arbitrators, *United States - Section 110(5) of the US Copyright Act (Article 25)*). Additionally, the Appellate Body Secretariat and the WTO Secretariat jointly serviced an *ad hoc* arbitration conducted pursuant to the Doha Waiver (Award of the Arbitrator, *EC – Banana Tariffs (ACP-EC Partnership Arbitration)*; Award of the Arbitrator, *EC – Banana Tariffs (Second ACP-EC Partnership Arbitration)*). The allocation of responsibility, as between the WTO Secretariat and the Appellate Body Secretariat, is determined according to the subject matter of the proceedings and the persons serving as adjudicator.

<sup>7</sup> See "Improved Dispute Settlement: Elements for Consideration: Discussion Paper Prepared by United States Delegation", GATT Doc No MTN.GNG/NG13/W/6 (25 June 1987) p. 2.

panel or the Appellate Body. Rather, parties to a dispute can turn to Article 25 at any stage of a dispute.

9. The applicable substantive and procedural law in an Article 25 arbitration would, of course, be the covered agreements, which include the DSU.<sup>8</sup> Under Article 1.1 of the DSU, Article 25 forms part of the “dispute settlement provisions” that are subject to the DSU’s rules and procedures, including any special or additional DSU rules and procedures.<sup>9</sup> Article 3.5 of the DSU adds that “solutions to matters” “raised under the dispute settlement provisions of the covered agreements, *including arbitration awards*, shall be consistent with those agreements and shall not nullify or impair benefits”. When Members invoke Article 25, they also comply with their duty under Article 23 of the DSU to “have recourse to, and abide by” the rules and procedures of the DSU.

10. Critically, Article 25 itself states that Articles 21 and 22 of the DSU apply “*mutatis mutandis*” to arbitration awards. Accordingly, awards under Article 25 are subject to the usual DSU procedures governing the surveillance and monitoring of implementation, as well as compensation and suspension of concessions in the event of non-compliance.

11. As the Article 25 arbitrator said in *US – Section 110*, recourse to arbitration under this provision should be consistent with the “object and purpose of the DSU”, should not “circumvent” the DSU, and should take place “in accordance with the rules and procedures governing the WTO”.<sup>10</sup>

12. Given these terms of the DSU, as previously interpreted, an arbitration under Article 25 that seeks appellate review of a panel report should replicate as closely as possible the features of regular appellate review proceedings. Article 25.2 provides the parties with the flexibility to do so through an arbitration agreement. Close replication would also offer Members the advantage of adopting appellate proceeding features with which they have long been familiar, and which they know to be effective – procedural security and predictability. In particular, as discussed further below, the parties could adopt the procedures that would usually apply to

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<sup>8</sup> See Annex 1 of the DSU. See also Laurence Boisson de Chazournes, “*Arbitration at the WTO: A Terra Incognita to be Further Explored*”, in *Law in the Service of Human Dignity: Essays in honour of Florentino Feliciano* (Charnovitz, Steve, Steger, Debra P. and Van Den Bossche, Peter, ed.), Cambridge (Cambridge University Press) 2005, at pp. 181-182; 200-201.

<sup>9</sup> See Article 1.2 of the DSU. See also Laurence Boisson de Chazournes, “*Arbitration at the WTO: A Terra Incognita to be Further Explored*”, in *Law in the Service of Human Dignity: Essays in honour of Florentino Feliciano* (Charnovitz, Steve, Steger, Debra P. and Van Den Bossche, Peter, ed.), Cambridge (Cambridge University Press) 2005, at pp. 181-182; 200-201.

<sup>10</sup> Award of the Arbitrators, *United States - Section 110(5) of the US Copyright Act (Article 25)*, footnote 22 to para. 2.1 and para. 2.5.

appellate proceedings under the DSU, including the *Working Procedures for Appellate Review (Working Procedures)*.

13. In sum, by engaging in an Article 25 arbitration, parties would not lose any of the benefits that are afforded through recourse to the DSU’s regular panel and appellate proceedings. Instead, parties may enjoy all the usual benefits: an “expeditious” process, conducted under the same procedures, with a binding outcome enforceable through the usual DSU mechanisms.

14. These features make the Article 25 arbitration process well suited to serve as an alternative to the DSU’s regular appellate proceedings. While the *form* of the process might differ from regular appellate proceedings, the *substance* of the process would *function* in the same way, so as to confer the same benefits on the parties.

**3. Article 25 of the DSU as an alternative to the regular appellate process**

15. In the table below, we consider how an Article 25 arbitration could be designed to replicate closely the DSU’s regular appellate proceedings, through what we refer to as an “appeal-arbitration”. In particular, Article 17 of the DSU and the *Working Procedures* could serve as the legal framework for an appeal-arbitration.<sup>11</sup> To that end, in the table below, we pair the key stages and features of appellate review under Article 17 of the DSU and the *Working Procedures* with elements of an Article 25 appeal-arbitration.

16. In terms of *timing*, security and predictability suggest that the parties should conclude a binding agreement to pursue an appeal-arbitration, and notify any such agreement to other WTO Members (with a WT/DS document), at a relatively early stage in the panel proceedings – optimally, before the panel issues its interim report. Were a pre-existing appeal-arbitration agreement not in place before the issuance of an interim report, recourse to an appeal-arbitration would risk being driven by the particular result of the panel proceedings, and more specifically, one or the other party’s (dis-)satisfaction with that result.

**Table: Comparison of Article 17 DSU appellate procedures with Article 25 DSU appeal-arbitration procedures**

Article 17 Appeal	Article 25 Appeal-Arbitration
<p><b><u>Initiation of an appeal</u></b></p> <ul style="list-style-type: none"> <li>An appeal by either party may be initiated up to 60 days after circulation of a panel</li> </ul>	<p><b><u>Initiation of an appeal</u></b></p> <ul style="list-style-type: none"> <li>The parties would agree to appeal-arbitration, setting out the terms of the</li> </ul>

<sup>11</sup> Given that adjudication would take place under Article 25 of the DSU, and not Article 17, the terminology used in adopting Article 17 and the *Working Procedures* as the framework under Article 25 would likely require some adaptation, to reflect that the adjudicator is an arbitrator. However, the substance of the procedures should not differ.

Article 17 Appeal	Article 25 Appeal-Arbitration
<p>report to Members (Article 16.4 of the DSU).</p> <ul style="list-style-type: none"> <li>An appeal is formally initiated by notifying the DSB and filing a notice of appeal (Rule 20 of the <i>Working Procedures</i>); an other appeal can be initiated through a notice of other appeal (Rule 23 of the <i>Working Procedures</i>).</li> </ul>	<p>appellate process (Article 25.2 of the DSU). The parties could agree that:</p> <ul style="list-style-type: none"> <li>- an appeal-arbitration would be initiated by either party within 60 days of the issuance of a panel report to the parties (see below);</li> <li>- an appeal-arbitration would be initiated through a notice of appeal, following Rule 20 of the <i>Working Procedures</i> (making appropriate adjustments for terminology<sup>12</sup>); and,</li> <li>- an other appeal-arbitration would be initiated through a notice of other appeal, following Rule 23 of the <i>Working Procedures</i>.</li> </ul>
<p><b><u>Composition of Division</u></b></p> <ul style="list-style-type: none"> <li>Three Appellate Body members “serve on any one case” on the basis of “random selection” from among the seven Appellate Body members; membership of the Appellate Body is broadly representative of WTO membership (Articles 17.1 and 17.3 of the DSU; see also Rule 6 of the Working Procedures for Appellate Review).</li> </ul>	<p><b><u>Composition of Article 25 appeal-arbitration</u></b></p> <ul style="list-style-type: none"> <li>Parties could agree to three “arbitrators” selected randomly from an agreed roster of individuals comprising current and previous Appellate Body members, with membership of the roster being broadly representative of WTO membership. The parties would likely compose the roster in consultation with the Appellate Body Secretariat, to ensure the availability of the individuals and the representativeness of the roster.</li> </ul>
<p><b><u>Procedural steps and timetable</u></b></p> <ul style="list-style-type: none"> <li>The <i>Working Procedures</i> set out the following procedural steps and notional timelines for an appeal: <ul style="list-style-type: none"> <li>- Notice of Appeal/Appellant’s Submission: Day 0</li> <li>- Notice of Other Appeal/Other Appellant’s Submission: Day 5</li> <li>- Appellee’s Submission: Day 18</li> <li>- Third Participant’s Submission/Notification: Day 21</li> <li>- Oral hearing: Days 30-45</li> </ul> </li> </ul>	<p><b><u>Procedural steps and timetable</u></b></p> <ul style="list-style-type: none"> <li>Parties could adopt, as a default, the procedural steps and timetable provided in the <i>Working Procedures</i>, with the arbitrator responsible for adopting the final schedule after consulting the parties.</li> </ul>

<sup>12</sup> The same adjustments would have to be made with respect to the other aspects of the procedures considered in this table. See footnote 11 above.

Article 17 Appeal	Article 25 Appeal-Arbitration
<ul style="list-style-type: none"> <li>- Circulation of Appellate Report: Days 60-90.<sup>13</sup></li> </ul>	
<p><b><u>Third participant participation</u></b></p> <ul style="list-style-type: none"> <li>• Any third party to the panel proceedings can become a third participant in an appeal.</li> <li>• A third participant files a written submission and/or notifies the Appellate Body Secretariat of any intention to appear at the oral hearing and make an oral statement (Rule 24 of the <i>Working Procedures</i>).</li> </ul>	<p><b><u>Third participant participation</u></b></p> <ul style="list-style-type: none"> <li>• Parties could agree to allow third parties in the panel proceedings to participate in an appeal-arbitration, and they could adopt Rule 24 of the <i>Working Procedures</i> to define this participation.</li> </ul>
<p><b><u>Scope of appellate review</u></b></p> <ul style="list-style-type: none"> <li>• An appeal “shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel” (Article 17.6 of the DSU).</li> <li>• The Appellate Body shall address each of the issues raised (Article 17.12 of the DSU).</li> <li>• The Appellate Body may uphold, modify or reverse legal findings and conclusions of the panel (Article 17.13 of the DSU).</li> </ul>	<p><b><u>Scope of arbitrator’s review</u></b></p> <ul style="list-style-type: none"> <li>• Arbitration may address issues “clearly defined by both parties” (Article 25.1 of the DSU); parties can, therefore, adopt Articles 17.6 and 17.12 of the DSU as the basis for defining the scope of an appeal-arbitration.</li> <li>• Parties could agree that powers of the arbitrators match those of the Appellate Body under Article 17.13 of the DSU.</li> </ul>
<p><b><u>Applicable Law</u></b></p> <ul style="list-style-type: none"> <li>• Under the DSU, the applicable law is the covered agreements, including the DSU.</li> <li>• Of particular note among many relevant DSU provisions: <ul style="list-style-type: none"> <li>- Article 3 of the DSU sets forth general provisions that guide WTO dispute settlement, including the requirements that: dispute settlement seek to ensure the security and predictability of the multilateral trading system; disputes be resolved promptly and consistently with the covered agreements; the covered agreements be interpreted in accordance with customary rules of treaty interpretation; and, recommendations and rulings not add</li> </ul> </li> </ul>	<p><b><u>Applicable Law</u></b></p> <ul style="list-style-type: none"> <li>• As discussed above, Article 25 arbitration falls within the scope of the WTO dispute settlement provisions. The applicable law would, therefore, be the covered agreements, including the DSU.</li> <li>• For the avoidance of doubt, an arbitration agreement could confirm this position, with respect to the applicable substantive and procedural law, and the rules of treaty interpretation.</li> </ul>

<sup>13</sup> Until recently, most Appellate Body reports were circulated within 90 days. In recent cases, the Appellate Body has often been unable to circulate its reports within the 90-day period.



Article 17 Appeal	Article 25 Appeal-Arbitration
<p>to or diminish Members’ rights and obligations.</p> <ul style="list-style-type: none"> <li>- Article 23 of the DSU requires Members to use the DSU’s rules and procedures to settle disputes and to refrain from making unilateral determinations that another Member has breached its obligations.</li> </ul>	
<p><b><u>Process for decision-making</u></b></p> <ul style="list-style-type: none"> <li>• The Appellate Body division assigned to an appeal must take decisions relating to that appeal by consensus, failing which it decides by majority vote (Rule 3.2 of the <i>Working Procedures</i>).</li> <li>• To ensure consistency and coherence, all seven members of the Appellate Body receive all documents filed in an appeal, and the division hearing an appeal shall “exchange views with other Members” before finalizing an Appellate Body report (Rule 4 of the <i>Working Procedures</i>).</li> <li>• Any separate opinions in the Appellate Body report shall be anonymous (Article 17.11 of the DSU).</li> </ul>	<p><b><u>Process for decision-making</u></b></p> <ul style="list-style-type: none"> <li>• Parties could adopt the decision-making process set out in Article 17.11 of the DSU and Rule 3.2 of the <i>Working Procedures</i>.</li> <li>• To ensure consistency and coherence, the parties could agree that the three arbitrators on an appeal-arbitration shall “exchange views” with four other individuals, applying Rule 4 of the <i>Working Procedures</i> by extension; these four other individuals could be selected randomly from the agreed roster, in accordance with the principles applicable to division selection under Rule 6.2 of the <i>Working Procedures</i>.</li> </ul>
<p><b><u>Procedures for the orderly conduct of appellate proceedings</u></b></p> <ul style="list-style-type: none"> <li>• The <i>Working Procedures</i> set out rules for the orderly conduct of appellate proceedings, including: rules of conduct (Rules 8-11); provision for exceptional circumstances (Rule 16); service of documents (Rule 18); <i>ex parte</i> communications (Rule 19); multiple appeals (Rule 23); record transmittal (Rule 25); amendments of notices of appeal (Rule 23bis); conduct of oral hearings (Rule 27); withdrawal of appeals (Rule 30).</li> </ul>	<p><b><u>Procedures for the orderly conduct of an appeal-arbitration proceeding</u></b></p> <ul style="list-style-type: none"> <li>• Parties could agree to adopt the procedures set out in the <i>Working Procedures</i>.</li> </ul>
<p><b><u>Binding effect of the panel and Appellate Body reports</u></b></p> <ul style="list-style-type: none"> <li>• Panel and Appellate Body reports take on their binding effect when they are adopted by the DSB.</li> </ul>	<p><b><u>Binding effect of the panel report and the arbitration award</u></b></p> <ul style="list-style-type: none"> <li>• Article 25 awards are automatically binding when issued by the arbitrator. They are not adopted by the DSB, but are notified to the DSB and relevant Councils or Committees,</li> </ul>

Article 17 Appeal	Article 25 Appeal-Arbitration
<ul style="list-style-type: none"> <li>• During the pendency of appellate proceedings, the adoption of the panel report is suspended.</li> <li>• Following appellate proceedings, the panel and Appellate Body reports are adopted together by the DSB, within 30 days of circulation. Any Member may express its views on a report (Article 17.14 of the DSU).</li> </ul>	<p>where Members may comment on the award.</p> <ul style="list-style-type: none"> <li>• The initiation of an Article 25 appeal-arbitration would not suspend the adoption of a panel report. To address this issue, the arbitration agreement could provide as follows: <ul style="list-style-type: none"> <li>- after the final panel report is issued to the parties, and before it is circulated to all Members, the complainant would suspend the panel proceedings under Article 12.12 of the DSU. The panel's authority would lapse automatically after 12 months, and its report would not be adopted by the DSB;</li> <li>- the appellant would attach the final panel report to its notice of appeal;<sup>14</sup></li> <li>- the arbitrator would attach the final panel report to its award, and formally incorporate the panel's findings and recommendations, as upheld, modified or reversed by the arbitrator. The arbitrator's award would, therefore, formally comprise the final panel report, including any unappealed portions, which would be binding as they form part of the arbitrator's award;</li> <li>- the arbitrator's award, including the final panel report, would be circulated as a WT/DS document in the language of the proceedings, and subsequently circulated in the other WTO working languages.</li> </ul> </li> </ul>

**4. Conclusion**

17. Article 25 appeal-arbitrations could serve as a viable alternative for parties seeking prompt appellate review of panel reports. This alternative would replicate the core features of, and function in substance like, the regular appellate review process under Article 17 of the DSU.

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<sup>14</sup> At this stage, the final panel report would be available only in the language of the proceedings. Thus, the initiation of an appeal would not have to await translation of the report into the other WTO working languages. As described in the table, the final panel report would be translated at a later stage.

At a time when no agreed procedure has been put in place to replace Appellate Body members whose terms have expired, and in view of the Appellate Body's increased workload, use of Article 25 would provide Members with an alternative avenue for providing security and predictability to the multilateral trading system, in the manner intended by the drafters of the DSU.

## **ANNEX**

### ***Article 25 of the DSU***

#### *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.