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CANADA – MEASURES GOVERNING THE SALE OF WINE

AGREED PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU

The following communication, dated 29 May 2020, from the delegation of Australia and the delegation of Canada to the Chairperson of the Dispute Settlement Body, is circulated at the request of these delegations.

Pursuant to Article 25.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Australia and Canada notify the Dispute Settlement Body that they have agreed to the attached Procedures for Arbitration under Article 25 of the DSU in the *Canada – Measures Governing the Sale of Wine* (DS537) dispute.

Australia and Canada jointly request that you notify all Members through circulation of those Procedures in the DS document series for that dispute.

CANADA-AUSTRALIA AGREED PROCEDURES FOR ARBITRATION
UNDER ARTICLE 25 OF THE DSU IN THE DISPUTE
CANADA - MEASURES GOVERNING THE SALE OF WINE (DS537)

1. In order to give effect to communication JOB/DSB/1/Add.12 in this dispute, Canada and Australia (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 report¹ issued to the parties in the dispute *Canada - Measures Governing the Sale of Wine* (DS537). 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 the arbitration under these agreed procedures, the parties hereby jointly request the panel in DS537 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, subject to the protection of business confidential information ("BCI") in accordance with the panel's adopted procedures for the protection of BCI ("BCI procedures");
- 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*; and,
- iii. subject to the protection of BCI in accordance with the panel's adopted BCI procedures, the transmission of a confidential and non-confidential version of the final panel report in the working languages of the WTO to the parties and to the third parties.²

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 non-confidential final panel report in the working

¹ For greater certainty, this includes any final panel report issued in compliance proceedings pursuant to Article 21.5 of the DSU.

² The parties confirm that it is not their intention that the panel report be circulated within the meaning of Article 16 of the DSU.

languages of the WTO. The Notice of Appeal shall be simultaneously notified to the other party and to the third parties in the panel proceedings. Rules 20-23 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.

6. Subject to paragraph 2, where the arbitration has not been initiated under these agreed procedures, the parties shall be deemed to have agreed not to appeal the panel report pursuant to Articles 16.4 and 17 of the DSU, with a view to its adoption by the Dispute Settlement Body ("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 (the "pool of arbitrators").³ 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.⁴ 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 Procedures 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.

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.⁵ It also includes, *mutatis mutandis*, the panel's BCI procedures that were applicable at the time of the suspension of the panel proceedings pursuant to paragraph 4.⁶ The arbitrators may adapt the Working Procedures for Appellate Review and the timetable for appeals provided for therein, as well as the BCI procedures, 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.

³ If the pool of arbitrators has not been composed, footnote 1 to paragraph 4 of communication JOB/DSB/1/Add.12 shall apply.

⁴ 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.

⁵ For greater certainty, paragraphs 14 – 17 of the Rules of Conduct shall apply to arbitrators.

⁶ For greater certainty, references in the panel's BCI procedures to the "Panel" shall, in these arbitration proceedings, be understood as references to the "arbitrators".

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.⁷

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.⁸ If an other appeal or appeal remains at the time an appeal or other appeal is withdrawn, the arbitration shall continue.

19. The parties shall jointly notify these agreed procedures to the panel in *Canada - Measures Governing the Sale of Wine* (DS537) and ask the panel to grant, where applicable, the joint requests formulated in paragraphs 3, 4, 6, and 18.⁹

⁷ 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.

⁸ 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.

⁹ 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.