

# Proactive Release

Date: 26 May 2020

The following Cabinet paper and related Cabinet minute have been proactively released by the Minister for Trade and Export Growth:

***WTO Appellate Body Impasse: Interim Arbitration Arrangement***

***(CAB-20-MIN-0159 refers)***

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to redaction codes:

- 6(a): to avoid prejudicing the international relations of the New Zealand Government; and
- 9(2)(j): to avoid prejudice to negotiations.

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# Cabinet Business Committee

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### WTO Appellate Body Impasse: Interim Arbitration Arrangement

**Portfolio**                      **Trade and Export Growth**

On 8 April 2020, the Cabinet Business Committee:

- 1        **noted** that the current impasse concerning appointments to the WTO Appellate Body represents an unprecedented threat to the rules-based multilateral trading system;
- 2        **noted** that restoring a functioning Appellate Body remains a priority and the preferred outcome for New Zealand;
- 3        **noted** that an interim arbitration arrangement is being discussed between a number of WTO Members, in order to preserve a two-stage dispute settlement system in any trade disputes between them for the period the WTO Appellate Body is unable to hear appeals;
- 4        **agreed** that New Zealand join the interim arbitration arrangement for trade disputes, as set out in the Appendix, in order to preserve a second tier of review;
- 5        **authorised** the Minister for Trade and Export Growth to make the final decision on joining the interim arbitration arrangement if any changes to the text are proposed, provided such changes are consistent with the objective of preserving a dispute settlement system compatible with New Zealand's existing rights and obligations;
- 6        **noted** that Cabinet processes would be followed prior to entering into an arbitration agreement with another participating Member in any future dispute;
- 7        **agreed** that s9(2)(j)                      be nominated as New Zealand's candidate for the pool of arbitrators established under the interim arrangement.

Vivien Meek  
Committee Secretary

**Present:**

Rt Hon Jacinda Ardern (Chair)  
Rt Hon Winston Peters  
Hon Grant Robertson  
Hon Phil Twyford  
Hon Dr Megan Woods  
Hon Chris Hipkins  
Hon Andrew Little  
Hon Carmel Sepuloni  
Hon Dr David Clark  
Hon David Parker  
Hon Nanaia Mahuta  
Hon Jenny Salesa  
Hon Damien O'Connor  
Hon Kris Faafoi  
Hon Ron Mark  
Hon Tracey Martin  
Hon James Shaw

**Officials present from:**

Office of the Prime Minister  
Department of the Prime Minister and Cabinet  
Treasury

Proactively released by the Minister for Trade and Export Growth



# Cabinet

## Minute of Decision

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### Report of the Cabinet Business Committee: Period Ended 9 April 2020

On 14 April 2020, Cabinet made the following decisions on the work of the Cabinet Business Committee for the period ended 9 April 2020:

OUT OF SCOPE

CBC-20-MIN-0024	<b>WTO Appellate Body Impasse: Interim Arbitration Arrangement</b> Portfolio: Trade and Export Growth	CONFIRMED
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OUT OF SCOPE

OUT OF SCOPE

Michael Webster  
Secretary of the Cabinet

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Chair,

Cabinet Economic Development Committee (DEV)

## WTO Appellate Body Impasse: Interim Arbitration Arrangement

### **Proposal**

- 1 This paper seeks agreement for New Zealand to join an interim arbitration arrangement for trade disputes between WTO Members for the period the WTO Appellate Body is unable to hear appeals. It also seeks agreement to nominate s9(2)(j) as New Zealand's candidate for a pool of arbitrators established under the interim arrangement.

### **Relation to government priorities**

- 2 The interim arbitration arrangement is designed to preserve New Zealand's ability to enforce its international trade law rights through the WTO's dispute settlement system for the period the WTO Appellate Body is unable to function. Cabinet approval is sought because of the expectation that, in the event of any future trade dispute between New Zealand and another participating WTO Member, New Zealand would enter into a legally binding arbitration agreement in order to access a second tier of review. I note that Cabinet processes would be followed prior to entering into any arbitration agreement in future, given its legally-binding treaty status.
- 3 The WTO's dispute settlement system applies only to trade disputes between WTO Members (i.e. countries and customs territories), and is not accessible by private investors. The interim arbitration arrangement similarly applies only to trade disputes between WTO Members.
- 4 In light of COVID-19 developments, the WTO has advised Members that all meetings are suspended until the end of April. This is not expected to impact the process for agreeing the interim arbitration arrangement, however, which could be done in writing or at a virtual meeting of WTO Members.

### **Background**

- 5 Since its creation in 1995, the WTO's dispute settlement system has been a cornerstone of the rules-based multilateral trading system. Decisions are legally binding on WTO Members, subject to a second tier of review, and can be enforced through approved prospective trade sanctions. Resolving trade issues on the basis of rules – rather than the relative power of the Members involved – has underpinned the last 25 years of rules-based trading relations. The late Mike Moore, when Director-General of the WTO, described its

dispute settlement system as “the jewel in its crown”. New Zealand has used the WTO dispute settlement system sparingly but effectively, bringing eight successful cases against trading partners since 1995 (and have not had to defend any challenges).

- 6 Since 2016 the US has been blocking the appointment of new members to the Appellate Body, responsible for carrying out the second tier of review in disputes. The US has cited a number of concerns regarding the functioning of the Appellate Body as justification for its refusal to allow new appointments. Without new appointments the Appellate Body is now down to one member (out of seven), and is no longer able to hear appeals in new trade disputes which requires a minimum quorum of three.
- 7 New Zealand has been active in seeking to find a solution to the Appellate Body impasse. The Prime Minister, Ministers and Senior Officials have used a range of international engagements to press the importance of a functioning WTO dispute settlement system and seek engagement on the issue from like-minded partners. Our Permanent Representative to the WTO, Ambassador David Walker, led a multilateral process in Geneva to try to find a solution to the impasse. However, the US remains unmoved in its block of new Appellate Body appointments.
- 8 The inability for the WTO to conclusively resolve trade disputes represents an unprecedented threat to the rules-based multilateral trading system. This is because Members that lose cases before first-instance WTO panels could avoid complying with the panel report by appealing to the non-functioning Appellate Body. In effect, Members could use their rights to appeal a first-instance report ‘into the void’. In addition, Members often comply with their WTO obligations in the ‘shadow’ of possible WTO cases. <sup>s6(a)</sup>

<sup>s6(a)</sup>

This carries significant risk for small, export-reliant countries like New Zealand.

- 9 New Zealand joined 16 other WTO Members<sup>1</sup> in a Ministerial Statement at Davos in January this year, reiterating our shared commitment to finding a lasting solution to the Appellate Body impasse. In this statement Ministers also agreed to commence work towards putting in place an interim solution that would allow for appeals of WTO panel reports between the willing. The subsequent negotiation on an arbitration arrangement (led by the EU) attracted the broadest buy-in as a viable interim solution, with participating Members demonstrating significant flexibility to reach agreement.

### **New Zealand’s participation in the interim arbitration arrangement**

- 10 The text of the interim arbitration arrangement has been agreed by participating Members at Ambassador-level in Geneva, and is set out in the Appendix to this paper. To date the participants in discussions have been Australia, Brazil, Canada, China, <sup>s6(a)</sup> Chile, Colombia, Costa

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<sup>1</sup> Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union, Guatemala, Republic of Korea, Mexico, Norway, Panama, Singapore, Switzerland and Uruguay.

Rica, the EU, Guatemala, Hong Kong, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, and Uruguay. I understand that s6(a) is also considering joining the proposal. Each participating Member is now working through their respective domestic procedures needed to officially join the arrangement.

- 11 Under the arrangement, instead of appealing a panel's first-instance report to the non-functioning Appellate Body, participating Members that are in a dispute will agree to enter into an arbitration procedure in order to access a second tier of review. The legal basis for the arbitration is Article 25 of the *WTO Dispute Settlement Understanding* (DSU), which currently provides an alternative means of dispute settlement for parties. The procedures for the arbitration – once entered into by disputing parties – are intended to closely replicate those for Appellate Review set out in Article 17 of the DSU. This includes timeframes, limiting reviews to issues of law rather than fact, and preserving the ability for third party Members with an interest in the dispute to participate. Disputing parties will agree to abide by the arbitrators' findings, as is currently the case with Appellate Body findings.
- 12 The interim arbitration arrangement will itself be established through a Communication notified to the WTO Dispute Settlement Body, which will be 'endorsed' by participating Members. Importantly, the interim arrangement will be open to any WTO Member willing to join it in the future.
- 13 The EU has signalled it will target agreement and notification to WTO Members at a meeting of the WTO Dispute Settlement Body currently scheduled for 29 April 2020. I consider it important that New Zealand be in a position to endorse the arrangement at the time it is stood-up. Aside from New Zealand's direct interest in being able to enforce and defend our trade law rights, the interim arrangement will also have systemic value by sending a signal to the global community that the system of trade rules remains strong. This is particularly important at a time of unprecedented global uncertainty, with the arrangement a "ready to go" boost to the rules-based international trading system.

#### **New Zealand's nomination for the pool of arbitrators**

- 14 Once the arrangement is established, participating Members will compose a pool of 10 arbitrators (from which three will be drawn to hear any appeal). Each participant in the interim arrangement will have the opportunity to nominate one candidate for this pool. The pool of arbitrators must comprise of persons of recognised authority, with demonstrated expertise in law, international trade, and the subject matter of the WTO agreements generally. Participating Members agree that the composition of the pool must ensure an appropriate overall balance, including gender. Arbitrators must be unaffiliated with any government while serving.
- 15 Nominations must be made by participants within 30 days of the interim arrangement being notified to WTO Members. It is important that we are in a position to nominate a New Zealand candidate within this 30-day timeframe. Members that join the arrangement at a later date will not have the



opportunity to nominate a candidate until a review of the pool is carried out by participants after two years, or when an existing arbitrator resigns.

- 16 Having had regard to the expressions of interest received in a public process run in late-2019 by the Ministry of Foreign Affairs and Trade when updating New Zealand's list of WTO panellists, I propose that s9(2)(j) be nominated by New Zealand for the pool of arbitrators established under the interim arrangement. s9(2)(j) has extensive experience in international trade law, and is a person of recognised authority in the international legal community. s9(2)(j)

### **Financial Implications**

- 17 There are no financial implications associated with endorsing the interim arbitration arrangement. As the possibility of arbitration is included in the relevant WTO agreement, arbitrators' costs should be met by the WTO through its existing operating budget. It is possible, however that participating Members may need to agree to a different system for arbitrators' costs in the future. If significant operational costs were to materialise, New Zealand could review its participation in the arrangement.

### **Legislative Implications**

- 18 The recommendations in this paper do not have legislative implications.

### **Impact Analysis**

- 19 The recommendations in this paper do not require an impact analysis.

### **Population Implications**

- 20 The recommendations in this paper do not have population implications.

### **Human Rights**

- 21 No inconsistencies have been identified with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

### **Consultation**

- 22 The Treasury, Department of Prime Minister and Cabinet (Policy Advisory Group), Ministry for Primary Industries, and Ministry for Business, Innovation and Employment have been consulted on this paper and agree with the recommendations made.

### **Communications**

- 23 The Minister for Trade and Export Growth will announce New Zealand's endorsement of the interim arbitration arrangement in a press release shortly

after the arrangement has been established and notified to WTO Members in Geneva.

### **Proactive Release**

- 24 The Minister for Trade and Export Growth intends to proactively release this paper, subject to any appropriate redactions provided for in the Official Information Act 1982 to protect legal professional privilege or to avoid prejudice to the international relations of the Government of New Zealand.

### **Recommendations**

- 25 The Minister for Trade and Export Growth recommends that the Committee:
- 1 **note** that the current impasse concerning appointments to the WTO Appellate Body represents an unprecedented threat to the rules-based multilateral trading system;
  - 2 **note** that restoring a functioning Appellate Body remains a priority and the preferred outcome for New Zealand;
  - 3 **note** that an interim arbitration arrangement is being discussed between a number of WTO Members, in order to preserve a two-stage dispute settlement system in any trade disputes between them for the period the WTO Appellate Body is unable to hear appeals;
  - 4 **agree** that New Zealand join the interim arbitration arrangement for trade disputes, as set out in the Appendix, in order to preserve a second tier of review;
  - 5 **authorise** the Minister for Trade and Export Growth to make the final decision on joining the interim arbitration arrangement if any changes to the text are proposed, provided such changes are consistent with the objective of preserving a dispute settlement system compatible with New Zealand's existing rights and obligations;
  - 6 **note** that Cabinet processes would be followed prior to entering into an arbitration agreement with another participating Member in any future dispute; and
  - 7 **agree** that s9(2)(j) be nominated as New Zealand's candidate for the pool of arbitrators established under the interim arrangement.

Authorised for lodgement

Hon David Parker

Minister for Trade and Export Growth

## Appendix: Text of the Interim Arbitration Arrangement

### MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT PURSUANT TO ARTICLE 25 OF THE DSU

*[NB: this communication will be notified to the DSB pursuant to the “Statement on a mechanism for developing, documenting and sharing practices in the conduct of WTO disputes” (JOB/DSB/1) and circulated as document JOB/DSB/1/Add.12]*

[Members endorsing this communication] (hereafter the “participating Members”)

*Re-affirming* their commitment to a multilateral rules-based trading system,

*Acknowledging* that a functioning dispute settlement system of the WTO is of the utmost importance for a rules-based trading system, and that an independent and impartial appeal stage must continue to be one of its essential features,

*Determined* to work with the whole WTO Membership to find a lasting improvement to the situation relating to the Appellate Body as a matter of priority, and to launch the selection processes as soon as possible, so that it can resume its functions as envisaged by the DSU,

*Resolved*, in the interim, to put in place contingency measures based on Article 25 of the DSU in order 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, and thereby to preserve their rights and obligations under the WTO Agreement,

*Desiring* to also preserve the possibility of a binding resolution of disputes at panel stage, if no party chooses to appeal under this arrangement, through the adoption of panel reports by the DSB by negative consensus,

*Re-affirming* that consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members and that arbitration awards cannot add to or diminish the rights and obligations provided in the covered agreements,

*Underlining* the interim nature of this arrangement,

In view of these extraordinary circumstances, envisage resorting to the following multi-party interim appeal arbitration arrangement (hereafter the “MPIA”):

1. The participating Members indicate their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure (hereafter the “appeal arbitration procedure”), as long as the Appellate Body is not able to hear appeals of panel reports in disputes among them due to an insufficient number of Appellate Body members.
2. In such circumstances, the participating Members will not pursue appeals under Articles 16.4 and 17 of the DSU.
3. The appeal arbitration procedure will be based on the substantive and procedural aspects of Appellate Review pursuant to Article 17 of the DSU, in order to keep its core features, including independence and impartiality, while enhancing the procedural efficiency of appeal proceedings. The appeal arbitration procedure is set out in Annex 1.

4. In particular, the participating Members envisage that, under the appeal arbitration procedure, appeals will be heard by three appeal arbitrators selected from the pool of 10 standing appeal arbitrators composed by the participating Members in accordance with Annex 2 (hereafter the “pool of arbitrators”).<sup>2</sup> The pool of arbitrators will comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They will be unaffiliated with any government. They will not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. The composition of the pool of arbitrators will ensure an appropriate overall balance.

5. Members of the pool of arbitrators will stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA. In order to promote consistency and coherence in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable.

6. The selection from the pool of arbitrators for a specific dispute will be done on the basis of 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, including the principle of rotation.<sup>3</sup> The WTO Director General will notify the parties and third parties of the results of the selection.

7. The participating Members envisage that appeal arbitrators will be provided with appropriate administrative and legal support, which will offer the necessary guarantees of quality and independence, given the nature of the responsibilities involved. The participating Members envisage that the support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels and be answerable, regarding the substance of their work, only to appeal arbitrators. The participating Members request the WTO Director General to ensure the availability of a support structure meeting these criteria.

8. The participating Members also envisage limited adjustments to panel procedures in disputes covered by the MPIA, to the extent it is necessary to facilitate the proper administration of the appeal arbitration procedure, should a party decide to appeal under this procedure. If no party appeals the panel report under the appeal arbitration procedure, the participating Members envisage that the panel report will be formally circulated for adoption by the DSB by negative consensus.

9. The MPIA applies to any future dispute between any two or more participating Members, including the compliance stage of such disputes, as well as to any such dispute pending on the date of this communication, except if the interim panel report, in the relevant stage of that dispute, has already been issued on that date.<sup>4</sup>

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<sup>2</sup> Should a need arise to select arbitrators to serve on a specific dispute while the pool of arbitrators has not yet been composed, the parties to that dispute will agree on the selection procedures applicable to that dispute. This footnote will cease to apply six months after the date of the multi-party communication, unless all the participating Members agree to extend it.

<sup>3</sup> However, at the request of a party to a dispute, any member of the pool of arbitrators who is not a national of a participating Member will be excluded from the selection process. Two nationals of the same Member may not serve on the same case.

<sup>4</sup> This is without prejudice to the right of the parties to decide to apply appeal arbitration procedures, such as those contained in Annex 1, to more advanced disputes on an *ad hoc* basis.

10. In order to render the appeal arbitration procedure operational in particular disputes, the participating Members indicate their intention to enter into the arbitration agreement (the “appeal arbitration agreement”) contained in Annex 1 to this communication and to notify that agreement pursuant to Article 25.2 of the DSU within 60 days after the date of the establishment of the panel. For pending disputes where, on the date of this communication, the panel has already been established but an interim report has not yet been issued, the participating Members will enter into the appeal arbitration agreement and notify that agreement pursuant to Article 25.2 of the DSU within 30 days after the date of this communication.

11. With respect to a specific dispute, parties to that dispute may, without prejudice to the principles set forth in this communication, mutually agree to depart from the procedures set out in the appeal arbitration agreement.

12. Any WTO Member is welcome to join the MPIA at any time, by notification to the DSB that it endorses this communication. In relation to disputes to which such WTO Member is a party, the date of that Member's notification to the DSB will be deemed to be the date of this communication for the purposes of paragraphs 9 and 10.

13. The participating Members will review the MPIA one year after the date of this communication. The review may concern any feature of the MPIA.

14. A participating Member may decide to cease its participation in the MPIA, by notifying to the DSB the withdrawal of its endorsement of this communication. However, subject to paragraph 9, the participating Members intend for the MPIA to continue to apply to disputes pending on the date of such withdrawal. Furthermore, any appeal arbitration agreement entered into under paragraph 10 will remain in effect.

15. The participating Members remain committed to resolving the impasse of the Appellate Body appointments as a matter of priority and envisage that the MPIA will remain in effect only until the Appellate Body is again fully functional. However, any appeal arbitration agreement entered into under paragraph 10 will remain in effect, unless the parties agree otherwise.

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## ANNEX 1

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

1. In order to give effect to communication JOB/DSB/1/Add.12 in this dispute [the parties to the dispute] (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 report<sup>5</sup> as issued to the parties in dispute DS X. Any 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 at the date on which the final panel report is issued to the parties, 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 final 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 final 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 any 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 the following, before the suspension takes effect:

- 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 working languages of the WTO to the parties and to the third parties<sup>6</sup>.

<sup>5</sup> For greater certainty, this includes any final panel report issued in compliance proceedings pursuant to Article 21.5 of the DSU.

<sup>6</sup> 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 18, 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 20 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 working languages of the WTO. The Notice of Appeal shall be simultaneously notified to the other party or parties 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 from the pool of 10 standing appeal arbitrators composed in accordance with paragraph 4 of communication JOB/DSB/1/Add.12 (hereafter the “pool of arbitrators”).<sup>7</sup> The selection from the pool of arbitrators will be done on the basis of 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, including the principle of rotation.<sup>8</sup> The WTO Director General will notify the parties and third parties of the results of the selection. 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 arbitrators.

8. In order to give effect to paragraph 5 of communication JOB/DSB/1/Add.12 in this dispute, the arbitrators may discuss their decisions relating to the appeal with all of the other members of the pool of arbitrators, without prejudice to the exclusive responsibility and freedom of the arbitrators with respect to such decisions and their quality. All members of the pool of arbitrators shall receive any document relating to the appeal.

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 together with the arbitrators’ own findings.

10. The arbitrators shall only address those issues that are necessary for the resolution of the dispute. They shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues.

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<sup>7</sup> If the pool of arbitrators has not been composed, footnote 1 to paragraph 4 of communication JOB/DSB/1/Add.12 shall apply.

<sup>8</sup> However, at the request of a party to a dispute, any member of the pool of arbitrators who is not a national of a participating Member shall be excluded from the selection process. Two nationals of the same Member shall not serve on the same case.

11. 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<sup>9</sup>. The arbitrators 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.

12. The parties request the arbitrators to issue the award within 90 days following the filing of the Notice of Appeal. To that end, the arbitrators may take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the parties and due process. Such measures may include decisions on page limits, time limits and deadlines as well as on the length and number of hearings required.

13. If necessary in order to issue the award within the 90 day time-period, the arbitrators may also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.<sup>10</sup>

14. On a proposal from the arbitrators, the parties may agree to extend the 90 day time-period for the issuance of the award.

15. 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, but not adopted by, the DSB and to the Council or Committee of any relevant agreement.

16. 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 arbitrators. Rule 24 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.

17. 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.

18. At any time during the arbitration, the appellant, or other appellant, may withdraw its appeal, or other appeal, by notifying the arbitrators. This notification shall also be notified to the panel and third parties, at the same time as the notification to the arbitrators. If no other appeal or appeal remains, the notification shall be deemed to constitute a joint request by the parties to resume panel proceedings under Article 12.12 of the DSU<sup>11</sup>. If an other appeal or appeal remains at the time an appeal or other appeal is withdrawn, the arbitration shall continue.

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<sup>9</sup> For greater certainty, paragraphs 14 – 17 of the Rules of Conduct shall apply to arbitrators.

<sup>10</sup> For greater certainty, the proposal of the arbitrators is not legally binding and it will be up to the party concerned to agree with the proposed substantive measures. The fact that the party concerned does not agree with the proposed substantive measures shall not prejudice the consideration of the case or the rights of the parties.

<sup>11</sup> If the authority of the panel has lapsed pursuant to Article 12.12 of the DSU, the arbitrators shall issue an award that incorporates the findings and conclusions of the panel in their entirety.



19. 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 18<sup>12</sup>.

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Proactively released by the Minister for Trade and Export Growth

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<sup>12</sup> For greater certainty, should any of these requests not be granted by the panel, the parties will agree on alternative procedural modalities to preserve the effects of the relevant provisions of these agreed procedures.

## ANNEX 2

### COMPOSITION OF THE POOL OF ARBITRATORS PURSUANT TO PARAGRAPH 4 OF COMMUNICATION JOB/DSB/1/ADD.12

After the notification of the present communication to the DSB, the participating Members will

promptly commence the composition process. The following will apply:

1. Each participating Member may nominate one candidate, by notifying the other participating Members<sup>13</sup>.
2. The deadline for nominations will expire 30 days after the date of this communication.
3. The candidates will undergo a pre-selection process in order to ensure that the pool of arbitrators comprises only persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

The participating Members envisage that this pre-selection process will be carried out by a pre-selection committee composed of the WTO Director General, and the Chairperson of the DSB, the Chairpersons of the Goods, Services, TRIPS and General Councils. The pre-selection committee will, after appropriate consultations, recommend to the participating Members the candidates who meet the above criteria.

The participating Members envisage the completion of this pre-selection process within one month following the expiry of the deadline to nominate candidates.

4. The participating Members will compose the pool of arbitrators by consensus. The participating Members will endeavour to compose the pool of arbitrators within three months following the date of this communication. They will notify the pool of arbitrators to the DSB, as addendum to this communication. The composition of the pool of arbitrators will ensure an appropriate overall balance.

5. The composition of the pool of arbitrators may be modified by agreement of all participating Members at any time. The participating Members underscore the interim nature of this arrangement. Should the conditions laid down in paragraph 15 of the communication remain for a longer period of time, the participating Members will, periodically, partially re-compose the pool of arbitrators, starting two years after composition, in line with the procedures established in this Annex.

6. Should a need arise to complete the pool of arbitrators, for instance following the resignation of a member of the pool, the procedure set out above will apply.

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<sup>13</sup> For greater certainty, current or former Appellate Body members may be nominated as candidates. If nominated as candidates, they will not undergo the pre-selection process set out in paragraph 3 of this Annex.