

DECISIONS

COUNCIL DECISION (EU) 2023/142

of 17 January 2023

on the position to be taken on behalf of the European Union in the Committee on Trade and Sustainable Development established under the Agreement between the European Union and Japan for an Economic Partnership as regards the establishment of a list of individuals who are willing and able to serve as experts and the adoption of the rules of procedure for the panel of experts

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4), first subparagraph, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Agreement between the European Union and Japan for an Economic Partnership ('the Agreement') was concluded by the Union by Council Decision (EU) 2018/1907 ⁽¹⁾ and entered into force on 1 February 2019.
- (2) Pursuant to Article 16.18(4), point (d), of the Agreement, the Committee on Trade and Sustainable Development (the 'Committee') is to establish a list of at least 10 individuals who are willing and able to serve as experts on the panel to be convened to examine matters concerning the interpretation or application of the relevant Articles of Chapter 16.
- (3) Pursuant to Article 16.18(2) of the Agreement, the Committee is to adopt the rules of procedure for the panel of experts.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Committee, as the envisaged decision will be binding on the Union.
- (5) Pursuant to Article 22.3(3) of the Agreement, the Committee may take decisions in writing.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf within the Committee on Trade and Sustainable Development established under the Agreement between the European Union and Japan for an Economic Partnership as regards the establishment of the list of individuals who are willing and able to serve as experts and the adoption of the rules of procedure for the panel of experts, as referred to in Article 16.18 of that Agreement, shall be based on the draft decision of the Committee attached to this Decision.

Article 2

This Decision shall enter into force on the date of its adoption.

⁽¹⁾ Council Decision (EU) 2018/1907 of 20 December 2018 on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership (OJ L 330, 27.12.2018, p. 1).

Done at Brussels, 17 January 2023.

For the Council
The President
E. SVANTESSON

DRAFT**DECISION No .../2023 OF THE COMMITTEE ON TRADE AND SUSTAINABLE DEVELOPMENT
UNDER THE AGREEMENT BETWEEN THE EUROPEAN UNION AND JAPAN FOR AN ECONOMIC
PARTNERSHIP****of ...****concerning the establishment of the list of individuals who are willing and able to serve as experts,
and the adoption of rules of procedure for the panel of experts**

THE COMMITTEE ON TRADE AND SUSTAINABLE DEVELOPMENT,

Having regard to the Agreement between the European Union and Japan for an Economic Partnership (the “EU-Japan EPA”) and in particular paragraph 2 and subparagraph 4(d) of Article 16.18 thereof,

Whereas:

- (1) Subparagraph 4(d) of Article 16.18 of the EU-Japan EPA provides that the Committee on Trade and Sustainable Development (the “Committee”) is to establish a list of at least 10 individuals who are willing and able to serve as experts pursuant to that Article,
- (2) Paragraph 2 of Article 16.18 of the EU-Japan EPA provides that the Committee is to adopt the rules of procedure for the panel of experts,

HAS ADOPTED THIS DECISION:

Article 1

The list of individuals who are willing and able to serve as experts is established as set out in Annex 1 to this Decision.

Article 2

The rules of procedure for the panel of experts are adopted as set out in Annex 2 to this Decision.

Article 3

The list of individuals and the rules of procedure for the panel of experts set out in Annex 1 and Annex 2 to this Decision in accordance with paragraph 2 and subparagraph 4(d) of Article 16.18 of the EU-Japan EPA shall be valid from the date of adoption of this Decision.

Done at ...

*For the Committee on Trade and
Sustainable Development
Chair*

ANNEX 1

LIST OF EXPERTS REFERRED TO IN SUBPARAGRAPH 4(d) OF ARTICLE 16.18 OF THE EU-JAPAN EPA

Sub-list for the European Union

1. Jorge CARDONA
2. Karin LUKAS
3. Laurence BOISSON DE CHAZOURNES
4. Geert VAN CALSTER

Sub-list for Japan

1. AGO Shin-ichi
2. TAKAMURA Yukari
3. TAMADA Dai
4. YAGI Nobuyuki

Sub-list of individuals who are not nationals of either Party and who shall act as the chairperson of the panel

1. Armand DE MESTRAL (Canada)
 2. Jennifer A. HILLMAN (United States)
 3. Arthur Edmond APPLETON (United States)
 4. Nathalie BERNASCONI (Switzerland)
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ANNEX 2

RULES OF PROCEDURE OF THE PANEL OF EXPERTS

In procedures of panel of experts under Chapter 16 (Trade and Sustainable Development) of the Agreement between the European Union and Japan for an Economic Partnership, the following rules apply:

I. Definitions

1. In these Rules of Procedure:

- (a) 'administrative staff', in respect of an expert, means persons under the direction and control of the expert, other than assistants;
- (b) 'adviser' means a person retained by a Party to advise or assist that Party for the purposes of the panel procedure, other than representatives of that Party;
- (c) 'Agreement' means the Agreement between the European Union and Japan for an Economic Partnership;
- (d) 'assistant' means a person who, under the terms of appointment of an expert, conducts research or provides assistance to that expert;
- (e) 'Code of Conduct' means the Code of Conduct for Arbitrators referred to in Article 21.30 of the Agreement and adopted by Decision No 1/2019 of 10 April 2019 of the Joint Committee of the Agreement;
- (f) 'Committee' means the Committee on Trade and Sustainable Development established pursuant to Article 22.3 of the Agreement;
- (g) 'days' means calendar days;
- (h) 'expert' means a member of a panel;
- (i) 'panel' means a panel of experts convened pursuant to paragraph 1 of Article 16.18 of the Agreement;
- (j) 'proceedings' means the proceedings of the panel;
- (k) 'representative' with respect to a Party means an official or any other person of a government department or agency or any other public entity of a Party and other personnel, that the Party nominates as its representative for the purpose of the panel proceedings;
- (l) 'requesting Party' means the Party that requests the convening of a panel pursuant to paragraph 1 of Article 16.18 of the Agreement; and
- (m) 'responding Party' means the Party that receives a request from the requesting Party that a panel of experts be convened pursuant to paragraph 1 of Article 16.18 of the Agreement.

II. Appointment of experts

- 2. The co-chair of the requesting Party of the Committee shall be responsible for the organisation of the lot referred to in subparagraph 4(c) of Article 16.18 of the Agreement, and shall inform the co-chair from the responding Party, with due anticipation, about the date, time and venue of the lot. The co-chair from the responding Party may be present or be represented by another person when the lots are drawn. Representatives of both Parties may also be present. In any event, the lot shall be carried out with the Party or Parties that are present.
- 3. The Parties shall inform in writing each individual who has been appointed to serve as an expert pursuant to Article 16.18 of the Agreement of his or her appointment. Each individual shall confirm his or her availability to both Parties within five days of the date on which he or she was informed of his or her appointment.

III. Code of Conduct

4. The Code of Conduct shall apply, *mutatis mutandis*, to the experts serving in the Panel of Experts.

IV. Organisational meeting

5. Unless the Parties agree otherwise, the Parties shall meet with the panel within seven days of the date of the establishment of the panel in order to determine those matters that the Parties or the panel deem appropriate, including:
- (a) the remuneration and expenses to be paid to the experts which shall be in accordance with WTO standards and criteria;
 - (b) the expenses for any assistants or administrative staff that an expert may decide to hire, with the total amount of remuneration for each expert's assistant or administrative staff not to exceed 50 % of the remuneration of that expert, unless the Parties agree otherwise; and
 - (c) the timetable for the proceedings, which shall be established based on the time zone of the responding Party.

Only the experts and the representatives of the Parties who are officials or other persons of a government department or agency or any other public entity may take part in this meeting in person or via telephone or video conference.

V. Notifications

6. Any request, notice, written submission or other document transmitted by:
- (a) the panel shall be sent to both Parties at the same time;
 - (b) a Party to the panel shall be copied to the other Party at the same time; and
 - (c) a Party to the other Party shall be copied to the panel at the same time, as appropriate.
7. Any notification referred to under paragraph 6 shall be made by email or, where appropriate, any other means of telecommunication that provides a record of the sending thereof. Unless proven otherwise, such notification shall be deemed to be received on the date of its sending.
8. Minor errors of a clerical nature in a request, notice, written submission or other document related to the panel proceedings may be corrected by delivery of a new document clearly indicating the changes.
9. If the last day for delivery of a document falls on a legal holiday of Japan or of the European Union or on any other day on which the offices of the Government of a Party are officially or by force majeure closed, the document shall be deemed received on the next working day. At the organisational meeting referred to in paragraph 5, each Party shall submit a list of its legal holidays and any other days on which its offices are officially closed. Each Party shall keep its list updated during the panel procedure.

VI. Written submissions

10. The requesting Party shall deliver its written submission no later than 20 days after the date of establishment of the panel. The responding Party shall deliver its written counter-submission no later than 20 days after the date of receipt of the written submission of the requesting Party.

VII. Requests for information and advice

11. In accordance with paragraph 3 of Article 16.18 of the Agreement, the panel should seek information and advice from the relevant international organisations or bodies for matters related to International Labour Organization instruments or multilateral environmental agreements, as it deems appropriate.

12. Before seeking information and advice from the entities referred to in paragraph 11, the panel shall allow the Parties the opportunity to comment on the list of entities and the requests to be addressed to them.
13. The panel shall submit any information obtained pursuant to paragraph 11 to the Parties, which shall have an opportunity to comment on such information.

VIII. Operation of the panel

14. The chairperson of the panel shall preside at all of its meetings. A panel may delegate to the chairperson the authority to make administrative and procedural decisions.
15. Unless otherwise provided for in Article 16.18 of the Agreement or in these Rules of Procedure, the panel may conduct its activities by any means, including telephone, facsimile transmissions or computer links.
16. Where a procedural question arises that is not covered by Article 16.18 of the Agreement or these Rules of Procedure or the Code of Conduct, the panel, after consulting the Parties, may adopt an appropriate procedure that is compatible with those provisions.
17. The panel may modify any time period other than the time periods set out in Article 16.18 of the Agreement and make any other procedural or administrative adjustment in the proceedings after consulting with the Parties. When the panel consults with the Parties, it shall inform the Parties in writing of the proposed modification or adjustment and the reason therefor.

IX. Hearings

18. Based upon the timetable determined pursuant to paragraph 5, after consulting with the Parties and the other experts, the chairperson of the panel shall determine the date and time of the hearing.
19. Unless the Parties agree otherwise, the venue shall alternate between the Parties with the first hearing to be held in the responding Party. Unless the Parties agree otherwise, the Party in which the hearing takes place shall:
 - (a) determine the venue of the hearing and inform the chairperson of the panel thereof; and
 - (b) be in charge of the logistical administration of the hearing.
20. Unless the Parties agree otherwise, and without prejudice to paragraph 49, the Parties shall share the expenses derived from the logistical administration of the hearing.
21. The chairperson of the panel shall notify in due course the Parties, in writing, of the date, time and venue of the hearing. This information shall be made publicly available by the Party in which the hearing takes place, unless the hearing is closed to the public.
22. As a general rule there should be only one hearing. If the dispute involves issues of exceptional complexity, the panel may convene additional hearings on its own initiative or, upon request of either Party, after consulting the Parties. For each of the additional hearings, paragraphs 18 to 21 apply *mutatis mutandis*.
23. Any hearing of the panel shall be open to the public unless the Parties agree otherwise or the submissions and arguments of a Party contain confidential information. There should be no audio or visual recording of the hearing by the public. Hearings held in closed session shall be confidential in accordance with paragraph 39.
24. All experts shall be present during the entirety of the hearing.

25. Unless the Parties agree otherwise, the following persons may attend the hearing, irrespective of whether the hearing is open to the public:
 - (a) representatives of the Parties;
 - (b) advisers;
 - (c) assistants and administrative staff;
 - (d) interpreters, translators and court reporters of the panel; and
 - (e) representatives of the relevant international organisations or bodies, as decided by the panel pursuant to paragraph 3 of Article 16.18 of the Agreement.
26. No later than five days before the date of a hearing, each Party shall deliver to the panel a list of the names of persons who will make oral arguments or presentations at the hearing on behalf of that Party and of other representatives and advisers who will be attending the hearing.
27. The panel shall conduct the hearing in the following manner, ensuring that the requesting Party and the responding Party are afforded equal time in both argument and rebuttal argument:
 - Argument
 - (a) argument of the requesting Party; and
 - (b) argument of the responding Party.
 - Rebuttal Argument
 - (a) reply of the requesting Party; and
 - (b) counter-reply of the responding Party.
28. The panel may direct questions to either Party at any time during the hearing.
29. The panel shall arrange for a transcript of the hearing to be prepared and delivered to the Parties as soon as possible after the hearing. The Parties may comment on the transcript and the panel may consider those comments.
30. Each Party may deliver a supplementary written submission concerning any matter that arose during the hearing within 10 days of the date of the hearing.
- X. Deliberations
 31. Only the experts may take part in the deliberations of the panel.
- XI. Questions in writing
 32. The panel may at any time during the proceedings submit questions in writing to one or both Parties. Any questions submitted to one Party shall be copied to the other Party.
 33. Each Party shall provide the other Party with a copy of its response to the questions submitted by the panel. A Party shall be given an opportunity to provide comments in writing on the other Party's response within five days of the receipt of such copy.
- XII. Replacement of experts
 34. If any of the experts of the original panel withdraws, is unable to participate, or otherwise needs to be replaced in panel proceedings pursuant to Article 16.18 of the Agreement, paragraph 4 of Article 16.18 of the Agreement applies *mutatis mutandis*.
 35. Where a Party considers that an expert does not comply with the requirements of the Code of Conduct and for this reason should be replaced, that Party shall notify the other Party within 15 days from the time at which it obtained sufficient evidence of the expert's failure to comply with the requirements of the Code of Conduct.

36. Where a Party considers that an expert other than the chairperson does not comply with the requirements of the Code of Conduct, the Parties shall consult and, if they so agree, select a new expert in accordance with paragraph 34.

If the Parties fail to agree on the need to replace the expert, either Party may request that this matter be referred to the chairperson of the panel, whose decision shall be final.

If, pursuant to this request, the chairperson finds that the expert does not comply with the requirements of the Code of Conduct, a new expert shall be selected in accordance with paragraph 34.

37. Where a Party considers that the chairperson of the panel does not comply with the requirements of the Code of Conduct, the Parties shall consult and, if they so agree, select a new chairperson in accordance with paragraph 34.

If the Parties fail to agree on the need to replace the chairperson, either Party may request that the matter be referred to the two remaining experts. The experts shall decide, no later than 10 days after the date of delivery of the request, whether there is a need to replace the chairperson of the panel. The decision by the experts on the need to replace the chairperson shall be final.

If the experts decide that the chairperson does not comply with the requirements of the Code of Conduct, a new chairperson shall be selected in accordance with paragraph 34.

38. The proceedings shall be suspended for the period taken to carry out the procedures provided for in paragraphs 34 to 37.

XIII. Confidentiality

39. The panel and the Parties shall treat as confidential any information submitted by a Party to the panel which that Party has designated as confidential. Where a Party submits a confidential version of its written submissions to the panel, it shall also, upon request of the other Party, provide within 20 days of the date of the request, a non-confidential version of the submissions that could be disclosed to the public. Nothing in these Rules of Procedure precludes a Party from disclosing its own submissions to the public to the extent that it does not disclose any information designated by the other Party as confidential. The panel shall meet in closed session if the submissions and arguments of a Party contain confidential information. The panel and the Parties shall maintain the confidentiality of the hearing of the panel where the hearing is held in closed session.

XIV. Ex parte contacts

40. The panel shall not meet or communicate with a Party in the absence of the other Party.
41. An expert shall not discuss any aspect of the subject matter of the proceedings with one Party or both Parties in the absence of the other experts.

XV. *Amicus curiae* submissions

42. Unless the Parties agree otherwise within three days of the date of the establishment of the panel, the panel may receive unsolicited written submissions from any natural persons of a Party or legal persons established in a Party, who are independent from the Governments of the Parties, provided that the submissions are received within 10 days of the date of the establishment of the panel.
43. The submissions shall be concise and in no case longer than 15 pages at double space, and shall be directly relevant to a factual or a legal issue under consideration by the panel. The submissions shall contain a description of the person providing the submissions including:
- (a) for a natural person, his or her nationality; and
 - (b) for a legal person, its place of establishment, the nature of its activities, its legal status, its general objectives and the source of its financing.

Any person shall specify in its submissions the interest that it has in the proceedings. The submissions shall be drafted in the languages chosen by the Parties in accordance with paragraphs 45 and 46 of these Rules of Procedure.

44. The panel shall list in its report all the submissions it has received pursuant to paragraphs 42 and 43. The panel is not obliged to address in its report the arguments made in such submissions. Those submissions shall be provided to the Parties for their comments. The comments of the Parties which have been submitted to the panel within 30 days shall be taken into consideration by the panel.

XVI. Language and translation

45. During the consultations referred to in Article 16.17 of the Agreement, and no later than the time of the organisational meeting referred to in paragraph 5, the Parties shall endeavour to agree on a common working language for the proceedings before the panel. Each Party shall notify the other Party, no later than 90 days after the adoption of these Rules of Procedure by the Committee in accordance with paragraph 2 of Article 16.18 of the Agreement, a list of languages for which it has a preference. The list shall include at least one working language of the WTO.
46. If the Parties are unable to agree on a common working language, each Party shall make its written submissions in its chosen language, providing at the same time a translation into one of the working languages of the WTO notified by the other Party in accordance with paragraph 45, where appropriate. The Party responsible for organising the oral hearing shall arrange for the interpretation of oral submissions into the same working language of the WTO, where appropriate.
47. The interim and final report of the panel shall be issued in the common working language. If the Parties have not agreed on a common working language, the interim and final report of the panel shall be issued in the working languages of the WTO referred to in paragraph 46.
48. A Party may provide comments on the accuracy of the translation of any translated version of a document drawn up in accordance with these Rules of Procedure.
49. In case a translation or interpretation of written and oral submissions of a Party in the relevant working language of the WTO is necessary, that Party shall bear the costs thereof.

XVII Panel Report

50. The panel shall present an interim and a final report to the Parties in accordance with paragraph 5 of Article 16.18 of the Agreement. The final report shall be made publicly available. The panel should not disclose its report before publication by the Parties.

XVIII Revision

51. These Rules of Procedure may be revised by agreement between the Parties.
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