



25 March 2022

(22-2528)

Page: 1/5

Original: English

**TURKEY – CERTAIN MEASURES CONCERNING THE PRODUCTION,
IMPORTATION AND MARKETING OF PHARMACEUTICAL PRODUCTS**

AGREED PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU

The following communication, dated 22 March 2022, from the delegation of Turkey and the delegation of the European Union to the Chairperson of the Dispute Settlement Body, is circulated at the request of these delegations.

The parties to the dispute DS 583 "*Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*" have agreed the attached Procedures for Arbitration under Article 25 of the DSU (the "Arbitration Agreement"). Pursuant to Article 25.2 of the DSU, the parties request you to notify the Arbitration Agreement to all Members as soon as possible.

Turkey – Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products (DS583)

AGREED PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU

1. Taking into account that the Appellate Body is not presently able to hear an appeal¹ in this dispute the European Union and Turkey (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 report² as issued to the parties in dispute DS583. 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.

The parties note that, with regard to the present panel proceedings, the panel has already notified the parties of the anticipated date of circulation of the final report within the meaning of Article 16 of the DSU.

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 note that the present panel proceedings were already suspended on 20 December 2021 (until 21 January 2022), which suspension was extended on 20 January 2022 (until 11 February 2022), on 9 February 2022 (until 25 February 2022) and on 23 February 2022 (until 25 March 2022). The notification of the present agreement to the panel shall be deemed to constitute a joint request by the parties for further indefinite suspension 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 immediate transmission of the final panel report, on a provisional basis, to the arbitrators and the lifting of confidentiality for that sole purpose;
- 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*;

¹ The parties recall that, in concluding this agreement, they aim to maintain their rights and obligations under the WTO dispute settlement system, including its mandatory and binding character and two levels of adjudication through an independent and impartial review of panel reports, until such time as the Appellate Body may again be able to hear appeals pursuant to Articles 16.4 and 17 of the DSU.

² For greater certainty, this includes any final panel report issued in compliance proceedings pursuant to Article 21.5 of the DSU.

- iii. the lifting of confidentiality with respect of the final panel report under the Working Procedures of the panel and the transmission of the final panel report, duly adjusted for translation, in the working languages of the WTO to the parties, to the third parties and to the arbitrators.³

The parties note that the present panel proceedings are already suspended but, by way of derogation therefrom, nevertheless affirm the limited joint requests in the preceding paragraph, to be executed, to the extent relevant, with effect from the date of the filing of a Notice of Appeal, and as soon as the arbitrators are appointed.

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 30 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*.

The parties agree that, because the present panel proceedings have already been suspended, the time limit for the filing of a Notice of Appeal shall be no later than 30 days from the date on which this agreement is notified to the DSB.

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 randomly selected, in the physical presence of representatives of the parties, from a combined list of former Appellate Body Members and appeal arbitrators.⁴ The random selection will be conducted at the same time as the random selection in *DS595 European Union — Safeguard Measures on Certain Steel Products*, so as to ensure that one randomly selected appeal is heard by two former Appellate Body Members and one MPIA appeal arbitrator whilst the appeal in the other dispute is heard by one former Appellate Body Member and two MPIA appeal arbitrators. If there is only one appeal it will be heard by one former Appellate Body Member, one MPIA appeal arbitrator, and the third person shall be drawn at random from the remaining persons on the combined list. The random selection shall be made immediately after the filing of any notice of appeal and the arbitrators informed immediately. The parties and third parties will be informed of the results of the selection immediately, once any notice of cross-appeal has been filed. 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. In the event of compliance appeal arbitration proceedings the arbitrators shall be the same persons that adjudicated the previous appeal arbitration proceedings, if available. If a person is not available or becomes unavailable in the original or any compliance proceedings, a replacement shall be drawn at random from the combined list of persons who are available. If no persons are available on the combined list, the parties shall agree on a reasonable method for appointing a replacement, taking into account the approach used in the original proceedings. If no agreement can be reached within one month, either party may request the Director-General to appoint a replacement, taking into account the approach used in the original proceedings.

8. In order to promote consistency and coherence in decision making in this dispute and in dispute *DS595 European Union — Safeguard Measures on Certain Steel Products*, the arbitrators may, upon consultation of the parties, inform the arbitrators in the other dispute of the issues susceptible to be adjudicated, who may comment thereon, without prejudice to the exclusive responsibility and freedom of the arbitrators in this dispute with respect to such decisions and their quality, and without

³ The parties confirm that it is not their intention that the panel report be circulated within the meaning of Article 16 of the DSU.

⁴ JOB/DSB/1/Add.12/Suppl.5, 3 August 2020.

prejudice to their independence and impartiality. Where necessary, the arbitrators in both appeals may receive any document relating to the other 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. 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.⁵

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.⁶ If an other appeal or appeal remains at the time an appeal or other appeal is withdrawn, the arbitration shall continue.

⁵ 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.

⁶ 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 DS583 and ask the panel to grant, where applicable, the joint requests formulated in paragraphs 4, 6, and 18.⁷

⁷ 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.