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**EUROPEAN UNION AND ITS MEMBER STATES – CERTAIN MEASURES RELATING
TO THE ENERGY SECTOR**

**NOTIFICATION OF AN APPEAL BY THE EUROPEAN UNION UNDER
ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 21 September 2018, from the delegation of the European Union, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law and legal interpretations covered in the report of the Panel in *European Union and its Member States – Certain Measures relating to the Energy Sector* (WT/DS476/R) concerning the third-country certification measure, the infrastructure exemption measure and the TEN-E measure. Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

2. For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse or declare moot and of no legal effect the findings and conclusions of the Panel with respect to the errors of law and legal interpretations contained in the Panel Report described below, and where indicated to complete the analysis on the basis of the Panel's findings and uncontested facts on the record.¹

I. THE THIRD-COUNTRY CERTIFICATION MEASURE

3. The European Union appeals the Panel's conclusion² and related findings³ that the third-country certification measure, as implemented in the national laws of Croatia, Hungary and Lithuania, is inconsistent with Article XVII of the GATS and is not justified under the general exception in Article XIV(a) of the GATS.

4. This conclusion is based on the Panel's erroneous finding that the third-country certification measure, as implemented in the provisions of the laws of the three EU Member States cited above, is not applied consistently with the *chapeau* of Article XIV of the GATS⁴.

5. In making this finding the Panel erred in the interpretation and application of the *chapeau* of Article XIV of the GATS. More precisely, the Panel erred by holding that the lack of an

¹ Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review* this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

² Panel report, para. 8.1.f.ii

³ Including the finding in Panel report, para. 7.1254 and the supporting reasoning in paras. 7.1241-7.1253.

⁴ Panel report, para. 7.1254.

ex-ante mechanism for assessing the threats to the security of gas supply posed by TSOs controlled by persons of an EU Member constitutes a means of "arbitrary or unjustifiable discrimination".⁵

6. The European Union requests the Appellate Body to reverse the appealed conclusion and related findings concerning the third-country certification measure and to find that the third-country certification measure is justified under Article XIV (a) of the GATS.

II. THE INFRASTRUCTURE EXEMPTION MEASURE

7. The European Union appeals the Panel's findings and conclusion that the two challenged OPAL conditions within the 2009 OPAL exemption decision are inconsistent with Article XI:1 of the GATT 1994.⁶ The Panel erred in finding that "the two challenged OPAL conditions restrict market access for EU imports of natural gas from Russia and limit competitive opportunities for importation of Russian natural gas into the European Union".⁷

8. The Panel's findings that the conditions relating to the 50% capacity cap and the 3 bcm/yr gas release programme have a limiting effect on the importation of natural gas from Russia⁸ are erroneous because the two conditions were examined in isolation from the generally applicable provisions of EU law that provide their context. The effects of those conditions, which concern access to the OPAL pipeline's capacities, must be assessed in the context of Directive's rules that require third-party access to the gas transmission and distribution system (Article 32) and allow partial exemptions to be granted to major new infrastructure (Article 36).

9. The Panel erred in failing to examine the two challenged OPAL conditions in their regulatory context and in mischaracterizing them as a measure on the importation of goods within the meaning of Article XI:1 of the GATT 1994.

10. In the alternative, the European Union argues that, in any event, the Panel erred in finding that those conditions have a limiting effect on the importation of natural gas from Russia.⁹

11. The European Union requests the Appellate Body to reverse the Panel's findings and conclusion that the challenged OPAL conditions (that is, the 50% capacity cap and 3 bcm/yr gas release programme) are inconsistent with Article XI:1 of the GATT 1994.¹⁰

III. THE TEN-E MEASURE

12. The European Union appeals the Panel's conclusion¹¹ and related findings¹² that the TEN-E measure is inconsistent with Article III: 4 of the GATT 1994. This conclusion is based on the Panel's erroneous finding that the TEN-E measure accords "less favourable treatment" to Russian natural gas than to like natural gas of EU origin¹³.

13. The European Union also appeals the Panel's conclusion¹⁴ and related findings¹⁵ that the TEN-E measure is inconsistent with Article I:1 of the GATT 1994. This conclusion is based on the Panel's erroneous finding that the TEN-E measure accords an "advantage" to imports of natural gas originating in countries other than Russia¹⁶.

⁵ Panel report, paras. 7.1252-7.1253.

⁶ Panel report, paras. 7.980 -7.1003 and 8.1.d.iii.

⁷ Panel report, para. 7.1002.

⁸ Panel report, paras. 7.1000 -7.1002.

⁹ Panel report, para. 7.1001.

¹⁰ Panel report, paras. 7.980 -7.1003 and 8.1.d.iii.

¹¹ Panel report, para. 8.1.g.

¹² Including Panel report, paras. 7.1285, 7.1299-7.1301 and supporting reasoning in paras. 7.1267-7.1286 and 7.1314-7.1324.

¹³ Panel report, para. 7.1300.

¹⁴ Panel report, para. 8.1.g.

¹⁵ Including Panel report, paras. 7.1285, 7.1311-7.1313 and supporting reasoning in paras. 7.1267-7.1286 and 7.1314-7.1324.

¹⁶ Panel report, para. 7.1312.

14. In making these two findings the Panel erred in law in the following two ways:

- first, by relying on an erroneous legal standard for establishing the existence of "less favourable treatment", for the purposes of Article III:4 of the GATT 1994, and of an "advantage", for the purposes of Article I:1 of the GATT 1994; and
- second, by excluding *a priori* from its analysis the legal relevance of the existing infrastructures for transporting natural gas.

15. In addition, when developing its analysis under both Article III:4 and I:1 of the GATT 1994 the Panel acted inconsistently with Article 11 of the DSU by failing to conduct an objective assessment of the facts of the case:

- first, the Panel failed to consider the detailed evidence and arguments submitted by the European Union with regard to the actual implementation of the TEN-E measure and, as a result, failed to undertake a "holistic assessment" of "all the relevant elements" in order to ascertain the meaning and expected operation of the TEN-E measure;
- second, the Panel's analysis relied on the import statistics provided by the European Union as Exhibit EU - 190. Yet the Panel misunderstood those statistics and drew conclusions that are not properly based on that evidence.

16. Should the Appellate Body reverse the Panel's findings that the TEN-E measure is inconsistent with Article III:4 of the GATT 1994 and Article I:1 of the GATT 1994, the European Union further requests the Appellate Body to declare moot and of no legal effect the Panel's conclusion that the TEN-E measure is not justified under Article XX (j) of the GATT 1994¹⁷.

17. In the event that the Appellate Body upheld the Panel's findings that the TEN-E measure is inconsistent with Article III:4 of the GATT 1994 and/or with Article I:1 of the GATT 1994, the European Union appeals the Panel's conclusion that the TEN-E measure is not justified under Article XX (j) of the GATT 1994¹⁸. This conclusion stems from an erroneous legal interpretation of the terms "in short supply" in Article XX (j) of the GATT 1994, according to which the terms "'products in general or local short supply' do not cover products at risk of being in short supply" and only products that are "currently" in short supply can be considered to be "in short supply".

18. Should the Appellate Body reverse the Panel's erroneous legal interpretation of the terms "in short supply", the European Union further requests the Appellate Body to complete the analysis of the TEN-E measure in the light of remaining elements of the legal standard under Article XX (j) of the GATT 1994 and to find that the TEN-E measure is justified under that provision.

¹⁷ Panel report, paras. 8.1.g, 7.1350-7.1353 and supporting reasoning in paras. 7.1328-7.1349.

¹⁸ Panel report, paras. 8.1.g, 7.1350-7.1353 and supporting reasoning in paras. 7.1328-7.1349.